

9-1-1989

Hall v. Post: North Carolina Rejects Claim of Invasion of Privacy by Truthful Publication of Embarrassing Facts

Lucy Noble Inman

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Lucy N. Inman, *Hall v. Post: North Carolina Rejects Claim of Invasion of Privacy by Truthful Publication of Embarrassing Facts*, 67 N.C. L. REV. 1474 (1989).

Available at: <http://scholarship.law.unc.edu/nclr/vol67/iss6/18>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

***Hall v. Post*: North Carolina Rejects Claim of Invasion of Privacy by Truthful Publication of Embarrassing Facts**

The first amendment rights to free speech and free press necessarily conflict with the desire to prevent or to provide compensation for harmful expression. The conflict is most acute when truthful speech hurts, because stopping the harm requires silencing truth. In close cases concerning harmful publication by the media, North Carolina historically has deferred to free press interests and denied some tort claims recognized in other states.¹ The North Carolina Supreme Court continued that tradition in 1988 by refusing to recognize the tort of invasion of privacy by publication of private facts. The court in *Hall v. Post*,² in contrast to the majority of state courts,³ rejected the private facts tort because of its potential conflict with the first amendment.⁴ The decision is unprecedented. It grants more protection to truthful speech than the United States Supreme Court thus far has required under the Constitution⁵ and more than any other state court has chosen to provide in common law.⁶

The court in *Hall* patterned its reasoning after an earlier decision rejecting another privacy tort, false light,⁷ because it threatened free press protected by the first amendment and partially duplicated the tort of libel.⁸ The *Hall* court reasoned that the private facts tort was likewise constitutionally suspect and that such a claim might be actionable under the established tort of intentional infliction of emotional distress.⁹ The court expressly withheld, however, any assurance that a factually similar claim made under an established tort label would not also amount to an unacceptable encroachment on free press.¹⁰

This Note analyzes the *Hall* decision and the new rule it establishes for North Carolina,¹¹ comparing the rule with those in other states.¹² The Note discusses the free speech implications of the private facts tort and concludes that

1. See, e.g., *Renwick v. News & Observer Publishing Co.*, 310 N.C. 312, 323, 312 S.E.2d 405, 412, cert. denied, 469 U.S. 858 (1984) (rejecting false light privacy tort); *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 82, 266 S.E.2d 861, 865 (1980) (denying relief for libel *per quod* in the absence of pecuniary loss).

2. 323 N.C. 259, 372 S.E.2d 711 (1988).

3. See Kovner, *Recent Developments in Intrusion, Private Facts, False Light, and Commercialization Claims* in 2 PRACTICING LAW INSTITUTE, COMMUNICATIONS LAW 289, 304, 326 (1983) (survey of decisions); Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 365-67 (1983) (listing 36 states that have recognized the "private-facts" tort).

4. *Hall*, 323 N.C. at 265, 372 S.E.2d at 714; see U.S. CONST. amend. I.

5. *Florida Star v. B.J.F.*, 57 U.S.L.W. 4816, 4820 (U.S. June 21, 1989); *Hall*, 323 N.C. at 265, 372 S.E.2d at 715 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975)); see *infra* notes 85-94 and accompanying text.

6. See *infra* note 131 and accompanying text.

7. See RESTATEMENT (SECOND) OF TORTS § 652E (1977).

8. See *Renwick v. News & Observer Publishing Co.*, 310 N.C. 312, 323, 312 S.E.2d 405, 412, cert. denied, 469 U.S. 858 (1984).

9. *Hall*, 323 N.C. at 268-69, 372 S.E.2d at 716-17.

10. *Id.* at 269, 372 S.E.2d at 717.

11. See *infra* notes 153-59 & 171-72 and accompanying text.

12. See *infra* notes 102-32 and accompanying text.

the court in *Hall* made a constitutionally wise decision, even though the United States Supreme Court has not yet required such general protection of truthful speech under the first amendment.¹³ The Note also discusses the potential alternative claim of intentional infliction of emotional distress mentioned by the *Hall* court, proposing that only intentional infliction of emotional distress motivated by actual ill will toward the plaintiff should be without first amendment protection. This Note concludes that even this narrowly defined tort may be constitutionally suspect, and ultimately more trouble than it is worth.

Hall v. Post began with the kind of human interest story small town newspaper reporters relish: *Ex-Carney Seeks Baby Abandoned 17 Years Ago*.¹⁴ Aledith Gottschalk had passed through Salisbury, North Carolina in 1967 as part of a carnival crew.¹⁵ She allowed her husband to leave their four-month-old daughter with a babysitter indefinitely.¹⁶ Mrs. Gottschalk returned to Salisbury in July, 1984 to search for the child, not knowing where her daughter was or what her name could be.¹⁷ She did remember that the babysitter's name was Mary Hall.¹⁸ An interview published in *The Salisbury Post* attracted telephone calls to a motel room where Mrs. Gottschalk and her second husband were staying.¹⁹ As a result, they found Mrs. Gottschalk's daughter, who had been renamed Susie Hall, and the girl's adoptive mother, Mary Hall.²⁰ The newspaper promptly followed up with a front-page article identifying the daughter and her adoptive family by name and address and describing an emotional telephone conversation between the Gottschalks and Mrs. Hall.²¹ Humiliated by the articles, Mary and Susie Hall fled their home to escape any further public attention.²² They later sought psychiatric treatment for alleged mental and emotional distress.²³

Mary and Susie Hall sued *The Salisbury Post* and the reporter who covered the story for invasion of privacy by publication of private, embarrassing facts.²⁴

13. See *Florida Star v. B.J.F.*, 57 U.S.L.W. 4816, 4818 (U.S. June 20, 1989); *infra* text accompanying notes 180-82.

14. *Salisbury Post*, July 18, 1984, at 1A, col. 1; see *Hall*, 323 N.C. at 261, 372 S.E.2d at 712.

15. *Hall*, 323 N.C. at 261, 372 S.E.2d at 712.

16. *Id.*

17. *Id.* Mrs. Gottschalk had lived all her life on a Wisconsin farm until 1966, when, at age 24, she married a carnival worker she had met at a fair in Wausau. *Ex-Carney Seeks Baby Abandoned 17 Years Ago*, *Salisbury Post*, July 18, 1984, at 1A, col. 1. Her husband left their child with the babysitter in Salisbury and told his wife they would return for the child within a few weeks. *Hall*, 323 N.C. at 261, 372 S.E.2d at 712. He eventually said he had signed papers authorizing the baby girl's adoption. *Id.* The couple later divorced, and the wife remarried, taking the name Gottschalk. She was accompanied by her new husband when she returned to Salisbury. *Id.*

18. See *Ex-Carney Seeks Baby Abandoned 17 Years Ago*, *Salisbury Post*, July 18, 1984, at 12A, col. 3.

19. *Hall*, 323 N.C. at 261, 372 S.E.2d at 712.

20. *Id.*

21. *Hall v. Post*, 85 N.C. App. 610, 613, 355 S.E.2d 819, 822 (1987), *rev'd*, 323 N.C. 259, 372 S.E.2d 711 (1988); *Daughter Found, Mom Hopes for Reunion*, *Salisbury Post*, July 20, 1984, at 1A, col. 1.

22. *Hall*, 323 N.C. at 261, 372 S.E.2d at 712.

23. *Id.* at 261-62, 372 S.E.2d at 712.

24. *Id.* at 262, 372 S.E.2d at 713. Plaintiffs also alleged invasion of privacy by intrusion on solitude and seclusion, but the trial court and both appellate courts held that the facts did not sup-

They cited a state statute requiring that adoption records be kept confidential.²⁵ The trial judge granted summary judgment for defendant newspaper.²⁶

A panel of the North Carolina Court of Appeals unanimously reversed the trial court, holding that plaintiffs had established a private facts claim.²⁷ The North Carolina Supreme Court subsequently reversed the court of appeals.²⁸ Although defendants argued that the disclosed facts were of legitimate public concern and were not sufficiently private to establish the invasion of privacy tort if it were recognized,²⁹ the supreme court chose to preclude the claim as a more general matter of law.³⁰ The majority declared that the tort of invasion of privacy by publication of private facts would not be recognized in North Carolina because it threatened free expression protected by the first amendment and overlapped an already recognized tort, intentional infliction of emotional distress.³¹

Justice Mitchell, writing for the majority, explained that when a truthful publication is alleged to have caused harm, " 'claims of privacy most directly confront the constitutional freedoms of speech and press.' "³² He noted that the United States Supreme Court has yet to decide " 'whether *truthful* publications *may ever* be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments.' "³³ The court expressed concern that the private facts tort was constitutionally suspect, noting that the origin of the tort predated the application of the first amendment to the states.³⁴ The court drew a distinction between the constitutional right to privacy from governmental intrusion and the common-law right to privacy from nongovernmental intrusion.³⁵ It concluded that when no constitutional privacy right is at stake, "a reasonable argument certainly can be made that the First Amendment rights of speech and press control and prohibit recovery . . . for [publication of] the truth."³⁶

The *Hall* decision ultimately relied not upon the first amendment but upon the state supreme court's authority to define common law. The court, by anal-

port an intrusion claim. *Id.* The intrusion tort normally consists of a physical or sensory intrusion, such as trespassing, wiretapping, or eavesdropping. See RESTATEMENT (SECOND) OF TORTS § 652B comment b (1977).

