THE 'BLURRED LINES' OF MARVIN GAYE'S '*HERE, MY DEAR*': MUSIC AS A TORTIOUS ACT, DIVORCE NARRATIVE AND FIRST AMENDMENT TOTEM♦

BRYAN ADAMSON*

*Associate Professor of Law, Seattle University School of Law. J.D., Case Western Reserve University School of Law, 1990. M.A., Purdue University, 1987. B.S./Ph.B., Miami University, 1985. Thanks to Michael Olivas, Bill Marshall, and Susan Saeger for their helpful comments. Thanks also to Brittany Torrence for her research assistance, and Benjamin Page.

INTRODUCTION

In 1977, singer Marvin Gaye did an audacious thing. Anna Gordy-Gaye was divorcing him and asking for one million dollars.[1] Despite having a wildly successful career up to that point, Marvin was near financial ruin.[2] His attorney, Curtis Shaw, hit upon an idea: Motown, Marvin's record label, had given him $305,000 as an advance for his upcoming-but-undeveloped album.[3] Marvin would give Anna the $305,000 and pledge the first $295,000 of the royalties yielded from that recording.[4] Instead of one million dollars, Anna agreed to $600,000, as did Motown's CEO Berry Gordy, Anna's brother.[5] The judge wrote up an Order to that effect.[6] Composed, written (with a few exceptions), and vocalized by Marvin alone, he first thought to do "nothing heavy, nothing even good."[7] Then he changed his mind. The album that resulted? A brilliantly unsettling poison pen to and about Anna,

[1] DAVID RITZ, DIVIDED SOUL: THE LIFE OF MARVIN GAYE 233 (DaCapo Press 1991) (1985); MICHAEL ERIC DYSON, MERCY, MERCY ME: THE ART, LOVES & DEMONS OF MARVIN GAYE 229 (2004).
[2] RITZ, *supra* note 1, at 233–34; FRANKIE GAYE WITH FRED E. BASTEN, MARVIN GAYE, MY BROTHER, 105–06 (2003).
[3] RITZ, *supra* note 1, at 233–34
[4] RITZ, *supra* note 1, at 234; DYSON, *supra* note 1.
[5] RITZ, *supra* note 1, at 233–34.
[6] *Id.* at 234.
[7] *Id.*

sardonically titled *Here, My Dear*.[8]

Released in December 1978, *Here, My Dear* laid bare to the world a marriage gone terribly, terribly wrong. From the double album's jacket illustrations and lyrics, down to the vocal colors and tones Marvin deploys, Anna is portrayed as greedy, vengeful, and manipulative.[9] The work was so upsetting to her that Anna publicly threatened to sue Marvin.[10]

This Article explores that threat. *Here, My Dear* is a rich legal document from which to mine the myriad torts Marvin commits against Anna over the course of the album's seventy-three minutes and ten seconds. Moreover, given Marvin's persona as one of the most preeminent celebrity male sex symbols from the 1960s until his death in 1984,[11] *Here, My Dear* can also be read as a beguiling take on the ways in which masculine perspectives on divorce are constructed and articulated.

Here, My Dear is a fascinating artifact also because its analysis applies some of the Supreme Court's seminal constitutional jurisprudence such as *New York Times Co. v. Sullivan*,[12] *Gertz v. Robert Welch, Inc.*,[13] *Hustler Magazine, Inc. v. Falwell*,[14] *Time, Inc. v. Hill*,[15] *Milkovich v. Lorain Journal Co.*,[16] *Cantrell v. Forest City Publishing Co.*,[17] and *Time, Inc. v. Firestone*[18]. Each, in some form or to some extent, is relevant to the Gaye divorce saga as it raises issues of free speech and artistic expression, who can be considered "media" or a "public figure," and rights of privacy versus newsworthiness of divorce (directly at issue in *Firestone*). Consequently, *Here, My Dear* serves to illustrate foundational communication and distress torts principles as balanced and shaped by First Amendment doctrine.

Moreover, it is impossible to consider *Here, My Dear* without regard to the broader contemporary issues. The "tell-all" era has grown exponentially with the rise of the Internet.[19] People tell stories about themselves through blogs, self-publishing sites, and other social media platforms. With the possibility of widespread and even lucrative

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8 MARVIN GAYE, HERE, MY DEAR (Tamla 1978).
9 *See* discussion *infra* at Part II.
10 RITZ, *supra* note 1, at 238.
11 DYSON, *supra* note 1, at 150.
12 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
13 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
14 *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
15 *See* Time, Inc. v. Hill, 385 U.S. 374 (1967).
16 *See* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
17 Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974).
18 Time, Inc. v. Firestone, 424 U.S. 448 (1976) (one of the Court's most significant decisions on privacy—with divorce proceedings providing a basis for the action as well).
19 Sonja R. West, *The Story of Me: The Underprotection of Autobiographical Speech*, 84 WASH. U. L. REV. 905, 919–20 (2006).

dissemination, cyberspace teems with autobiographers. But in discussing their relationships with others, the legal risks of tortious conduct autobiographers face can potentially outweigh their First Amendment rights. In blurring the lines between speech, art, and infliction of injury, *Here, My Dear* also represents a potentially cautionary tale on the pitfalls of self-expression.

Marvin is considered one of the greatest popular music artists in history.[20] *What's Going On*—his reflections on war, race, religion, politics and ghetto life—is an unequivocal masterpiece.[21] The smoldering eroticism of *Let's Get In On*,[22] *I Want You*,[23] and "Sexual Healing"[24] mark him as the musical progenitor of a distinctive form of black masculinity—what cultural critic Mark Anthony Neal would come to describe as urban, "hyper-sexualized soul."[25] Marvin has influenced artists as revered and varied as Stevie Wonder,[26] Michael Jackson,[27] Alicia Keys,[28] R. Kelly,[29] Justin Timberlake,[30] and D'Angelo.[31] Singers Pharrell and Robin Thicke had long-acknowledged their stylistic debts to Marvin—until it became legally inconvenient. Despite belated attempts to disavow his influence on their smash hit "Blurred Lines," a jury found that they had so emulated their idol's 1977 hit "Got To Give It Up" that they were liable for copyright

[20] *100 Greatest Singers of All Time*, ROLLING STONE (Dec. 2, 2010), http://www.rollingstone.com/music/lists/100-greatest-singers-of-all-time-19691231 (#6); Molly Driscoll, *The 25 Best Musicians of the Rock and Roll Era*, CHRISTIAN SCI. MONITOR (Jan. 16, 2013), http://www.csmonitor.com/The-Culture/2013/0116/The-25-best-musicians-of-the-Rock-Roll-era/Fats-Domino (#18); Billboard Staff, *The 35 Greatest R&B Artists of All Time*, BILLBOARD (Nov. 12, 2015), http://www.billboard.com/photos/6737387/best-r-and-b-singers-of-all-time (#7); *The 20 Best Singers of All Time (VIDEO)*, L.A. WKLY. (Mar. 8, 2016, 8:30 AM), http://www.laweekly.com/music/the-20-best-singers-of-all-time-video-6686064/2 (#17).

[21] MARVIN GAYE, WHAT'S GOING ON (Tamla 1971). *What's Going On* is Number 6 on Rolling Stone's list of the 500 all-time greatest albums. *See 500 Greatest Albums of All Time*, ROLLING STONE (May 31, 2012), http://www.rollingstone.com/music/lists/500-greatest-albums-of-all-time-20120531/marvin-gaye-whats-going-on-20120524.

[22] MARVIN GAYE, LET'S GET IT ON (Tamla 1973).

[23] MARVIN GAYE, I WANT YOU (Tamla 1976).

[24] MARVIN GAYE, *Sexual Healing*, *on* MIDNIGHT LOVE (Columbia Records 1982).

[25] Mark Anthony Neal, *The Tortured Soul of Marvin Gaye and R. Kelly*, *in* DA CAPO BEST MUSIC WRITING 2004: THE YEAR'S FINEST WRITING ON ROCK, HIP-HOP, JAZZ, POP, COUNTRY AND MORE, 222, 224 (Mickey Hart & Paul Bresnick, eds., 2004) (emphasis added); *see also* MARK ANTHONY NEAL, NEW BLACK MAN 128–29 (Routledge 2006).