25. See Plaintiff's Brief at 8, *Hall* (No. 8627SC1012) (citing N.C. GEN. STAT. § 48-25 (1984)).

26. *Hall*, 85 N.C. App. at 611, 355 S.E.2d at 821.

27. *Id.* at 623, 355 S.E.2d at 828. The court of appeals affirmed summary judgment on plaintiffs' claim of invasion of privacy by intrusion because the facts showed no "physical or sensory interference with, or prying into, a person's solitude or seclusion or his private affairs." *Id.* at 615, 355 S.E.2d at 823. The supreme court agreed with the court of appeals on that issue and did not discuss it further. See *Hall*, 323 N.C. at 262, 372 S.E.2d at 713.

28. *Hall*, 323 N.C. at 260, 372 S.E.2d at 712. The court considered the case after granting defendant's petition for discretionary review. *Hall v. Post*, 320 N.C. 512, 358 S.E.2d 519 (1987) (granting discretionary review).

29. Defendants' Brief at 17-25, *Hall* (No. 340PA87).

30. *Hall*, 323 N.C. at 269-70, 372 S.E.2d at 717.

31. *Id.* at 268-69, 372 S.E.2d at 716-17.

32. *Id.* at 267, 372 S.E.2d at 716 (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975)).

33. *Id.* at 265, 372 S.E.2d at 715 (quoting *Cox*, 420 U.S. at 491 (emphasis added)).

34. *Id.* at 262, 372 S.E.2d at 713.

35. *Id.* at 266, 372 S.E.2d at 715.

36. *Id.*

ogy, followed its 1984 ruling in *Renwick v. News & Observer Publishing Co.*,³⁷ which rejected another privacy tort, the claim against publicity placing a person in a false light.³⁸ In *Hall* Justice Mitchell echoed his majority opinion in *Renwick*, reasoning that the elements of the private facts tort substantially overlapped those for other torts already recognized in North Carolina,³⁹ particularly intentional infliction of emotional distress.⁴⁰ The court expressly declined, however, to decide "whether any other tort is constitutional or cognizable at law upon facts such as those presented here."⁴¹

Although concurring in the *Hall* result, two justices refused to join the majority's opinion.⁴² The concurring justices would have allowed the tort of invasion of privacy by publication of private facts in a proper case, but not under the facts of *Hall*.⁴³ Justice Frye wrote, "I do not believe that the media should be given a license to pry into the private lives of ordinary citizens and spread before the public highly offensive but very private facts without any degree of accountability."⁴⁴ He noted that nearly every state, including North Carolina, has recognized some type of privacy tort.⁴⁵ He reasoned that the *Restatement's* requirement that plaintiffs prove that the publication of private facts was both offensive and not of legitimate public concern,⁴⁶ combined with the trial court's ability to decide those issues as a matter of law on a summary judgment motion, would protect first amendment rights sufficiently.⁴⁷

North Carolina's treatment of the private facts tort in *Hall* is best understood in the context of the tort's development in other states and its impact on first amendment concerns recognized by the United States Supreme Court. The private facts tort is a distinctively American invention.⁴⁸ It was proposed in

37. 310 N.C. 312, 312 S.E.2d 405, *cert. denied*, 469 U.S. 858 (1984). For a discussion of *Renwick*, see *infra* notes 138-45 and accompanying text.

38. *Hall*, 323 N.C. at 265, 372 S.E.2d at 714 (citing *Renwick*).

39. *Hall*, 323 N.C. at 267, 372 S.E.2d at 716. The court in *Renwick* rejected the false light tort in part because its elements overlapped those for libel. See *Renwick*, 310 N.C. at 323, 312 S.E.2d at 412.

40. *Hall*, 323 N.C. at 269, 372 S.E.2d at 717. Other torts that the court said "possibly" could be duplicated by the private facts tort were trespass and intrusive invasion of privacy. *Id.*

41. *Id.*

42. *Id.* at 270, 372 S.E.2d at 717 (Frye, J., concurring). Justice Meyer joined in Justice Frye's concurrence.

43. *Id.* at 279, 372 S.E.2d at 722 (Frye, J., concurring). Justice Frye opined that a reasonable juror could not have found that the details of the *Post* articles were not of legitimate public concern under the *Restatement* standards. *Id.* (Frye, J. concurring) (citing RESTATEMENT (SECOND) OF TORTS § 653D comment h (1977)).

44. *Id.* at 270, 372 S.E.2d at 717 (Frye, J., concurring).

45. *Id.* at 271, 372 S.E.2d at 718 (Frye, J., concurring).

46. *Id.* at 275, 372 S.E.2d at 720 (Frye, J., concurring) (citing RESTATEMENT (SECOND) OF TORTS § 652D (1977)). The elements of this tort and standards for proving them are discussed *infra* text accompanying notes 57-60.

47. *Hall*, 323 N.C. at 275, 372 S.E.2d at 720 (Frye, J., concurring). Justice Frye's reasoning is slightly less generous than the court of appeals' assertion that the determination whether the facts published were of legitimate public concern is an issue particularly suited for jury review. See *Hall*, 85 N.C. App. at 620, 355 S.E.2d at 826 (1987), *rev'd*, 323 N.C. 259, 372 S.E.2d 711 (1988).

48. See *Hall*, 323 N.C. at 262-64, 372 S.E.2d at 713-14 (private facts tort never has been recognized in England or in other countries following English common law); D. PEMBER, *PRIVACY AND THE PRESS* 18 (1972) (suggesting that transformed social environment in the United States in 1890s

1890 by Samuel D. Warren and (later United States Supreme Court Justice) Louis D. Brandeis in perhaps the most famous of all law review articles, *The Right to Privacy*.⁴⁹ According to Warren and Brandeis, the truth of facts publicized would be no defense to a private facts claim, because the right to privacy they identified was "not merely the right to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."⁵⁰

The Warren and Brandeis thesis was not accepted quickly. The first state appellate court thereafter to consider a privacy claim rejected the theory,⁵¹ and other state courts and legislatures did not begin to recognize the tort until the early twentieth century.⁵² Eventually, a majority of state courts presented with private facts claims recognized the tort.⁵³ In addition to the private facts tort, state courts have recognized three other invasions of the common-law right to privacy: unreasonable intrusion upon one's seclusion in a physical area, appropriation of one's name or image for commercial use, and publicity that unreasonably places one in a false light.⁵⁴ Although the United States Supreme Court has recognized a fourth and fourteenth amendment due process right against invasion of privacy by the government,⁵⁵ the Court consistently has distinguished this constitutional right from the common-law right to privacy from other people.⁵⁶

helped spur creation of the tort); Zimmerman, *supra* note 3, at 307 (English common law, Roman law, and Biblical law forbade only false free speech).

49. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life," the authors lamented. *Id.* at 195. "The press is overstepping in every direction the obvious bounds of propriety and of decency. . . . When personal gossip attains the dignity of print . . . it usurps the place of interest in brains capable of other things." *Id.* at 196. Although the article drew analogies to the law of copyright, *id.* at 206-07, contract, *id.* at 207, and trade secrets, *id.* at 212, the authors emphasized that the right to privacy "is in reality not the principle of private property, but that of an inviolate personality." *Id.* at 205.

The Warren and Brandeis article has been called "perhaps the outstanding illustration of the influence of legal periodicals upon the courts." W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 117 (5th ed. 1984).

50. Warren & Brandeis, *supra* note 49, at 218.

51. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 544, 64 N.E. 442, 443 (1902) (denying "the claim that a man has a right to pass through this world . . . without having his picture published, his business enterprises discussed . . . or his eccentricities commented upon . . . whether the comment be favorable or otherwise").