[26] RITZ, *supra* note 1, at 153.

[27] MARY K. PRATT, MICHAEL JACKSON: KING OF POP 29 (ABDO Publishing Co. 2010).

[28] Raymond Fiore, *Seven who influenced Alicia Keys' life*, ENT. WKLY. (Aug. 8 2006, 4:00 AM), http://ew.com/article/2006/08/08/seven-who-influenced-alicia-keys-life/.

[29] Neal, *supra* note 25 at 227.

[30] Meredith Lerner, *Justin Timberlake: Work in Progress*, VH1.COM (Nov. 18, 2002 4:38 PM), http://www.vh1.com/artists/interview/1458752/11182002/timberlake_justin.jhtml [https://web.archive.org/web/20040603183039/http://www.vh1.com/artists/interview/1458752/11182002/timberlake_justin.jhtml].

[31] Amy Wallace, *Amen! (D'Angelo's Back)*, GQ (Dec. 14, 2014) https://www.gq.com/story/dangelo-gq-june-2012-interview.

infringement.[32]

An artistic creation such as *Here, My Dear* that meditates on love and its vagaries from a personal perspective is not unusual in music. Before 1978 and since, there have been scores of works—autobiographical by varying degrees—about separation and divorce. Bob Dylan's *Blood on the Tracks*,[33] Paul Simon's *Still Crazy After All These Years*,[34] Richard and Linda Thompson's *Shoot Out the Lights*,[35] George Jones' *The Battle*,[36] Robin Thicke's *Paula*,[37] and John Lennon's "Lost Weekend"[38] are just a handful of examples. What sets *Here, My Dear* apart from other works is its explicit reference to its subject and the circumstances under which it was born, viz., the expressly bargained-for bounty of a divorce settlement.[39]

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[32] Eriq Gardner, *'Blurred Lines' Trial Verdict: Jury Rules Against Pharrell Williams & Robin Thicke*, BILLBOARD (Mar. 10, 2015), http://www.billboard.com/articles/news/6495159/blurred-lines-trial-verdict.

[33] BOB DYLAN, BLOOD ON THE TRACKS (Columbia Records 1975) (about his estrangement from then-wife Sara). For an insightful discussion of this work, *see* Rick Moody, *Blood on the Tracks*, *in* STUDIO A: THE BOB DYLAN READER 109 (Benjamin Hedin ed., 2004).

[34] PAUL SIMON, STILL CRAZY AFTER ALL THESE YEARS (Columbia Records 1975). Released after he just divorced Peggy Harper, it was speculated that the album was about one of his lovers, Kathy Chitty, or even his music partner, Art Garfunkel. Paul Simon, *Still Crazy After All These Years*, THE INDEPENDENT, (May 25, 2006), http://www.independent.co.uk/arts-entertainment/music/features/paul-simon-still-crazy-after-all-these-years-6099926.html.

[35] RICHARD THOMPSON & LINDA THOMPSON, SHOOT OUT THE LIGHTS (Hannibal 1982) (which proved to be the couple's final album together).

[36] GEORGE JONES, THE BATTLE (Epic Records 1976) (a chronicle of his breakup with another country superstar, Tammy Wynette).

[37] ROBIN THICKE, PAULA (Star Trak Entertainment/Interscope Records 2014). *Paula* was inspired by the dissolution of Thicke's marriage to Paula Patton, recorded shortly after their announced separation. Thicke's thinly-veiled attempt to create another *Here, My Dear* was savaged by critics. "As art goes, Robin Thicke's *Paula* is less Marvin Gaye's *Here, My Dear* and more the musical equivalent of a Facebook friend who refuses to stop overdoing it on tequila slammers and ranting about the demise of their relationship. It's messy, it's generally grammatically incoherent, it's humiliating for everyone involved." Sophie Gilbert, *Robin Thicke's* Paula *Is One of the Creepiest Albums Ever Made*, THE ATLANTIC (July 2, 2014), https://www.theatlantic.com/entertainment/archive/2014/07/robin-thickes-terrifying-new-album/373794/. Music critic Joe Caramanica lambasted the effort with a series of rhetorical questions, including: "How many people suggested that you listen to 'Here, My Dear' before recording this album? Do you need to believe that this is your greatest work? . . . Looking back, don't you think it would have been better to sound more desperate, more scarred? Did your fundamental eagerness to please as a performer undermine your (admittedly brave) urge to bare your all, ugly though it might be? Have you considered, instead of touring this album, only performing it outside windows in acts of hostile serenade?" Joe Caramanica, *Robin Thicke Hears the Vultures Tweet*, N.Y. TIMES (July 2, 2014), https://www.nytimes.com/2014/07/03/arts/music/robin-thicke-hears-the-vultures-tweet.html.

[38] "Lost Weekend" is the name Lennon gave to the eighteen-month period during which John Lennon left Yoko Ono to live with May Pang. During that time, Lennon recorded three albums. *See* Allan Kozinn, *A Fond Look At Lennon's 'Lost Weekend,'* N.Y. TIMES (Mar. 12, 2008), http://www.nytimes.com/2008/03/12/arts/12iht-12pang.10978303.html.

[39] Although they never remarried, Anna and Marvin reconciled their differences just a few years before his death. *See* Jason Newman, *Anna Gordy Gaye, Ex-Wife of Marvin Gaye, Dead at 92*, ROLLING STONE (Jan. 31, 2014), http://www.rollingstone.com/music/news/anna-gordy-gaye-ex-wife-of-marvin-gaye-dead-at-92-20140131.

Upon its release, *Here, My Dear* was panned by prominent music critics, who thought the album was self-indulgent and inaccessible.[40] While some thought *Here, My Dear* reeked of hubris,[41] others saw it as a mark of genius.[42] Marvin's fans were relatively underwhelmed. It peaked at number four on Billboard's Soul Albums chart and number twenty-six on its Pop Albums chart.[43] Unlike four of his prior solo efforts, *Here My Dear*, in its initial release, failed to reach gold status.[44]

Since Marvin's unspeakably tragic murder by his father,[45] there have been re-assessments of his entire body of work. Time has been kind to *Here, My Dear*. Today, it is considered one of the greatest recordings in popular music history, with critical outlets such as *Rolling Stone* ranking it amongst its top 500 Greatest Albums of All Time.[46]

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[40] RITZ, *supra* note 1, at 250.

[41] "'Pretentious' is too good a word for this clutter, said *The Village Voice*." *Id.* (quoting *The Village Voice*). Dennis Hunt felt the album should have been "a potent, cohesive statement about the trials of marriage but it just fizzles." *Id.* (quoting *The Los Angeles Times*). Critic Robert Palmer said, "[t]his "self-serving" album "flaunts the macho self-absorption that must have had something to do with the marriage's faltering in the first place." Robert Palmer, *Marvin Gaye Tests The Limits*, N.Y. TIMES (Mar. 25, 1979), http://www.nytimes.com/1979/03/25/archives/marvin-gaye-tests-the-limits-gaye.html. Vivien Goldman found *Here, My Dear* to be nothing more than "banal meanderings." RITZ, *supra* note 1, at 250 (citing *Melody Maker*).

[42] RITZ, *supra* note 1, at 250. Robert Palmer, in his review, concluded that while *Here, My Dear* "is flawed, . . . much of it is simply brilliant . . . the most intriguing piece of black popular music on record in some time." *See* Palmer, *supra* note 41; *see also* Davitt Sigerson, *Marvin Gaye's Here, My Dear: A Masterpiece After All?*, MELODY MAKER, Jan. 20 1979.

[43] DYSON, *supra* note 1, at 255.

[44] Gold status is designated when a recording sells 500,000 units. *RIAA AND GR&F CERTIFICATION AUDIT REQUIREMENTS RIAA ALBUM AWARD*, RECORDING INDUS. ASSOC. OF AMERICA, http://www.riaa.com/wp-content/uploads/2017/03/ALBUM-AWARD-RIAA-AND-GRF-CERTIFICATION-AUDIT-REQUIREMENTS.pdf (last visited Oct. 1, 2017). With the exception of the movie soundtrack. *Trouble Man*, Marvin's albums, *What's Going On*, *Let's Get It On*, *I Want You*, and *Live at the London Palladium*, all went gold or platinum shortly after their releases. Marvin Gaye's Gold & Platinum Albums, RECORDING INDUS. ASSOC. OF AMERICA, https://www.riaa.com/gold-platinum/?tab_active=default-award&se=marvin+gaye#search-section (last visited Oct. 1, 2017).

[45] RITZ, *supra* note 1, at 331–34. Marvin's death resulted from an argument with his father over a lost insurance letter.

[46] *500 Greatest Albums of All Time*, *supra* note 21 (#456). Music critic Keith Murphy called it a "surreal 1978 masterpiece." Keith Murphy, *What Millennials Should Know About… Marvin Gaye's 'Here, My Dear'*, VIBE (June 3, 2014, 7:34 PM), http://www.vibe.com/2014/06/what-millennials-should-know-about-marvin-gayes-here-my-dear-album/; *see also* Al Shipley, Keith Harris, Richard Gehr & Maura Johnston, *14 Classic Albums That Flopped When They Were Released*, ROLLING STONE (May 16, 2016), http://www.rollingstone.com/music/lists/14-classic-albums-that-flopped-when-they-were-released-20160516/marvin-gaye-here-my-dear-1978-20160516; Gordon Stephen, *MOJO: THE 100 GREATEST ALBUMS EVER MADE*, ROCKLIST.NET (Dec. 3, 2016, 08:27 AM), http://www.rocklistmusic.co.uk/mojo.html (listing *Here, My Dear* on the magazine's August 1995 edition list of the greatest albums ever made); Mike Joseph, *Marvin Gaye: Here, My Dear*, POP MATTERS (Apr. 10, 2008), http://www.popmatters.com/review/marvin-gaye-here-my-dear/ ("Due both to its music and its history, this album was relatively ignored upon initial release, but its legend has grown by leaps and bounds over the years, and it's now widely recognized as the soul classic that it is."); Nick Coleman, *Marvin Gaye: How the singer created one of the most stinging break-up records of all time*, THE INDEP. (Feb. 17, 2008, 12:00 AM), http://www.independent.co.uk/arts-entertainment/

Here, My Dear is another storied album in Marvin's canon. As more than a mere polemic on the deterioration of his marriage to Anna, it is due for legal and narrative analysis. This Article proceeds in six parts. Part One offers a brief biography of Marvin, his rise to stardom, and the conflicts with Anna which led to the creation of *Here, My Dear*. Part Two offers a visual and lyrical analysis of the work. Part Three examines the album as a divorce narrative to demonstrate the ways in which Marvin, on *Hear, My Dear*, distorts traditional forms of masculine expression. Part Four explicates the possible causes of action Anna may have based on *Here, My Dear*: libel; false light invasion of privacy; publication of private facts; appropriation of name or likeness of another and right of publicity; and negligent and intentional infliction of emotional distress. Before concluding with an assessment of Anna's likelihood of success on those seven claims, Part Five appraises Marvin's status as a media defendant, Anna's status as a public or private figure, and the newsworthiness of their divorce.

I. *HERE, MY DEAR*

A. *THE BACKSTORY*

Marvin Pentz Gay, Jr. was born on April 2, 1939 in Washington D.C. to a Pentecostal minister and Alberta Gay, a domestic worker.[47] The second of four children,[48] Marvin demonstrated his musical gifts early on in Reverend Gay's church.[49] Reese Palmer, who lived in the same housing projects as the Gays, was one of Marvin's childhood friends.[50] At Cardozo High School, Marvin and Reese formed the D.C. Tones.[51] Marvin's group adopted the emerging form of black pop—doo wop—and modeled itself after the preeminent groups of the day such as The Orioles.[52] With his group, Marvin performed at local talent shows—incorporating his gospel roots into the new sound, along with elements of jazz, blues, and pop.[53]

While one might surmise that Marvin's vocal, piano, and drum talents would be a source of fatherly pride,[54] nothing could have been further from the truth. Throughout Marvin's life, Reverend Gay was

music/features/marvin-gaye-how-the-singer-created-one-of-the-most-stinging-break-up-records-of-all-time-782216.html.

47 DYSON, *supra* note 1, at 6.

48 RITZ, *supra* note 1, at 11 (Jeanne was the eldest, followed by Marvin, brother Frankie, and sister Zeola).

49 GAYE & BASTEN, *supra* note 2, at 8; DYSON, *supra* note 1, at 103.

50 RITZ, *supra* note 1, at 29.

51 *Id.* at 30; DYSON, *supra* note 1, at 7 (Other members of the group were Sondra Lattisaw, James Hoppe, Vernon Christian and Leon McMickens.).

52 RITZ, *supra* note 1, at 26.

53 DYSON, *supra* note 1, at 7.

54 *Id.*

physically and psychologically abusive.[55] The abuse intensified because of Marvin's preference for more secular musical forms, so Marvin left home at seventeen—one year before high school graduation—and joined the Air Force.[56] However, less than a year later, after a series of run-ins with his superiors, Marvin was honorably discharged, and he returned to D.C.[57]

Upon his return, he re-joined his singing group, which had been re-formed as The Marquees.[58] After performing at various clubs, sock hops, and school assemblies, The Marquees came under the tutelage of the legendarily influential music artist Bo Diddley.[59] In 1957, with Bo Diddley's help, the quartet secured a contract with Columbia Records.[60] Soon after signing with Columbia, the group met members of the rhythm and blues ("R & B") quintet The Moonglows, who were performing at D.C.'s famed Howard Theatre.[61] The Moonglows' lead singer and co-founder, Harvey Fuqua, was looking for new members, as tensions were fraying his group.[62] Shortly after his original group disbanded, Harvey invited The Marquees to join him as his background singers.[63] Upon Marvin joining the fold, Harvey became his best friend, mentor, business manager, and father figure. Most significantly, from a musical standpoint, Harvey was perhaps the most influential person in helping Marvin develop his unique vocal style and distinctive background harmonic arrangements.[64] In addition, in 1959, it was also Harvey who introduced Marvin to Anna.[65]

Anna Gordy was then the thirty-seven-year-old CEO of Anna Records, which she founded with her sister, Gwen Gordy, and Billy Davis (Berry Gordy's songwriting partner).[66] Leonard Chess, founder of Chess Records, hired Harvey to help with Anna's label, with which Chess had a distribution deal.[67] In April of that year, Harvey invited Anna, Gwen, Billy, and Berry to The Moonglows' final performance at Detroit's' Twenty Grand Theater in the hopes that they would sign Marvin to a solo record deal.[68] Impressed, Berry signed the twenty-year-old Marvin to his nascent Tamla Records instead, which, in 1960, was

55 RITZ, *supra* note 1, at 12–13; DYSON, *supra* note 1, at 6–8.
56 RITZ, *supra* note 1, at 34; DYSON, *supra* note 1, at 8.
57 RITZ, *supra* note 1, at 35, 37; DYSON, *supra* note 1, at 8.
58 RITZ, *supra* note 1, at 37; DYSON, *supra* note 1, at 9.
59 RITZ, *supra* note 1, at 37; DYSON, *supra* note 1, at 9.
60 RITZ, *supra* note 1, at 39; DYSON, *supra* note 1, at 9.
61 RITZ, *supra* note 1, at 43–44; DYSON, *supra* note 1, at 9.
62 RITZ, *supra* note 1, at 43–44; DYSON, *supra* note 1, at 10.
63 RITZ, *supra* note 1, at 44; DYSON, *supra* note 1, at 10.
64 RITZ, *supra* note 1, at 42–44; DYSON, *supra* note 1, at 10.
65 DYSON, *supra* note 1, at 10.
66 *Id.*
67 *Id.*; RITZ, *supra* note 1, at 49–50.
68 DYSON, *supra* note 1, at 10–11.

folded into the Motown Record Corporation.[69]

Soon after Marvin inked his deal with Berry, he and Anna began dating.[70] They married in December 1963,[71] and adopted a son, whom they named Marvin III.[72] Anna, seventeen years Marvin's senior, was a significant, positive force behind Marvin's musical success—primarily because, as he admitted, she would impel him to write and record.[73]

Initially, Anna's influence did not result in commercial success for Marvin. Despite having signed onto Motown Records, Marvin had no desire to be an R&B singer.[74] So, his first few releases found him covering jazz and pop standards—inauspiciously.[75] Marvin's musical fortunes turned as he moved more toward R&B. Beginning in 1963 and into the 70s, Marvin garnered acclaim with a string of hits. His solo releases,[76] as well as his now classic duets with Tammi Terrell and Diana Ross, cemented his reputation as the consummate soul singer and romantic icon.[77] Yet it was *What's Going On* that would establish Marvin as one of the most impactful musical artists of all time.