52. Commentators cite *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905), as the first decision recognizing the common-law right to privacy. See, e.g., D. PEMBER, *supra* note 48, at 70-71. The *Pavesich* court recognized a privacy claim when a photograph of plaintiff, a private person, and a false statement that plaintiff had bought a life insurance policy from defendant was published in a newspaper advertisement. *Pavesich*, 122 Ga. at 220-22, 50 S.E. at 81. The court also held that plaintiff had stated a cause of action for libel. *Id.* Although *Pavesich* typically is cited by courts allowing the private facts tort, its greater similarity to the misappropriation branch of the privacy torts rarely has been acknowledged. For a discussion of cases and statutes following *Pavesich*, see D. PEMBER, *supra* note 48, at 72-76.

53. Zimmerman, *supra* note 3, at 365-66 (citing 36 jurisdictions that recognize the private facts tort).

54. RESTATEMENT (SECOND) OF TORTS § 652B, 652C, 652E (1977).

55. See *Katz v. United States*, 389 U.S. 347, 353 (1967).

56. See, e.g., *United States v. Jacobsen*, 466 U.S. 109, 115 (1984) (no fourth amendment violation when Federal Express manager opened package containing cocaine). But see *Time, Inc. v. Hill*, 385 U.S. 374, 414-15 (1967) (Fortas, J., dissenting) (equating a general right to privacy with fourth and fourteenth amendment rights to privacy from government). One commentator has written,

The private facts tort as defined in the *Restatement* and most jurisdictions contains three elements: (1) giving publicity,⁵⁷ (2) to facts that a reasonable person would consider private and highly offensive if exposed,⁵⁸ and (3) that are not of legitimate public concern.⁵⁹ The *Restatement* requires that the public concern addressed by the third element of the tort be legitimate: "account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores."⁶⁰ The *Restatement* also issues a special note of caution: "It has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment."⁶¹

The historical evidence suggests that the framers of the first amendment would have viewed restraints imposed by tort law on accurate speech—to the extent that they considered the matter at all—as inappropriate, and that the embarrassment that might result from true revelations was not considered a legal or compensable wrong.

Zimmerman, *supra* note 3, at 311.

57. RESTATEMENT (SECOND) OF TORTS § 652D (1977). The publicity element differs from the publication element in defamation cases in that publicity requires that the facts be communicated not merely to a third person, but to the public at large. *Id.* comment a. Warren and Brandeis made a parallel distinction between oral and written publication, explaining that "[t]he injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether." Warren & Brandeis, *supra* note 49, at 217 n.4. One commentator has noted that this element "targets the mass media for liability . . . [and] suggests that in this area the press has significantly less freedom of speech than does a private individual." Zimmerman, *supra* note 3, at 300-01.

58. RESTATEMENT (SECOND) OF TORTS § 652D (1977). Whether a fact is so private that publicizing it is offensive is open to interpretation. The *Restatement* cites sexual relations, family quarrels, humiliating illnesses, and some details of a person's past "that he would rather forget" as examples of private facts. *Id.* § 652B comment b. The *Restatement* suggests that a person has a right to prevent disclosure of facts that he "keeps entirely to himself or at most reveals only to his family or to close personal friends." *Id.* The *Restatement* finds a publication offensive if "a reasonable person would feel justified in feeling seriously aggrieved by it." *Id.* § 652B comment c. Examples of offensive publicity are publication of a photograph without her consent of a mother nursing her child or of a woman giving birth by caesarian operation. *Id.* § 652B illustrations 10 & 11.

59. *Id.* § 652D. The public concern element is also subject to interpretation. The *Restatement's* broad definition includes "matters of genuine, even if . . . deplorable, popular appeal," *id.* § 652B comment g, and "the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment." *Id.* § 652B comment j. Commentary to the *Restatement* explains that the drafters understood the Supreme Court's decision in *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975), to indicate that "common law restrictions on recovery for publicity given to a matter of proper public interest will now become a part of the constitutional law of freedom of the press and freedom of speech." RESTATEMENT (SECOND) OF TORTS § 652D comment d (1977). Even Warren and Brandeis conceded that "privacy does not prohibit any publication of matter which is of public or general interest." Warren & Brandeis, *supra* note 49, at 214.

60. RESTATEMENT (SECOND) OF TORTS § 652D comment h (1977). No legitimate public concern exists when publicity "becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public with decent standards, would say he had no concern." *Id.*

61. *Id.* § 652D special note. The first state court decision recognizing a privacy tort after the Warren and Brandeis article, but preceding the first amendment's application to the states, emphasized that the public concern exemption was necessary to protect free speech. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 204, 50 S.E. 68, 74 (1905). The Georgia Supreme Court explained:

The right of privacy is unquestionably limited by the right to speak and print. It may be said that to give liberty of speech and of the press such wide scope as has been indicated would impose a very serious limitation upon the right to privacy; but if it does, it is due to the fact that the law considers that the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his

The United States Supreme Court has resolved conflicts between the right to privacy and the right of free press by analogy to defamation cases. The Supreme Court first addressed the conflict between privacy and free press in *Time, Inc. v. Hill*,⁶² a false light case holding that false but nondefamatory publicity about private persons in an event of public interest must be protected to the same degree as defamatory false speech about a public official.⁶³ In *Time* plaintiff family brought a false light privacy claim against defendant magazine when their ordeal as hostages erroneously was reported to have been reenacted in a Broadway play.⁶⁴ Although the magazine article did not defame plaintiffs, it inaccurately portrayed their ordeal.⁶⁵ The Court held that plaintiffs had to prove the article was published with knowledge of falsity or reckless disregard of the truth—the “actual malice” standard established three years earlier in *New York Times Co. v. Sullivan*⁶⁶ for a public official presenting a libel claim.⁶⁷ The plurality opinion in *Time* declared that “guarantees for speech and press are not the preserve of political expression or comment upon public affairs.”⁶⁸ Furthermore, “[t]he line . . . between . . . informing and . . . entertaining is too elusive for the protection of the free press.”⁶⁹ The Court explained that a stringent fault standard is particularly necessary to protect the publisher of nondefamatory facts because “the content of the speech itself affords no warning of prospective harm to another through falsity.”⁷⁰ The plurality left open the question whether newsworthy disclosures would be immune from liability if “‘so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency.’”⁷¹ Two Justices concurred in the *Time* decision, but insisted that the first amendment should protect free speech absolutely.⁷² Three dissenters equated the right to privacy against the press with the fourth

right of privacy in such a way as to interfere with the free expression of one’s sentiments and the publication of every matter in which the public may be legitimately interested.

Id. One commentator has referred to this as “the newsworthiness defense” and reports that every jurisdiction recognizing the private facts tort allows the defense. Zimmerman, *supra* note 3, at 300 n.34. Determining what is and is not newsworthy, however, is an inherently subjective task. See *Winters v. New York*, 333 U.S. 507, 510 (1948); *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451 (3d Cir. 1958); *Anderson v. Fisher Broadcasting Cos.*, 300 Or. 452, 461, 712 P.2d 803, 809 (1986) (en banc).

62. 385 U.S. 374 (1967).

63. *Id.* at 387-88.

64. *Id.* at 393. The play actually was based on several hostage events, but a *Life* magazine reporter—who had accurate reports of plaintiffs’ ordeal in his files—arranged for photographs at the family’s residence to illustrate a feature article about the play. *Id.* at 391-93.

65. *Id.* at 378.

66. 376 U.S. 254 (1964).

67. *Id.* at 279-80 (sheriff who sued newspaper for defaming him in a political advertisement held to actual malice standard). “Actual malice” is a legal term of art distinct from common-law malice—the ill will or wanton disregard of another’s rights that usually is necessary to obtain punitive damages. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974).

68. *Time*, 385 U.S. at 388.

69. *Id.* (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

70. *Id.* at 389.

71. *Id.* at 383 n.7 (quoting *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)).