During his astonishing wave of popularity, Marvin's marriage was coming apart at the seams. In fact, Marvin's marriage to Anna had been full of interpersonal strife from the outset.[78] Early on, Marvin battled with depression,[79] drug use, and sexual insecurities.[80] Both he and Anna engaged in extramarital affairs and public spats that at times became physically violent.[81] Jealousies and recriminations became worse.[82] As time passed, according to Marvin, all they "were doing was improving

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69 *Id.* at 11; GAYE & BASTEN, *supra* note 2, at 197–98.

70 DYSON, *supra* note 1, at 11; GAYE & BASTEN, *supra* note 2, at 44.

71 RITZ, *supra* note 1, at 82.

72 *Id.* at 101.

73 *Id.* at 64–65.

74 *Id.* at 73.

75 *Id.* at 73–76; GAYE & BASTEN, *supra* note 2, at 47–48. *The Soulful Moods of Marvin Gaye* (1961), *When I'm Alone I Cry* (1964), *Hello Broadway* (1964), and *A Tribe to the Great Nat "King" Cole* (1964) all failed to even chart. DYSON, *supra* note 1, at 254.

76 DYSON, *supra* note 1, at 254, 257–58.

77 RITZ, *supra* note 1, at 121–26; DYSON, *supra* note 1, at 255, 259. Between 1967 and 1969, Marvin and Tammi charted three albums and nine hit singles, *e.g.*, "Ain't No Mountain High Enough," "If I Could Build My Whole World Around You," and "Your Precious Love." *See* DYSON, *supra* note 1, at 256–57. He also found chart success with Mary Wells, Kim Weston, and Diana Ross. *Id.* at 256–60.

78 RITZ, *supra* note 1, at 108–09, 120; DYSON, *supra* note 1, at 11.

79 DYSON, *supra* note 1 at 196. In addition to the growing deterioration of his marriage to Anna, Tammi Terrell's death at the age of twenty-four sent Marvin into an emotional tailspin. During the duo's October 1967 live performance in Virginia, Tammi collapsed on stage. Marvin carried her off, and the show ended. Shortly after being hospitalized, she was diagnosed with brain cancer and finally succumbed to the disease on March 16, 1970. *See* RITZ, *supr*a note 1, at 117–19. Marvin was so devastated by her illness and death, he attempted suicide in 1970 and for years refused to perform in public. *See* RITZ, *supra* note 1, at 118, 120, 138, 155.

80 RITZ, *supra* note 1, at 17–21, 114–15; DYSON, *supra* note 1, at 191–92; GAYE & BASTEN, *supra* note 2, at 61, 120.

81 RITZ, *supra* note 1, at 82, 109, 120; GAYE & BASTEN, *supra* note 2, at 76–77.

82 RITZ, *supra* note 1, at 109.

[their] methods of hurting each other."[83] While they had both settled into California by 1973, they had not been living as a couple for a year.[84] It was in 1973 that Janis Hunter would enter the picture and provide the catalyst for Marvin and Anna's divorce.

On March 13, Janis, the seventeen-year-old daughter of Harvey's girlfriend, visited Marvin's recording studio as he was laying down vocals for *Let's Get It On*. [85] For Marvin—ironically, seventeen years her senior (as Anna was to him)—it was love at first sight.[86] He recorded the title cut while staring at her through the studio glass. He would later credit her for the album's unabashed sensuality.[87]

A year after the release of *Let's Get It On*—while still married to Anna—Marvin moved Jan into his Topanga Canyon ranch home.[88] Together they had two children: Nona, in 1974, and Frankie, in 1975.[89] Anna filed for divorce in 1976, yet it was not finalized until March 1977.[90] Only seven months later, Marvin would marry Jan. [91]

B. *THE ALBUM*

As a composition, *Here, My Dear* is unmistakably steeped in soul music—the fusion of poly-tonal vocal expressions and a landscape rhythmically layered with elements of blues, jazz, and gospel. All of the core instruments are present: drums, bass, guitar, piano, keyboard, percussion, congas and bongos, saxophones, and trumpets. Whether singing or speaking, Marvin's vocal phrasings recall his Moonglows' doo wop, balladeer style.[92] During *Here, My Dear*'s less lyrically defiant moments, Marvin deploys his soft tenor or falsetto voice—an approach that conveys both pensiveness and vulnerability.

On *Here, My Dear*, as with his past solo efforts, Marvin performs

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[83] *Id.* at 183.

[84] DYSON, *supra* note 1, at 133.

[85] *Id.* at 149. Music critic Jon Landau wrote that while on *What's Going On*, Marvin "sang of the difference between his vision of God's will and man's life," but on *Let's Get It On*, "he is currently preoccupied with matters purely secular—love and sex." Jon Landau, Review of *Let's Get It On*, ROLLING STONE (Dec. 6, 1973), http://www.rollingstone.com/music/albumreviews/lets-get-it-on-19731206.

[86] RITZ, *supra* note 1, at 177–78; DYSON, *supra* note 1, at 149; GAYE & BASTEN, *supra* note 2, at 96–97.

[87] RITZ, *supra* note 1, at 178; DYSON, *supra* note 1, at 164.

[88] RITZ, *supra* note 1, at 199, 218; DYSON, *supra* note 1, at 165.

[89] RITZ, *supra* note 1, at 188.

[90] *Id.* at 206.

[91] *Id.*; GAYE & BASTEN, *supra* note 2, at 201.

[92] Mark Anthony Neal, *Trouble Man: The Art and Politics of Marvin Gaye*, 22 W. J. BLACK STUD. 252, 253 (1998); *see also* Andrew Flory, *Marvin Gaye as Vocal Composer, in* SOUNDING OUT POP: ANALYTICAL ESSAYS IN POPULAR MUSIC 63, 81 (Mark Spicer & John Covach, eds. 2010). (Marvin's vocal performative style blends the doo-wop groups of the 1950s, the gospel choirs and shouting preachers of his religious youth, and the seductive spoken rap of his hypersexualized soul all to "historicizing effect.").

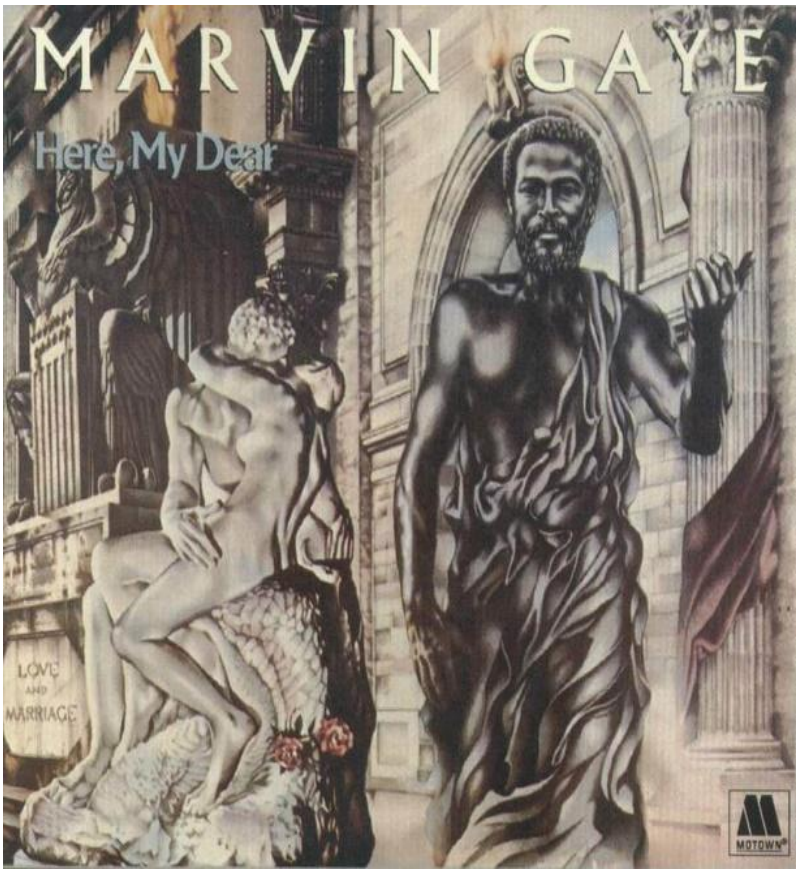
all of the lead and background vocals.[93] Nearly every song contains a thickly textured vocal composite. In his approach to the creative process, Marvin sings new, often improvised lyrics over his recorded tracks. Marvin essentially sings duets with himself, re-creates doo-wop phrasings and whether in his sung or spoken-word passages, highlights the contrast between the different timbres of his three octave range. Marvin does not relegate his self-harmonizing to the background: those arrangements flow above, under, run simultaneous to, or move in between the lead phrases.[94] In fact, most songs on *Here, My Dear* have no distinctive chorus or hook and disregard rhyme and meter. That vocal, lyrical, and compositional fluidity adds an improvisational, confessional tone to the work.[95]

Viewed as a meditation on his meeting of, marriage to, and estrangement from Anna, *Here My Dear* is not just confession but accusation—down to the album's cover illustrations. Of artistic and legal significance is the fact that neither Anna's name nor likeness appears anywhere in the album's design. Nonetheless, her presence is depicted symbolically and metaphorically throughout Michael Bryan's artwork.

[93] DYSON, *supra* note 1, at 7.

[94] Flory, *supra* note 92, at 68–69. Marvin's recording processes were unique in that he would compose important elements of the music *during* a session onto tape, and continually edit and revise his work through the process of "punching in" and overdubbing. The results of this technique were first evident throughout *What's Going On*, on which Marvin creates dense vocal compositions, combining multiple recordings of his own voice. Throughout the majority of the song "What's Going On," for example, there are two simultaneous Gaye vocal tracks that assume the lead, performing at times in unison, heterophony, parallel motion, and call-and-response. The same vocal approach is evident throughout *Here, My Dear*. *Id.* As an example, listen to "When Did You Stop Loving Me, When Did I Stop Loving You." MARVIN GAYE, *When Did You Stop Loving Me, When Did I Stop Loving You, on* HERE, MY DEAR (Tamla 1978).

[95] That same style, with songs that eschewed radio-friendly traits of hooks, choruses, or refrains is perhaps another reason the album was initially a commercial failure. DYSON, *supra* note 1, at 230. (Dyson speculates that Marvin's approach, coupled with the subject matter, "too sophisticated, too boldly honest, too remarkably insightful—and too close to the emotional quick.").



Rendered primarily in grays, black, blues, and purples, the front cover features a temple drawn in Grecian neo-classic style. With its Corinthian columns, plinths, and capitals, the temple features a massive griffin statue perched dispassionately but authoritatively at its entrance. Bryan depicts the griffin as guarding the temple (a metaphor for the sanctity of matrimony). The phrase "Love and Marriage" is carved into the griffin's pedestal. Befitting the album's subject, the griffin in mythology mated for life, and if either partner died, the survivor would continue its life alone, never mating again.[96]

In the griffin's foreground is a sculpture of a man and woman engaged in a passionate kiss. Carved out of a block of stone, the piece quotes Auguste Rodin's famous work,[97] and two red roses lie at its base. Imagined in high foreground and darker hues on the right, Marvin is rendered as if emerging out of the temple's setting. Donned in a toga, his left forearm is slightly outstretched, and his hand is poised as if

96 Griffin, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Griffin
97 Auguste Rodin, THE KISS (1882).

beckoning the viewer/listener. His pose recalls statuary depictions of Marcus Aurelius, whose famous tome *Meditations* captures what Marvin attempts through *Here, My Dear*: the attainment of peace of mind amidst conflict.[98]

Bryan's back cover illustration starkly depicts that conflict.

The setting is the same as that of the front, but the griffin's pedestal inscription here reads "Pain and Divorce." Inside the temple, fires burn. The lovers are still locked in their passionate embrace, but now smoke emanates from behind them, flames lick at their foundation, and engulf the man's crotch. The cityscape outside the temple, with its crumbling buildings, is a vision of a war-torn dystopia.

The acrid symbolism continues inside the gatefold.

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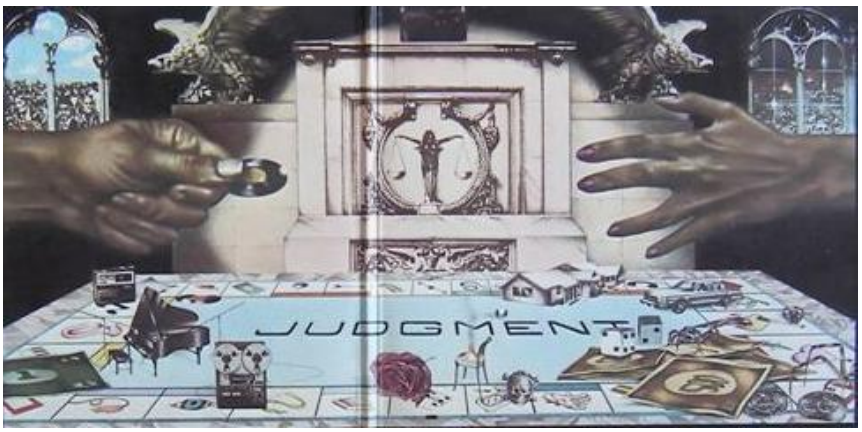
[98] *See* MARCUS AURELIUS, THE MEDITATIONS, http://classics.mit.edu/Antoninus/meditations.html (last visited Oct. 1, 2017). Marcus Aurelius was a Roman Emperor who ruled from 161 to 180 A.D. and is considered one of the most important Stoic intellectuals. *The Meditations* include his personal reflections written as he struggled with spiritual, philosophical, and existential concerns. His journal—never intended for publication and eventually divided into 12 books—covered topics such as human rationality, the values of leadership, and the question of virtue. *See generally Marcus Aurelius*, HISTORY.COM, https://www.history.com/topics/ancient-history/marcus-aurelius (last visited Oct. 1, 2017).



Echoing the neo-classical style of the cover art, the focal point of the gatefold illustration is an interior room with a table that resembles a Monopoly game board, here called "Judgment." In the foreground and on the left, a man's hand extends over the Judgment board, holding an album in between his thumb and forefinger. On the opposite side, a woman's hand is outstretched as if to receive it. In the rear are two arched windows to the outside world. Beneath a bright blue sky with legions of onlookers (fans and/or the prurient) congregate at "Marvin's" window. The view from "Anna's" window is a landscape of ruins and darkness with flames providing the only light.

The depictions in the property squares along the Judgment board's outer border are telling: images such as an ear, electric cord, eye, piano and clef note occupy Marvin's side, while a lit match, decrepit hand, telephone, snake, and heart waiting to be pierced by a dagger comprise Anna's domain. Above the board is a judge's bench made of marble, framed by two imposing eagle statues. Carved into the bench is an ornate depiction of Lady Justice holding the balance scales.

Atop the Judgment board, a reel-to-reel audio tape recorder, audio box, piano with a microphone, and one dollar bill are all that Marvin has. Within Anna's realm are prototypic material possessions: a house, car, paper currency and coin, in addition to a ring and dice. The inferences of the gatefold illustration could scarcely be clearer: except for his music, Anna had taken everything from Marvin—and had done so with court sanction.[99] The judge's chair sits unoccupied, and the scales of justice rest in perfect equilibrium.

Here, My Dear marks Marvin's giving over his last, most valued possession. He sets out the album's purpose in the first four lines of the moderately paced opening title track:

[99] DYSON, *supra* note 1, at 6; RITZ, *supra* note 1, at 235.

I guess I'll have to say this album is dedicated to you

Although perhaps you may not be happy

This is what you won, so I've conceded

I hope it makes you happy . . . there's a lot of truth in it baby.[100]

As those passages demonstrate, much of *Here, My Dear* is a conversation with and about Anna. The theme foreshadowed is Anna as victor and Marvin as martyr. His presentation of the ensuing narrative as "truth" sets the entire suite up for critical analysis.