72. *Id.* at 398 (Black, J., concurring). Justice Black was joined in his concurrence by Justice Douglas. *Id.*

and fourteenth amendment rights to privacy against government.⁷³

Since the *Time* decision, the Supreme Court has established various levels of first amendment protection for false defamatory speech. The Court has extended or contracted the scope of constitutional protection depending primarily upon two factors: whether the plaintiff is a private or public individual, and whether the speech at issue is of only private concern, as opposed to being of public concern as well. In *Gertz v. Robert Welch, Inc.*⁷⁴ the Court ruled that a private person could maintain a libel claim for the publication of a false defamatory magazine article by showing some fault, if not necessarily the knowledge or reckless disregard of falsity a public official or a public figure must show.⁷⁵ The Court explained that states have a more compelling interest in compensating private individuals who have not assumed the risks of public life and who lack access to media to counteract defamatory speech.⁷⁶ The Court, however, did limit private plaintiffs to compensatory damages on a mere negligence showing.⁷⁷

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁷⁸ the Court went beyond *Gertz*, holding that both presumed and punitive damages for false defamatory speech could be awarded without proof of actual malice when speech was of private concern only.⁷⁹ The *Dun & Bradstreet* Court found that the state interest in compensating private individuals for defamation was more compelling than "the reduced constitutional value of speech involving no matters of public concern."⁸⁰ The Court offered a vague formula for distinguishing speech of public concern from speech of private concern by considering "content, form, and context . . . as revealed by the whole record."⁸¹

In *Philadelphia Newspapers, Inc. v. Hepps*⁸² the Court held that a private person alleging defamation by false statements about a matter of public concern should bear the burden of proving falsity, contrary to the common-law presumption of falsity.⁸³ Justice O'Connor wrote for the majority: "In a case presenting

73. *Id.* at 414 (Fortas, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). Justice Fortas was joined in his *Time* dissent by Chief Justice Warren and Justice Clark.

74. 418 U.S. 323 (1974).

75. *Id.* at 347. The *Gertz* Court reserved judgment on whether its decision would control false light privacy cases and therefore displace the *Time* decision. *Id.* at 348.

76. *Id.* at 344-45.

77. *Id.* at 349.

78. 472 U.S. 749 (1985).

79. *Id.* at 763. The *Dun & Bradstreet* Court upheld a punitive damage award for a construction contractor who was reported inaccurately to have filed for bankruptcy. *Id.* at 751-52. The report was made only to five confidential subscribers of the defendant credit reporting agency. *Id.* at 751. The Court described the speech at issue as "solely in the individual interest of the speaker and its specific business audience." *Id.* at 762.

80. *Id.* at 761. *Dun & Bradstreet* was a plurality decision, authored by Justice Powell and joined by Justices Rehnquist and O'Connor. Chief Justice Burger and Justice White separately concurred with the plurality's distinction between private and public concern. *Id.* at 764 (Burger, C.J., concurring); *id.* at 774 (White, J., concurring).

81. *Id.* at 761 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

82. 475 U.S. 767 (1986).

83. *Id.* at 776-77. *Hepps* concerned a private businessman who claimed he was defamed by false newspaper reports linking him to organized crime and government corruption. *Id.* at 769-71.

a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance . . . we believe that the Constitution requires us to tip them in favor of protecting true speech."⁸⁴

The Supreme Court has only narrowly addressed the issue whether truthful publication invading a privacy interest can be subject to suit consistent with the first amendment. In *Cox Broadcasting Corp. v. Cohn*⁸⁵ the Court held that a television news broadcast of a rape victim's name obtained from public court records could not give rise to liability for invasion of privacy by publication of private facts.⁸⁶ The majority noted that in the past the Court had "carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure."⁸⁷ The Court noted further that while it previously had protected criticism of a public official's conduct because " 'the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth,' " it also had recognized that " 'different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned.' "⁸⁸ The Court found both privacy and free press "plainly rooted in the traditions and significant concerns of our society."⁸⁹ Accordingly, the Court declared, "Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press."⁹⁰ The Court expressly declined to address "the broader question whether truthful publication may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments."⁹¹ Instead, the Court limited its holding to bar state sanctions for the publication of truthful information contained in official court records open to public inspection.⁹²

Since *Cox*, the Supreme Court has yet to tackle the broader question whether truth is always a defense to private facts claims. In *Florida Star v. B.J.F.*, a decision handed down earlier this year, the Court extended immunity to the publication of government records lawfully obtained outside the courtroom, overturning a damage award to a rape victim whose name was published from a police report.⁹³ The Court, however, declined to decide whether the

84. *Id.* at 776.

85. 420 U.S. 469 (1975).

86. *Id.* at 491. The crime victim in *Cox* had been raped and murdered; plaintiff was her father. *Id.* at 472-74.

87. *Id.* at 490.

88. *Id.* at 490-91 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)).

89. *Id.* at 491.

90. *Id.* at 489.

91. *Id.* at 491.

92. *Id.* at 495. Justice Powell, in a lone concurrence, interpreted the fault standard of *Gertz* to imply "the constitutional necessity of recognizing a defense of truth." *Id.* at 499 (Powell, J., concurring).

93. *Florida Star v. B.J.F.*, 57 U.S.L.W. 4816, 4820 (U.S. June 21, 1989). The court acknowledged that the case before it was not controlled by *Cox*, because the rape victim's name was only

Constitution protects all truthful publication of private facts lawfully obtained from public and private sources.⁹⁴

In addition to the private facts tort, the Supreme Court has also left in constitutional limbo the tort of intentional infliction of emotional distress when the intentional act is truthful speech about a private person.⁹⁵ The emotional distress tort imposes liability for extreme and outrageous conduct intended to cause, and which in fact causes, severe emotional distress.⁹⁶ In *Hustler Magazine v. Falwell*⁹⁷ the Court held that political satire at the expense of a public figure could not give rise to a claim for intentional infliction of emotional distress without additional proof that the publication contained a false statement of fact made with actual malice.⁹⁸ The Court held that the tort's intent and outrageous behavior elements would not safeguard free speech and press sufficiently "in the world of debate about public affairs."⁹⁹ The Court's criticism of applying an outrageousness standard in the context of harmful speech resembled its previous condemnation of presumed and punitive damages in libel:

"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

inadvertently released by police and was not supposed to be in the public record. *Id.* at 4818. The Court, however, relied on *Cox* and on other decisions, particularly *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), in which the Court held that a newspaper could not be criminally punished for publishing an alleged juvenile offender's name obtained from witnesses, police, and a prosecutor. *Florida Star*, 57 U.S.L.W. at 4818 (also citing *Oklahoma Publishing Co. v. District Court*, 420 U.S. 308 (1977) (invalidating restraint on media publication of juvenile defendant's photograph) and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (protecting newspaper report about state panel's confidential review of judge)).

94. *Id.* at 4818. Justice Marshall wrote for the majority: "We continue to believe that the sensitivity and significance of the interests presented in clashes between the First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* His final conclusion leaves room to protect the publication of private facts lawfully obtained from private sources: "We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order . . ." *Id.* at 1420. Although the Court noted the public significance of the rape report in its decision, *id.* at 4819, it did not state clearly whether that factor is a prerequisite for constitutional protection. Because the *Florida Star* decision was handed down in the final stages of this publication, this Note cannot more thoroughly discuss the case.

95. See R. SMOLLA, LAW OF DEFAMATION § 11.01 (1986).

96. RESTATEMENT (SECOND) OF TORTS § 46 (1965). The exact definition of these elements differs among the states. For example, the Virginia statute at issue in *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988), allowed liability for reckless infliction of emotional distress. See *id.* at 879 n.3.

97. 108 S. Ct. 876.

98. *Id.* at 882. The satire was an ad parody titled "Jerry Falwell talks about his first time," which portrayed the television minister in a drunken, incestuous encounter with his mother in an outhouse. *Id.* at 878. A disclaimer at the bottom of the page described it as "ad parody—not to be taken seriously." *Id.* Falwell sued both for libel and intentional infliction of emotional distress. The libel claim failed because the jury found that the parody could not have been reasonably believed to be actual fact. *Id.*

99. *Id.* at 880. The *Hustler* Court recalled an earlier decision in which it protected even ill-willed criticism of a public official:

"Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."

Id. at 880-81 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)).

basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.¹⁰⁰

The *Hustler* Court concluded that public officials and public figures could not recover for emotionally harmful speech short of libel committed with actual malice.¹⁰¹ It did not, however, suggest how it might decide a similar claim by a private person.