The opening song also presages the schizophrenic nature of what unfolds. Without irony, Marvin hopes that Anna, as she listens, will reminisce about "the kisses and the joy."[101] He goes so far as to wish that love will "forever possess [her]" and "peace come[s] into [her] life."[102] Marvin's opening words also remind Anna of the "cloudy," "gray," and "bad" times.[103] A recurring indictment is first heard here, when Marvin accuses Anna of using Marvin III in the divorce proceedings as a pawn ("You don't have a right to use this son of mine / To keep me in line").[104] He closes, sarcastically, "I was your baby / This is what you wanted / Here, dear, here it is."[105] In one song, Marvin ricochets from resignation to compassion, gloom, accusation and spite.

Marvin settles into somberness on the next song, "I Met A Little Girl." Here, he recounts meeting Anna and their subsequent estrangement. Marvin talks of a "fine" and much older Anna who took him home and "made love to me."[106] Feeling their love would "last forever," Marvin decides to marry Anna ("I do, yes I do, I do darlin' / 'Cause I love you.").[107] Then, the lyrical tone shifts as Marvin shouts the first year of their union "1964!" and croons "Once you really loved me / Once I really loved you."[108] He then shouts the year Anna initiated divorce proceedings—"1976!" and sings, "Then time would change you / As time would really change me."[109] He laments about all of his crying and how "you have caused my tears to flow."[110] He closes "I Met A Little Girl" with an extended phrase, in three-part self-harmony and in a tone that is at once resigned, beautiful, and mordant: "Hal-le-Hallelujah,

100 MARVIN GAYE, *Here, My Dear*, *on* HERE, MY DEAR (Tamla 1978).
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
106 MARVIN GAYE, *I Met A Little Girl*, *on* HERE, MY DEAR (Tamla 1978).
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*

Hal-le-lu-I'm free / Hal-le-Hallelujah, Hal-le-lu-I'm free."[111]

It is on the third song that Marvin begins to lay out his bill of particulars. "When Did You Stop Loving Me, When Did I Stop Loving You" offers a vivid account of their marriage's devolution.[112] Marvin's accusations grow more pointed on "Is That Enough"[113] and "You Can Leave, But It's Going To Cost You."[114] On "Is That Enough," Marvin derides Anna's envy and greed.[115] On "You Can Leave, But It's Going To Cost You," Anna caustically threatens Marvin over his affair with Jan.[116] In title and substance, "When Did You Stop Loving Me, When Did I Stop Loving You" provides the central motif for the entire album, bowing three times: first as a complete composition with lyrics, second as an instrumental, and finally as a brief reprise that closes the work.[117]

"Falling In Love Again," the album's penultimate composition, is an ode to Jan.[118] Whether it was included as a public testament of his newfound joy, a final dig at Anna, or both, "Falling In Love Again" finds Marvin at his most enraptured. On it, Marvin initially muses on the ways in which heartache breeds cynicism ("You say, 'Love, please go away don't torture me night and day'").[119] Suddenly, Jan—"beautiful outside and in"—has come along and made him believe in love again ("Then someone real, someone who feels comes in").[120] At the coda, he euphorically declares "I love you, baby! I~~~~~love~~~~~you~~~~~!" As the music fades he repeats, "Let's live life together."[121]

To appreciate the devastating significance of what comes next, recall that Marvin and Jan married in October 1977[122]—as *Here, My Dear* was being recorded. But their marriage quickly began to evince the same woeful patterns as his union with Anna.[123] By the time *Here, My Dear* was released in December 1978, Jan had filed for divorce.[124] So, as "Falling in Love Again" fades out, the album's centerpiece fades back in: "When Did You Stop Loving Me" takes a forty-seven second curtain call to close the album, as Marvin again asks the same titular

111 *Id.*
112 MARVIN GAYE, *When Did You Stop Loving Me, When Did I Stop Loving You*, *on* HERE, MY DEAR (Tamla 1978).
113 MARVIN GAYE, *Is That Enough*, *on* HERE, MY DEAR (Tamla 1978).
114 MARVIN GAYE, *You Can Leave, But It's Going To Cost You*, *on* HERE, MY DEAR (Tamla 1978).
115 GAYE, s*upra* note 112.
116 GAYE, s*upra* note 113.
117 *See* discussion *infra* Part V (detailing these compositions, including the most incisive attacks on Anna).
118 MARVIN GAYE, *Falling In Love Again*, *on* HERE, MY DEAR (Tamla 1978).
119 *Id.*
120 *Id.*
121 *Id.*
122 GAYE & BASTEN, *supra* note 2, at 201.
123 RITZ, *supra* note 1, at 239–40; DYSON, *supra* note 1, at 167.
124 RITZ, *supra* note 1, at 245; DYSON, *supra* note 1, at 195–96.

question—now to Jan. It is a heartbreaking close to an eminently heartbreaking album.

Surprisingly, there is one composition, "Anna's Song," which is in fact a glowing love letter to his wife.[125] However, the other compositions rounding out *Here, My Dear*find Marvin looking inward. He laments his inability to control his temper on "Anger" ("Up and down my back, my spine, in my brain—it injures me").[126] He yearns for affection on "Everybody Needs Love."[127] He imagines a place of carnal delight on "A Funky Space Reincarnation."[128] Marvin implores wisdom from the Greek mythological symbol of love on "Sparrow."[129] On "Time To Get It Together," he recites his struggles with self-destructive behavior, "Blowin' coke all up my nose / Gettin' in and out my clothes / Foolin' 'round with midnight 'hos."[130] On those songs, it is clear that he is dealing with his own desires and demons independent of Anna.

While introspective, those songs do not negate the overall tenor of the work. From the patent sexism of the album art (the man's crotch on fire, Anna's material bounty on the Judgment board) to the vocal and musical tones punctuating the lyrics, *Here, My Dear* is a deft account of marital estrangement that features a sustained, withering portrait of Anna. Shortly after its release, Marvin admitted that the point of the work was to "tell my story, not hers."[131] His admission aptly captures another perspective from which to examine *Here, My Dear*. In telling *his* story, not *Anna's*, Marvin constructs a divorce narrative that thoroughly upends norms of traditional gender performance.

II. *HERE, MY DEAR* AS GENDER PERFORMANCE

Sociologists and social psychologists have long explored the intersections of self-accountability and gender roles when couples divorce.[132] Marriage is a storied institution. It is valued as a sign of social attainment and personal accomplishment. With marriage viewed in that light, divorce can come to represent social and personal failure, as divorce "violate[s] deeply entrenched individual and social expectations."[133] Perhaps unsurprisingly then, research has shown self-accounting divorce narratives to be subjective, marked by ego-

[125] MARVIN GAYE, *Anna's Song*, *on* HERE, MY DEAR (Tamla 1978).
[126] MARVIN GAYE, *Anger*, *on* HERE, MY DEAR (Tamla 1978).
[127] MARVIN GAYE, *Everybody Needs Love*, *on* HERE, MY DEAR (Tamla 1979).
[128] MARVIN GAYE, *A Funky Space Reincarnation*, on HERE, MY DEAR (Tamla 1978).
[129] MARVIN GAYE, *Sparrow*, on HERE, MY DEAR (Tamla 1978).
[130] MARVIN GAYE, *Time To Get It Together*, on HERE, MY DEAR (Tamla 1978).
[131] RITZ, *supra* note 1, at 235.
[132] Susan Walzer & Thomas P. Oles, *Accounting for Divorce: Gender and Uncoupling Narratives*, 26 QUALITATIVE SOC. 331, 332 (Fall 2003). *See, e.g.*, Ann L. Weber, *The Account-Making Process: A Phenomenological Approach*, in CLOSE RELATIONSHIP LOSS 174 (Terri L. Orbuch ed., 1992).
[133] Walzer & Oles, *supra* note 132, at 332.

enhancing rhetoric and suffused with bias. Gender norms also inform and mediate how divorcing people explain their behavior and that of their spouse.[134]

Generally, divorce narratives fall into two categories: justification-giving and excuse-giving.[135] Justifications occur when, rhetorically, responsibility is taken, but the pejorative quality of an act is denied.[136] Excuses are offered when the actor believes his audience perceives his conduct is wrong, but he seeks to minimize personal culpability by explaining that his conduct was prompted by circumstances beyond his control.[137] While in differing measures, both justifications and excuses surface in the narratives of divorcing parties.

Various tropes undergird both justificatory and excuse-giving accounts—particularly around questions of divorce initiator and non-initiator.[138] Narratives often involve neutralizing one's own culpability as initiator (face-saving).[139] Cultural and gendered values surface in accounts, with women more likely to express the importance of doing what is "best for the children."[140] Fundamentally, articulated justifications or excuses are adaptive strategies for people attempting to organize trying events into a coherent story and seeking a sense of control over the circumstances.[141]

Cultural assumptions around gender roles also surface in the adaptive strategies to the divorce process.[142] Male practices during the process may entail the assertion of power over the spouse (e.g., withholding financial support, physical abuse, asserting verbal or physical sexual violence) or the situation (e.g., refusing to assent to divorce when demanded, claiming initiator status when the opposite is true).[143] It is also well-understood that men and women "mourn" divorce differently. Women, who begin the mourning process before the decision to divorce is made,[144] are more prone to grieve the loss of the marital relationship above all, and manifest itself in depression,

134 *Id.*
135 *Id.* at 333.
136 *Id.*
137 *Id.*
138 *Id.* at 332.
139 *Id.* at 317.
140 *Id.* at 333.
141 *Id.* at 333–34.
142 *Id.*
143 *Id.* Notably, Janice Gray and Roxane Silver's divorce account comparisons of the perceptions of ninety ex-spouses (forty-five couples) revealed that both men and women speak in biased and ego-enhancing ways about the causes and process of separation. Hilary P. M. Winchester, *Lone Fathers, and the Scales of Justice: Renegotiating Masculinity After Divorce*, 4 J. OF INTERDISC. GENDER STUD. 81 (Dec. 1999).
144 Nehami Baum, *The Male Way Of Mourning Divorce: When, What, And How*, 31 CLINICAL SOC. WORK J. 37, 40 (Spring 2003).

emotional and verbal expressions, and help-seeking.[145] Men, in contrast, primarily mourn the loss of home and children and do so only later in the uncoupling process.[146] Men also tend not speak through the natural thoughts of emptiness, unpleasantness, rage, pining, or other inchoate feelings. Instead, men express their pain and grief indirectly, manifested through "hyperactivity, substance use, or somatization as expressions of their feelings in the wake of their loss."[147]

That acting out is a form of gender performance.[148] Being a contingent construct, gender is enacted through a constant "engagement of discursive practices" with others and our surroundings.[149] This perpetual discursive practice reflects an attempt to attain a gender ideal, *i.e.*, the shared normative belief that we come to accept as appropriately, completely masculine or feminine.[150] For men, to "do gender" is to seek to attain an "ontological security" with one's self.[151] Thus, in their justificatory and excuse-giving divorce narratives, and in their mourning behaviors, men may be doing more than rehabilitating self-perceived social or personal failure: they may be (re)claiming their identity as men.

The pursuit of traditionally masculine ontological security is typically a part of men's divorce account-giving and behavior. But, fascinatingly, not so much with Marvin on *Here, My Dear*—it possesses virtually no lyrical claims of what we commonly consider masculine authority, for example, through account-giving that evinces command over Anna or his circumstances.

Marvin opens the album with words of surrender ("This is what you won / So I've conceded").[152] He practically begs her not to use their son as a pawn in the divorce proceedings when he gently sings, "One

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145 *Id.* The performance of masculinity can be categorized within five broad categories: (a) advancing physical force and control over subjugated bodies (i.e., women); (b) demonstrating occupational achievement; (c) instituting familial patriarchy; (d) manifesting frontiersmanship; and (e) performing heterosexuality. *See* Nick Trujillo, *Hegemonic Masculinity on the Mound: Media Representations of Nolan Ryan and American Sports Culture*, 8 CRITICAL STUD. MEDIA COMM. 290 (Sept. 1991).

146 Trujillo, *supra* note 145.

147 Baum, *supra* note 144, at 41.

148 Walzer & Oles, *supra* note 132, at 332.

149 Scott F. Kiesling, *Homosocial desire in men's talk: Balancing and re-creating cultural discourses of masculinity*, 34 LANGUAGE IN SOC'Y 695, 701 (2005).

150 *Id.*

151 Bryan Adamson, *Michael Sam: Upending NFL Heteronormativity With a Piece of Cake*, 17 TEX. REV. ENT. & SPORTS L. 33, 36–37 (2015); *see also* Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J. L. & GENDER 431, 435 (2010); Susan M. Alexander, *Stylish Hard Bodies: Branded Masculinity in* Men's Health *Magazine*, 46 SOC. PERSP. 535, 539 (2003); *see also* R.W. Connell, *An Iron Man: The Body and Some Contradictions of Hegemonic Masculinity*, *in* SPORT, MEN, AND THE GENDER ORDER (Michael A. Messner & Donald F. Sabo eds.,1990).

152 GAYE, *supra* note 100.

thing I can't do without is the son God gave to both of us."[153] In wonderment, he tells Anna "I never thought I'd see the day when you'd put me through what you put me through / You tried your best / You say I gave you no rest."[154]

In fact, throughout *Here, My Dear*, there is no question that Anna is the one exerting power. Anna wields sexual authority ("She took me home / And made love to me"),[155] as well as legal authority ("what could I do? The judge said she got to keep on living the way she 'customed to").[156] Marvin is the emotionally weaker party—"I was a dumb little fool" who Anna "plucked clean."[157] She "caused my tears to flow,"[158] in fact "miles of tears—enough to last me for a lifetime."[159] He had to "defend [his] life" against Anna's vengeful "spirit . . . [that] begun to fight me."[160] Marvin is the party who must escape the abuse ("I had to leave you for my health's sake.").[161] His flight, however, comes at a cost: "my fine[] is to pay forever."[162]

Throughout *Here, My Dear*, Anna is the dominant force against whom Marvin is virtually defenseless. In fact, only one line on the entire album can Marvin be heard as resolutely self-assertive—and even it is not completely of his independent agency. On *You Can Leave*, Marvin endures Anna's attempts to "break a man" financially and emotionally.[163] He perseveres, butonly with God's help ("stood my ground and prayed").[164] Then, in a powerful, heteronormative affect, he vows "you have won the battle but daddy's gonna win the war!"[165] That third person reference marks Marvin's only attempt throughout the entire suite to take what might be seen as a traditionally masculine posture. Everywhere else, Marvin hews to a narrative in which he is both a victim of and helpless in his circumstance.

Placed in its proper perspective, Marvin's failure to express his divorce story to re-assert a traditional masculine ideal is not surprising. As mentioned earlier, sexual insecurities dogged Marvin throughout his life.[166] Much of that insecurity stemmed from his religious upbringing, and his attempts to reconcile the spiritual and carnal aspects of his

153 *Id.*
154 *Id.*
155 GAYE, *supra* note 106.
156 GAYE, *supra* note 113.
157 *Id.*
158 GAYE, *supra* note 106.
159 GAYE, *supra* note 112.
160 GAYE, *supra* note 114.
161 GAYE, *supra* note 112.
162 *Id.*
163 GAYE, *supra* note 113.
164 GAYE, *supra* note 114.
165 *Id.*
166 RITZ, *supra* note 1, at 17–21.

psyche.[167] In reflecting upon his childhood, Marvin saw his lack of physical prowess to be "woman-like."[168] Marvin even confessed to a fascination with wearing women's clothes as an adult, intrigued by seeing "[him]self as a woman."[169]

Marvin's physical and sexual insecurities perhaps also explain his stage performance style. Bear in mind that some of Marvin's most popular songs (e.g., "Let's Get It On," "I Want You," "Sexual Healing") evoke a seductiveness that became an indelible part of his allure. But for Marvin, "sex and public performances were troublesome tests of his masculinity."[170] In his live shows, Marvin did not trade on any physical sensuality his music conjured; he eschewed the black, hyper-masculine, kinetic styles of his contemporary peers that Neal describes.[171] Instead of performing heterosexuality through vigorous, libidinal expressions,[172] emulating the bravado of, say, James Brown, Marvin was more inclined to perform while slunk across a stool,[173] offering only the occasional physical flourish.[174]

Marvin traded not on hyper-sexuality but on nuance. That chosen performative approach was famously effective—women would go wild.[175] Marvin thus defined his masculinity not through demonstrating

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167 *Id.* at 179–82. Writing *Let's Get It On*, Marvin struggled to reconcile his two strongest sources of emotional enthusiasm: "God and sex." *Id.* Even as a child, he was mocked about it and as an adult was very self-conscious about being called "Gay." Marvin was also troubled by his surname, which originally did not have an "e." *Id.* at 62.