Given the Supreme Court's narrow and sharply divided decisions on the extent of constitutional protection for speech that hurts private individuals, it is not surprising that lower federal and state courts do not follow any uniform rule when deciding private facts cases. Some courts have disregarded the first amendment totally;¹⁰² other courts carefully have balanced privacy and free press concerns to accommodate the Constitution as well as common-law tort theory.¹⁰³

Recently the South Carolina Supreme Court failed to mention the first amendment at all on facts resembling those in *Hall*. *Hawkins v. Multimedia, Inc.*¹⁰⁴ arose from a feature article concerning teenage pregnancy.¹⁰⁵ The article identified plaintiff as the teenage father of an illegitimate child and contrasted his views on the birth with those of the child's teenage mother.¹⁰⁶ A jury awarded plaintiff \$1500 in actual damages and \$25,000 in punitive damages for invasion of privacy by publication of private facts.¹⁰⁷ The South Carolina Supreme Court upheld the judgment, finding the issue whether the facts reported were of public interest a question of fact for the jury.¹⁰⁸ The court previously had affirmed the dismissal of a private facts claim because the birth of a baby to a twelve-year-old girl was held to be a "biological occurrence which would naturally excite public interest."¹⁰⁹ In *Hawkins* the court distinguished its earlier holding, emphasizing that "[p]ublic or general interest does not mean mere curiosity, and newsworthiness is not necessarily the test."¹¹⁰

The notion that newsworthiness is not always an absolute defense originated in 1940 in *Sidis v. F-R Publishing Corp.*,¹¹¹ decided by the United

100. *Id.* at 882; cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (limiting the availability of presumed damages to avoid "invit[ing] juries to punish unpopular opinion rather than to compensate individuals for injury").

101. *Hustler*, 108 S. Ct. at 882.

102. See, e.g., *infra* text accompanying notes 104-10.

103. See cases discussed *infra* text accompanying notes 117-32.

104. 288 S.C. 569, 344 S.E.2d 145, *cert. denied*, 479 U.S. 1012 (1986).

105. Compare the facts of *Hall* *supra* text accompanying notes 14-23.

106. *Hawkins*, 288 S.C. at 570, 344 S.E.2d at 146. Plaintiff had been contacted by a reporter over the phone and reluctantly answered questions for a few minutes before ending the conversation. The reporter did not explicitly ask the teenager for his consent to be identified or quoted in the article. *Id.* at 571, 344 S.E.2d at 146.

107. *Id.* at 570, 344 S.E.2d at 146.

108. *Id.* at 571-72, 344 S.E.2d at 146. *Contra* *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983) (question whether speech is of public or private concern is one of law, not fact).

109. *Meetze v. Associated Press*, 230 S.C. 330, 338, 95 S.E.2d 606, 610 (1956).

110. *Hawkins*, 288 S.C. at 571, 344 S.E.2d at 146.

111. 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

States Court of Appeals for the Second Circuit. William Sidis, a child prodigy who had lectured to mathematicians on the fourth dimension at age eleven and graduated from Harvard at sixteen, thereafter shunned publicity and withdrawn from public life.¹¹² More than twenty years after Sidis secluded himself, the *New Yorker* magazine published a profile of him, describing his "chosen career as an insignificant clerk" and "the bizarre ways in which his genius flowered."¹¹³ The court held that the details of Sidis' life were still of legitimate interest because of his earlier fame, but suggested that some private facts of interest could be so intimate "as to outrage the community's notions of decency" and therefore exceed the scope of legitimate public concern.¹¹⁴ This distinction between facts of legitimate public interest and intimately private facts gained potentially constitutional magnitude when the United States Supreme Court in *Time, Inc. v. Hill* quoted *Sidis*,¹¹⁵ and ultimately reserved a decision on whether such intimate facts would be protected by the first amendment.¹¹⁶

Following the *Time* decision, and thirty-five years after the *Sidis* decision, the United States Court of Appeals for the Ninth Circuit in *Virgil v. Time, Inc.*¹¹⁷ acknowledged that newsworthiness or public concern is an issue of "constitutional dimension."¹¹⁸ The *Virgil* court nevertheless held that the *Restatement* standards for determining which speech is not within legitimate public concern, including the *Restatement's* "community mores" test, did not offend the first amendment.¹¹⁹ The court held that while the main theme of a magazine article about body surfing was of legitimate public concern, "it does not necessarily follow that it is in the public interest to know private facts about the persons who engage in that activity."¹²⁰ On remand, the trial court found the publication was of public concern based on "a rational and at least arguably close relationship between the facts revealed and the activity to be explained."¹²¹ Subsequent state court decisions have employed similar analyses producing widely ranging results. The decisions depend, not simply on the facts of each case, but also on how broadly or narrowly a court defines "rational relationship."¹²²

112. *Id.* at 807.

113. *Id.*

114. *Id.* at 809.

115. *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967).

116. *Id.*

117. 527 F.2d 1122 (9th Cir. 1975).

118. *Id.* at 1129.

119. *Id.* For a discussion of the *Restatement* standards, see *supra* notes 57-60 and accompanying text.

120. *Virgil*, 527 F.2d at 1131. The private facts at issue in *Virgil* described an accomplished body surfer's strange behavior, including diving down a flight of stairs to impress "chicks," dropping loads of lumber on himself to collect worker's compensation so he could afford to spend time surfing, and eating spiders. *Id.* at 1124 n.1. The court remanded the case to the lower court for reconsideration of summary judgment for defendant. *Id.* at 1132.

121. *Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1289 n.2 (S.D. Cal. 1976).

122. A plurality of the Iowa Supreme Court in *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980), held that the name and description of a mental patient who was sterilized in a county home because a psychiatrist felt she was "impulsive and hair triggered" were newsworthy facts not so intimate that they were not of legitimate public concern. *Id.* at 292, 300-01. The plurality reasoned that using the patient's name "offered a

A recent decision demonstrating great deference toward free speech protections without barring the private facts tort altogether is *Anderson v. Fisher Broadcasting Cos., Inc.*,¹²³ handed down by the Oregon Supreme Court in 1986. Plaintiff Anderson was an automobile accident victim filmed by a television cameraman while receiving medical treatment.¹²⁴ The court unanimously held that the publication of private facts, even those that might not be considered newsworthy, would not give rise to liability "unless the manner or purpose of defendant's conduct is wrongful in some respect apart from causing the plaintiff's hurt feelings."¹²⁵

Justice Linde, writing for the unanimous court, cited federal and state constitutional concerns with the private facts tort but avoided that issue by holding that the facts before the court did not establish a claim for relief.¹²⁶ The court nevertheless criticized the private facts tort's threat to free speech. It noted that the element of widespread publicity "singles out the print, film, and broadcast media for legal restraints that will not be applied to gossipmongers in neighborhood taverns or card parties, to letter writers or telephone tattlers."¹²⁷ The

personalized frame of reference" and "lent specificity and credibility to the report." *Id.* at 303. A majority of the court did not find the public concern issue dispositive, however, but rather held that the facts were taken from a public record and therefore were protected under *Cox Broadcasting Corp. v. Cohn*. *Howard*, 283 N.W.2d at 302; see *supra* text accompanying notes 85-94 (discussion of *Cox*).

The United States Court of Appeals for the Tenth Circuit in *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 309 (10th Cir. 1981), held that a newspaper article disclosing the psychiatric and marital problems of an anesthesiologist accused of malpractice was not a tortious invasion of privacy. *Id.* The court reasoned that the facts were "connected to the newsworthy topic by the rational inference that plaintiff's personal problems were the underlying cause of the acts of alleged malpractice." *Id.* The court concluded that the "generous breathing space" accorded the press meant "editors must have freedom to make reasonable judgments and to draw one inference where others also reasonably could be drawn." *Id.*

Some state courts have taken a narrower view of what news is of public concern, particularly when private facts appear in features articles rather than in "hard" news columns. The Mississippi Supreme Court in *Deaton v. Delta Democrat Publishing Co.*, 326 So. 2d 471 (Miss. 1976), held that a private facts claim could be maintained against a newspaper that published an article identifying and describing children in a public school special education class as "retarded." *Id.* at 474. The court distinguished the legitimate public interest in the education of mentally retarded children from the publication of the names and photographs of plaintiff's children. *Id.* In contrast, the New Mexico Supreme Court in *McNutt v. New Mexico State Tribune Co.*, 530 P.2d 804 (N.M. 1975), held that the publication of names and addresses of private citizens participating in newsworthy events was necessary to assure proper identification and to avoid confusion. *Id.* at 809.

Rarely has a court decided that the entire subject matter of a publication is not of legitimate public concern. In *Daily Times Democrat v. Graham*, 276 Ala. 380, 162 So. 2d 474 (1964), the Alabama Supreme Court upheld a jury verdict for invasion of privacy when a newspaper published a photograph of a housewife whose skirt was blown above her waist when she exited a "fun house" at a county fair. *Id.* at 381, 162 So. 2d at 478. Even though the woman's body was not completely exposed, the court viewed the photograph as "obscene . . . 'offensive to modesty or decency.'" *Id.* at 381, 162 So. 2d at 479 (quoting *Holcombe v. State*, 5 Ga. App. 47, 50, 62 S.E. 647, 648 (1908)).

123. 300 Or. 452, 712 P.2d 803 (1986) (en banc).

124. *Id.* at 454, 712 P.2d at 804.

125. *Id.* at 469, 712 P.2d at 814. An independent wrong would include conduct seeking emotional distress as its very object or as a means to another end, or publicity that violated a duty owed to the plaintiff based on a special relationship. *Id.* An action might also be sustained, the court advised, when publicized information was obtained by conversion, bribery, false pretenses, or trespassory intrusion. *Id.*

126. *Id.* at 459, 712 P.2d at 806.

127. *Id.* at 462, 712 P.2d at 809; see also *Florida Star v. B.J.F.*, 57 U.S.L.W. 4816, 4820-21 (U.S.

court distinguished noncommercial use of a person's name from commercial use, suggesting that the respective interests invaded and motives of the publishers "should bear on the remedy."¹²⁸ The court concluded that publishing plaintiff's photograph was not commercial appropriation "simply because the [television] medium itself is operated for profit."¹²⁹ The court also noted the difficulty in discerning which facts are private and which are not. "What is 'private' so as to make its publication offensive likely differs among communities, between generations, and among ethnic, religious, or other social groups, as well as among individuals. . . . [O]ne reader's or viewer's 'news' is another's tedium or trivia."¹³⁰

Courts in three states other than North Carolina have declined to recognize the private facts tort, although none has gone so far as to reject the tort regardless of the facts of any case and without at least purported deference to the legislature.¹³¹ Among those decisions, only one addresses the first amendment issue, expressing "serious concern that, by sidestepping the safeguards which restrain the reach of traditional public defamation litigation, a [privacy claim] could compromise the constitutional guarantee of freedom of the press."¹³²

North Carolina historically has protected free press to a greater degree than other states. The state's original constitution protected freedom of the press but did not mention other speech.¹³³ North Carolina stands apart from the *Restatement (Second) of Torts* by denying relief to plaintiffs suing for libel *per quod*—

June 21, 1989) (criticizing as unevenhanded and underinclusive a Florida statute prohibiting publication of rape victims' names by any "instrument of mass communication").

128. *Anderson*, 300 Or. at 466, 712 P.2d at 811-12.

129. *Id.* at 467, 712 P.2d at 812. The United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 572-75 (1976), explained in detail the differences between commercial appropriation and invasion of privacy by publication of private facts. The Court noted that newspaper reports are not considered commercial speech merely because the newspaper is sold or because advertisements subsidize the news. *Id.* at 574 n.11 (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117 (4th ed. 1971)). For a recent survey of New York decisions distinguishing commercial speech from noncommercial speech in the context of privacy claims, see *Rogers v. Grimaldi*, 695 F. Supp. 112, 120-24 (S.D.N.Y. 1988).

130. *Anderson*, 300 Or. at 461, 712 P.2d at 809 (footnote omitted); see also *Winters v. New York*, 333 U.S. 507, 510 (1948) ("one man's amusement teaches another's doctrine"); *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451 (3rd Cir. 1958) ("once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment").

131. See *Brunson v. Ranks Army Store*, 161 Neb. 519, 525, 73 N.W.2d 803, 806 (1955) (court deferred to legislature to decide whether a private facts claim should be recognized); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 442, 434 N.E.2d 1319, 1323, 449 N.Y.S.2d 941, 945 (1982) (assuming privacy action were recognized, publication of plaintiff's photograph in article about middle class blacks did not support a claim; "an inability to vindicate a personal predilection for greater privacy may be part of the price every person must be prepared to pay for a society in which information and opinion flow freely"), *cert. denied*, 459 U.S. 1146 (1983); *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 2 Utah 2d 256, 263-66, 272 P.2d 177, 184 (1954) (declining to extend statutory provision for commercial misappropriation to allow claim of misappropriation of plaintiff entertainer's life story in a movie). The Rhode Island Supreme Court rejected the privacy tort in *Henry v. Cherry & Webb*, 30 R.I. 13, 73 A. 97 (1909), but that decision was superseded by a statute granting a cause of action for all four branches of the privacy tort. R.I. GEN. LAWS § 9-1-28.1 (1985).

132. *Arrington*, 55 N.Y.2d at 442, 434 N.E.2d at 1323, 449 N.Y.S.2d at 945.

133. N.C. CONST. OF 1776, Declaration of Rights § 15, reprinted in *NORTH CAROLINA GOVERNMENT: 1585-1974* 810 (J. Cheney ed. 1975); see Martin, *Freedom of Speech in North Carolina Prior to Gitlow v. New York, With a Forward Glance Thereafter*, 4 CAMPBELL L. REV. 243, 246-47 (1982) (explaining free speech provisions of early North Carolina government documents).

libel in which defamation is apparent only by reference to extrinsic facts—in the absence of actual pecuniary loss arising from the publication.¹³⁴ When false speech has two potential meanings, one defamatory and one not, North Carolina courts require the plaintiff to prove that defendant intended the defamatory meaning and that the speech was so understood by the audience.¹³⁵

The North Carolina Supreme Court recognized a claim of commercial appropriation in 1938,¹³⁶ but since has not recognized another branch of the privacy tort.¹³⁷ The court rejected the false light privacy tort in *Renwick v. News & Observer Publishing Co.*,¹³⁸ declining “to add to the tension already existing between the First Amendment and the law of torts.”¹³⁹ The false light tort, the court explained, would “either duplicate an existing right of recovery for libel or slander or involve a good deal of overlapping with such rights.”¹⁴⁰ Justice Mitchell, writing for the *Renwick* majority, observed that, in contrast to the “yellow journalism” of the late nineteenth century, “journalists simply are more responsible and professional today.”¹⁴¹ In support of the court’s decision, Mitchell quoted James Madison:

Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press.

It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits.¹⁴²

Justice Mitchell reasoned that in addition to threatening free speech and press, the false light tort would reduce judicial efficiency by requiring courts to con-

134. See *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 82, 266 S.E.2d 861, 865 (1980); cf. RESTATEMENT (SECOND) OF TORTS § 569 comment b (1977) (abandons libel per se, libel per quod distinction in light of actual malice standard).

135. *Renwick v. News & Observer Publishing Co.*, 310 N.C. 312, 316-17, 312 S.E.2d 405, 408, cert. denied, 469 U.S. 858 (1984).

136. *Flake v. Greensboro News Co.*, 212 N.C. 780, 792-93, 195 S.E. 55, 64 (1938) (allowing claim against newspaper that published plaintiff’s photograph in a bread advertisement without her consent, inaccurately identifying her as a vaudeville dancer).

137. The supreme court has not yet addressed one branch, invasion of privacy by physical intrusion. But see *Morrow v. Kings Dep’t Stores*, 57 N.C. App. 13, 23, 290 S.E.2d 732, 738 (1982) (invasion of privacy claim failed where plaintiff alleged that store employee removed a shirt from her bag, but failed to allege that the shirt was taken without consent or in an illegal search).

138. 310 N.C. 312, 312 S.E.2d 405, cert. denied, 469 U.S. 858 (1984). In *Renwick* a newspaper editorial attributed an erroneous factual statement to plaintiff, a university dean, and the editorial noted that the statement was contradicted by statements from other sources. *Id.* at 314-15, 312 S.E.2d at 407. Plaintiff also brought a libel claim based on the editorial, but the supreme court found the facts did not establish libel. *Id.* at 316-20, 312 S.E.2d at 408-10.

139. *Id.* at 323, 312 S.E.2d at 412.

140. *Id.* The majority noted that the false light and private facts branches of the privacy tort had been identified by Professor Prosser as falling within constitutional protection. *Id.* at 324-25, 312 S.E.2d at 413 (citing W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 118 (4th ed. 1971)).

141. *Id.* at 325, 312 S.E.2d at 413 (noting that “nothing in the first amendment mandates that members of the news media be responsible or professional”). But cf. Zuckerman, *Knocking on Death’s Door*, TIME, Feb. 27, 1989, at 49 (describing the effect on decedents’ families when journalists insensitively report death details).

142. *Renwick*, 310 N.C. at 324, 312 S.E.2d at 413 (quoting 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)). Part of this passage also was quoted by the Supreme Court in *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

sider two nearly identical claims for the same injurious publication.¹⁴³ Like *Hall*,¹⁴⁴ *Renwick* granted more protection to the press than did the United States Supreme Court, which recognized the tort of false light in *Time, Inc. v. Hill*.¹⁴⁵

The tort of intentional infliction of emotional distress, sometimes used as an alternative to the private facts tort, has allowed redress for truthful but malicious publication of private facts in North Carolina. The North Carolina Court of Appeals in *Woodruff v. Miller*¹⁴⁶ upheld a jury verdict of \$20,001 for a public school superintendent who was humiliated, lost sleep, and suffered other physical ailments after his thirty-year-old criminal conviction for aiding and abetting a service station break-in was posted beside "wanted" posters in the local post office and circulated in the local community by a personal adversary.¹⁴⁷ The court cited defendant's "consuming animus against the plaintiff"¹⁴⁸ in determining that the publication was "a calculated, persistent plan to disturb, humiliate, harass, and ruin plaintiff for no purpose but defendant's own spiteful satisfaction."¹⁴⁹ The court held that the evidence established the requisite elements of the emotional distress tort: extreme and outrageous conduct, intended to cause severe emotional distress, and in fact causing severe emotional distress.¹⁵⁰ Because *Woodruff* was a public official, the court of appeals' decision probably is no longer valid after the United States Supreme Court's decision in *Hustler Magazine v. Falwell*.¹⁵¹ The emotional distress claim nevertheless may be available to a private person, as Justice Mitchell suggested in *Hall*.¹⁵²

In refusing to recognize invasion of privacy by the truthful publication of private facts, the North Carolina Supreme Court in *Hall* maintained the state's policy of protecting free press even more than may be constitutionally required.¹⁵³ The United States Supreme Court has yet to decide what first amend-

143. *Renwick*, 310 N.C. at 323, 312 S.E.2d at 412.

144. See *supra* text accompanying notes 29-36.

145. 385 U.S. 374 (1967). For a discussion of *Time*, see *supra* notes 62-73 and accompanying text. In *Renwick* Justices Meyer and Frye dissented, arguing that North Carolina should recognize the false light privacy tort. *Renwick*, 310 N.C. at 328-30, 312 S.E.2d at 414-15 (Meyer, J., dissenting); *id.* at 331, 312 S.E.2d at 416 (Frye, J., dissenting).

146. 64 N.C. App. 364, 307 S.E.2d 176 (1983).

147. *Id.* at 365-66, 307 S.E.2d at 177-78 (reversing trial court's judgment notwithstanding the verdict).

148. *Id.* at 366, 307 S.E.2d at 178. Defendant was angry over two "bitterly contested lawsuits over a property dispute" between plaintiff and him that defendant had lost. *Id.* at 365, 307 S.E.2d at 177.

149. *Id.* at 365-66, 307 S.E.2d at 178.

150. *Id.* In contrast to *Woodruff*, the court of appeals in *Briggs v. Rosenthal*, 73 N.C. App. 672, 327 S.E.2d 308, cert. denied, 314 N.C. 114, 332 S.E.2d 479 (1985), found that a magazine article did not meet the legal standard of extreme or outrageous conduct because the article was "honest, sincere, and sensitive." *Id.* at 677, 327 S.E.2d at 312. The article described plaintiff's deceased son as a heavy drinker, a "pain in the ass," and "the only friend I had who would dive on the hood of a car." *Id.* at 673-75, 327 S.E.2d at 309-10.

151. 108 S. Ct. 876 (1988) (holding that absent a showing of falsity and actual malice, first amendment precluded intentional infliction of emotional distress claim for speech concerning a public figure) (discussed *supra* notes 97-101 and accompanying text).

152. See *supra* text accompanying notes 39-41.

153. Defendants argued that the North Carolina Constitution provides "at least as broad" a free speech guarantee as the United States Constitution. Defendant's Brief at 10 n.6 (emphasis omitted).

ment protection is due truthful publication of private facts not found in public records. The Supreme Court's decisions in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹⁵⁴ *Philadelphia Newspapers, Inc. v. Hepps*,¹⁵⁵ and *Hustler Magazine v. Falwell*¹⁵⁶ suggest that the high court may accord relatively little first amendment protection to speech of private concern that hurts only private individuals. Not one of the foregoing three cases, however, concerned true speech. The Court's strong statements supporting the promotion of truth suggest that true speech ultimately should prevail.¹⁵⁷ The sharp divisions in many cases prevents any confident prediction for the future of this constitutional issue. Without guidance to the contrary, the North Carolina Supreme Court was wise to err, if at all, on the side of drawing too wide a scope of first amendment protection.

The *Hall* decision necessarily precludes potential claims by genuinely hurt people, a consequence the court should have acknowledged. Disparity between the protection allowed by law and the potential for actual harm is not new to first amendment cases.¹⁵⁸ The constitutional provision for freedom of the press far outweighs the state's interest in compensating tort plaintiffs, particularly when truthful speech is involved. The balance in favor of free press and speech becomes clear when one considers the benefits and costs of the private facts tort.

The private facts tort is so narrowly defined that it benefits relatively few people. A plaintiff should win a private facts claim only if private facts have been published about him that a reasonable person would find offensive, and only if the facts disseminated to the general public are deemed not of public

The court, however, did not address the issue whether the private facts tort violates the state constitution. *Cf. State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988) (fourth amendment of state constitution requires exclusionary rule even in some circumstances in which federal constitution does not require exclusionary rule).

154. 472 U.S. 749 (1985); *see supra* notes 78-81 and accompanying text (discussing *Dun & Bradstreet*).

155. 475 U.S. 767 (1986); *see supra* notes 82-84 and accompanying text (discussing *Hepps*).

156. 108 S. Ct. 876 (1988); *see supra* notes 97-101 and accompanying text (discussing *Hustler*).

157. *See, e.g., Dun & Bradstreet*, 472 U.S. at 770 (White, J., concurring) ("The press must . . . be privileged to spread false information, even though that information has negative First Amendment value and is severely damaging to reputation, in order to encourage the full flow of the truth."). The most famous passages in support of free speech appear to assume the value of truth. *See, e.g., Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market"); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.) (the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection"), *aff'd*, 326 U.S. 1 (1945).

158. As noted by the Supreme Court in *Time, Inc. v. Hill*: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." 385 U.S. 374, 388 (1966); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (statute prohibiting publication of rape victim's name held unconstitutional when the name was obtained from a public court record). An example of potentially offensive publication of private facts that is perfectly legal under *Cox* is a North Carolina newspaper's coverage of an obscenity trial. The newspaper published prospective juror's names, occupations, church memberships, and disclosures compelled by the judge in open court of their familiarity with sexually explicit materials. *For Adam and Eve Case: Four Jurors Now Selected*, *The Alamance News*, Mar. 12, 1987, at 1A.

concern.¹⁵⁹ Ironically, in a typical case, the more embarrassing the facts, the more likely they are to be found to be of public concern, leaving the most aggrieved plaintiffs without compensation.

The profound costs of the private facts tort outweigh its marginal benefits. Plaintiffs continue to file private facts claims that ultimately fail, saddling defendants with legal fees as chilling as any jury verdict.¹⁶⁰ The publication element aims exclusively at the media, directly attacking free press and preventing the even administration of justice.¹⁶¹ The tort's public concern element, particularly when defined by community mores or standards of decency, also conflicts with the first amendment by replacing the judgment of editors and publishers with that of judges and jurors.¹⁶²

By focusing on audience reaction rather than publisher behavior, the community standard does not correlate to any reasonably certain standard of foreseeability or control on the defendant's part. The inherently subjective standard creates a risk of unequal justice in the same way as do similar tests determining when speech is obscene and therefore unprotected by the first amendment.¹⁶³ Citizens bring to the jury box varied ideas as to what information is not of legitimate public concern. Furthermore, truthful facts, unlike obscenity, have never been presumed undeserving of constitutional protection.¹⁶⁴ The United States Supreme Court consistently has assumed the contrary—that truth is an ultimate goal of the first amendment.¹⁶⁵ The *Hall* court's assertion that "true statements . . . are entitled to no less constitutional protection than that guaranteed false

159. See *supra* notes 57-61 and accompanying text.

160. *Time*, 385 U.S. at 389 (warning that "[f]ear of large verdicts in damage suits . . . [and] even fear of the expense involved in their defense" can suppress free speech); Smolla, *Let the Author Beware: the Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 13 (1983) ("Whether a suit is settled, won, or lost, the legal fees alone can be chilling.").

161. See *supra* notes 57 & 127 and accompanying text.

162. In cases concerning individual access to publicity through the media, the Supreme Court has recognized professional journalists' special privilege of gauging the public interest:

For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but . . . [c]alculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 124-25 (1973). A subsequent private access decision suggests, however, that the Court would allow editors discretion only within the scope of public concern. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspapers' treatment of public issues and public officials is a matter of editorial control).

163. See *Miller v. California*, 413 U.S. 15, 24 (1973) (two prongs of three-pronged obscenity test require determination whether an "average person applying contemporary community standards" would say the work taken as a whole appeals to a prurient interest and whether the work "lacks serious literary, artistic, political, or scientific value" (quoting *Roth v. United States*, 354 U.S. 479, 489 (1957))). The subjective and unpredictable nature of obscenity tests are evident from Justice Stewart's comment: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

164. Cf. *Miller*, 413 U.S. at 23 (it is "categorically settled . . . that obscene material is unprotected by the first amendment").

165. See *supra* note 157.

statements"¹⁶⁶ reflects the fundamental value of truth. The same premise supports the argument that we should protect true speech with a broad rule shielding even some truth that hurts.

The paternalistic view of Warren and Brandeis¹⁶⁷ quashes not only freedom of expression, but also freedom of access to materials of varying content. Courts have long appreciated the healthy diversity of Americans' news appetites and the media's responsibility to meet public demand.¹⁶⁸ The United States Court of Appeals for the Third Circuit more than thirty years ago observed:

A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. . . . This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account.¹⁶⁹

Some citizens may wish to spend their leisure time reading only scholarly works or highly acclaimed literature, but a greater mass of the American public may be more interested in the features pages of the daily press or tabloids such as *The National Enquirer*. As long as the information reported is true and has not been obtained by tortious or dishonest means, it is difficult to define the publication as an invasion of privacy undeserving of substantial first amendment protection.¹⁷⁰

The *Hall* court did not decide whether all truthful publication is immune from tort liability; it expressly left open the possibility of claims for intentional infliction of emotional distress.¹⁷¹ The court's reasoning that the facts of a private facts claim might support an emotional distress claim is, however, circular. The court described the private facts tort as overlapping the emotional distress

166. *Hall*, 323 N.C. at 266, 372 S.E.2d at 715.

167. See *supra* notes 49-50 and accompanying text.

168. Cf. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."); *Associated Press v. United States*, 326 U.S. 1, 20 (1944) (first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

169. *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451 (3d Cir. 1958). For various commentators' views on the functions of free speech in society, see M. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 1.02 (1984) (discussing the enlightenment function of speech); O'Connor, *The Right to Privacy in Historical Perspective*, 53 MASS. L.Q. 101, 109 (1968) (as immigration and urbanization changed our once homogeneous society, people began to experience "a desire to know more and more about the intimate details of the lives, the actions, the habits, the customs, the thoughts, and the activities of those about them"); Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L. J. 1519, 1537 n.87 (1987) (surveying discussions of the "enlightenment function" of free speech); Zimmerman, *supra* note 3, at 332-337 (surveying sociologists' and anthropologists' historical accounts of the social value of gossip).

170. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring) ("Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press.").

171. See *supra* text accompanying notes 39-41.

tort. It did not acknowledge the likelihood that, because of their similarity, the latter tort may impinge just as sharply on free press concerns. Intentional infliction of emotional distress requires extreme and outrageous behavior intended to cause severe emotional distress and causing distress in fact.¹⁷² The same level of intent has been found when a newspaper published a truthful article, not with a purpose to harm, but nonetheless with knowledge that the publication would cause extreme emotional harm to the subject of the report.¹⁷³ Because the emotional distress tort does not depend on whether harmful speech is of public concern, conceivably the most compelling news story would not be protected if its author were reasonably certain the subject would be emotionally injured by it.¹⁷⁴ The same jurors who might find a news story offensive under a private facts claim could find the defendant's behavior in publishing outrageous under an emotional distress claim.¹⁷⁵

If truthful publication of private facts is too constitutionally suspect a tort to be recognized, the publication of true private facts with reckless disregard, or even with certainty, that severe emotional distress will follow, actually followed by such harm, should not give rise to a claim of intentional infliction of emotional distress. Regardless of which tort label is placed on such facts, adding the element of intent and replacing the offensiveness and public concern elements of the private facts claim with the extreme and outrageous behavior element does not dispel the first amendment concerns that supported the *Hall* decision.

A compromise that could satisfy the first amendment, while allowing claims by some victims of emotional distress, would add to the emotional distress tort an element of ill will when the intentional action in question is truthful speech. Such a modification would be similar to the Oregon Supreme Court's order in *Anderson v. Fisher Broadcasting Cos.*,¹⁷⁶ which limited the private facts tort to cases showing more than the traditionally required elements.¹⁷⁷ The emotional distress tort is not directed solely at publishers and, for that reason, is conceptually less offensive to the first amendment than is the private facts tort. The proposed element of ill will—the layperson's definition of malice—is one

172. See *supra* note 96 and accompanying text.

173. *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (Cal. Ct. App. 1983). In *Diaz*, a private facts case, the California Court of Appeal upheld punitive damages based on malice analogous to the intent element of an emotional distress claim. *Id.* at 135-35, 188 Cal. Rptr. at 773-74. The court found that a newspaper article about plaintiff's transexuality, published without ill will but with the intent to be humorous and with reasonable certainty that the article would have a "devastating impact" on plaintiff, would support an inference that the reporter "acted with the intent to outrage or humiliate" plaintiff. *Id.* at 134-36, 188 Cal. Rptr. at 773-75.

174. See *Hall*, 323 N.C. at 269, 372 S.E.2d at 717 ("The tort may also exist where a defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress.") (quoting *Dickens v. Puryear*, 302 N.C. 437, 452-53, 276 S.E.2d 325, 335 (1981)); RESTATEMENT (SECOND) OF TORTS § 46 comment i (1965) (liability for intentional infliction of emotional distress arises when the actor desires, knows, or is substantially certain that her actions will cause severe emotional distress).

175. See *id.* § 46 comment d ("Liability has been found only where the conduct has been 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.").

176. 300 Or. 452, 712 P.2d 803 (1986) (en banc). For a discussion of *Anderson*, see *supra* text accompanying notes 123-30.

177. *Anderson*, 300 Or. at 469, 712 P.2d at 814.

that most people understand. The narrower range of its definition would decrease the risk of unpredictable results and subjective value judgments by juries.

Even with an element of ill will added, the intentional infliction of emotional distress tort may be doomed in the first amendment area following the Supreme Court's decision in *Hustler*, which held that ill will would not overcome the first amendment's protection of public speech about a public figure.¹⁷⁸ The Court might refuse to extend the same protection to bar emotional distress claims by private persons.¹⁷⁹ Also unknown is whether the Court will prevent emotional distress claims by private persons who cannot show knowing or reckless falsity.

The North Carolina court's discretion to reject the private facts tort on common-law grounds¹⁸⁰ enabled it to avoid the difficult issue of first amendment protection for truthful speech. Although the court's reasoning does not anticipate similar questions that are likely to arise in the future, its rule is simple, definite and, therefore, not subject to dispute. The court has rejected a tort that through overbreadth and unmanageable application could have caused more harm than it was intended to prevent. Ultimately the court may have to reach the same decision about the emotional distress tort when a claim is brought in the context of true speech. If a future case arises under facts more aggravated than those in *Hall*, the court may find its rule difficult to apply. Perhaps the court will restrict even truthful speech if it is used as a private weapon to hurt rather than to enlighten. The protection of truthful speech, however, is a policy that only rarely—if ever—should be compromised.¹⁸¹ The media must never be coerced toward self-censorship. At the same time, if the media follow the court's example in self-restraint by responsibly exercising their role in society, rules such as that in *Hall* should not be tested often.¹⁸²

LUCY NOBLE INMAN

178. See *supra* note 99 and accompanying text.

179. See *Garrison v. Louisiana*, 379 U.S. 64, 72 n.8 (1964) (rule that express malice does not vitiate truth defense to claim of defamation by a public official does not apply to "purely private libels" (quoted in *Cox*, 420 U.S. 469, 490-91 (1975))).

180. See *supra* text accompanying note 37.

181. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring) (citing national defense as a potential justification for restricting truthful speech).

182. "It's nice to know that, in North Carolina in 1988, the only restraint on 'invasion of privacy' is self-restraint. But with that knowledge comes the sobering realization that in confirming our freedom, the court has laid on us the sole responsibility to use it for good rather than for evil." Stevens, *Hall vs Salisbury Post: Victory for N.C. Newspapers*, N.C. PRESS, Nov. 1988, 3, 4.