168 *Id.* at 18.

169 *Id.* Despite his insecurities, no accounts suggest that Marvin was homosexual. And, to be sure, gender expression cannot reflexively signify sexuality nor sexual identity.

170 RITZ, *supra* note 1, at 80.

171 RITZ, *supra* note 1, at 81; Mark McAuley, Black Sinatras, White Panthers: Race, Genre and Performance in Detroit Black Pop and Rock, 1960–1970, 107 (2010) (unpublished Masters dissertation, Dalhousie University) (on file with author). There were deeply-entrenched expectations of what black male performance historically should look like, with a heavy emphasis in the 1970s on more spectacular and *identifiably black* masculine performative images. Those images involved movement and the control over the entire stage in hypersexualized or kinetic dance movements. Compare Marvin Gaye's performance to James Brown's electric 1964 performance in *The T.A.M.I. Show*. T.A.M.I. SHOW (American International Pictures 1964), *The T.A.M.I. Show 1964—Full HD Original Electronovision Version*, YOUTUBE (Feb. 14, 2017), https://www.youtube.com/watch?v=8pdZJ7TkJQU.

172 In one view, the display of hypersexualized masculinity in music performance by artists such as James Brown was a reclamation of the signifier once used to adversely mark black men in popular culture. *See* GUTHRIE P. RAMSEY JR., RACE MUSIC: BLACK CULTURES FROM BEBOP TO HIP-HOP (2003). Marvin's performance combined the coded hokum blues of the 1940s and 1950s to the explicit, overtly romanticized rhythm and blues of the 1970s and 1980s. He was a leading force in this movement, which also included contemporaries such as Al Green, Isaac Hayes, and Barry White and followers such as Teddy Pendergrass, Keith Sweat, and R. Kelly. *See also* Orea Jones, *The Theology of Sexual Healing*, 3 THEOMUSICOLOGY: A SPECIAL ISSUE OF BLACK SACRED MUSIC: A JOURNAL OF THEOMUSICOLOGY 68–74 (1989).

173 McAuley, *supra* note 171, at 103 ("Gaye was simply not the same dazzling extroverted performer that Brown was.").

174 In fact, Marvin suffered at times from debilitating stage fright. RITZ, *supra* note 1, at 101.

175 RITZ, *supra* note 1, at 41. For an example, view Marvin's live performance of "Distant Lover." *Soul Train* (Don Cornelius Production Feb. 16, 1974), *Marvin Gaye— Distant Lover*,

a heteronormative authority but instead by—perhaps rooted in self-doubt—exhibiting a reserved romantic flair with a palpable vulnerability.

On *Here, My Dear*, Marvin is not acting out his grief, but speaking it.[176] In this sense, again, his expressive form comports with the female model of mourning.[177] *Here, My Dear* has Marvin engaged in quintessential justificatory and excuse-giving storytelling. It captures Marvin not as the sexualized icon, and certainly not as the hopeless romantic.[178] On *Here, My Dear*, we hear Marvin emotionally exposed, wronged, and wounded by a woman stronger than him—the diametric opposite of what might be expected of a man striving for ontological security.

As it pertained to Anna, Marvin saw *Here, My Dear* and the creative process it represented as cathartic. After its release, Marvin said:

> The more I lived with the notion of making the album about his relationship with Anna, the more it fascinated me. The record became an obsession. I had to rid myself of the pain, and I saw this as the way. All those depositions and hearings, all those accusations and lies—I knew I'd explode if I didn't get all that junk out of me.[179]

Yet, while emotionally imperative, it was nearly a full year after completing the record that *Here, My Dear* was released to the public.

That its release was delayed is subject to various theories: Gordy, so outraged, did not want to promote this sustained riposte against his sister;[180] legal battles between Marvin and the album's performers and musicians' union regarding payment or composing credits;[181] and Marvin himself, who was reluctant to let go of the recording into which he had poured his soul.[182]

Before Marvin eventually handed the finished recording over to the label, he invited Anna to his studio to listen to it. Marvin waited upstairs while Art Stewart, his engineer, played it for her.[183] "Anna just sat there and listened, didn't say much, and left."[184] Later, Anna told

YOUTUBE (July 7, 2007), https://www.youtube.com/watch?v=U9BSjRCN0cQ

176 RITZ, *supra* note 1, at 235.

177 Walzer & Oles, *supra* note 132.

178 The only arguable exception to this point is "A Funky Space Reincarnation," which takes place in 2093, where Marvin imagines sexual escapades with someone "who looks like somebody I met a long time ago." GAYE, *supra* note 128.

179 RITZ, *supra* note 1, at 234.

180 *Marvin Gaye's Divorce Album To Be Reissued*, Reuters (Dec. 15, 2007), https://www.reuters.com/article/us-gaye/marvin-gayes-divorce-album-to-be-reissued-idUSN1556789320071216

181 *Id.* at 240.

182 *Id.* at 234.

183 *Id.* at 237–38.

184 *Id.* at 238.

People magazine: "'I think he did it deliberately for the joy of seeing how hurt I could become.'"[185] Upon hearing her response, Marvin was coy and asked, "[D]oes this album invade her privacy? I'll have to give it another listen . . . but all's fair in love and war."[186] And with that utterance, Marvin called the legal question.

III. PRELIMINARY ISSUES ON THE GAYES' LEGAL STATUS AND THE NEWSWORTHINESS OF THEIR DIVORCE

Here, My Dear raises a host of possible legal claims by Anna toward artist Michael Bryan, her brother Berry, and certainly Marvin. Assume that, in the court order, Anna did not waive any rights to sue. Assume further that Anna, not having consented to being the subject of *Here, My Dear*, rejected any royalties, and had unsuccessfully tried to prevent the album's release. Finally, assume that Anna in fact suffered reputational and personal injury (e.g., social ridicule and depression) as a direct and proximate result of *Here, My Dear*'s release.

Allowing for those caveats, *Here, My Dear* enables an exploration of several tort and First Amendment principles. Given that Marvin wrote, produced, and oversaw all the creative aspects of *Here, My Dear*, we can pose the following hypothetical: what if Anna *had* sued Marvin? Assuming a timely action, most plausibly, Anna might sue for (i) libel; (ii) false light invasion of privacy; (iii) publication of private facts; (iv) appropriation of another's name or likeness/right of publicity; and (v) negligent or intentional infliction of emotional distress.[187]

Given the location of *Here, My Dear*'s production, and the parties' residence, Anna's possible claims would be primarily controlled by California law.[188] And while the Supreme Court has reshaped those common law doctrines in light of First Amendment freedom of speech and freedom of the press interests, virtually all of those cases involved media defendants.[189] While he certainly had access to a powerful medium, Marvin cannot be characterized as "the media" in a conventional sense. Thus, any meaningful analysis of the Gaye dispute must initially address whether non-media defendants benefit from the same constitutional privileges granted to media defendants.

Another important issue must be considered before proceeding. In California, spouses can sue for intentional and negligent torts.[190]

185 *Id.*

186 *Id.* at 238.

187 If Anna sought to use the album art as additional facts for her claims, she would bring an action under the doctrine of *respondeat superior*, as Marvin did not create the illustrations himself but directed and approved Bryan's work.

188 CAL. CIV. PROC. CODE §§ 392–403 (West, Westlaw through 2017 Sess.).

189 See *infra* Section III.A.

190 Nagy v. Nagy, 210 Cal. App. 3d 1262, 1268 (1989).

However, Anna's claims against Marvin must be considered more specifically in the context of the status of domestic relations principles. California's anti-heart balm statute may also contribute to a court's deliberation over her claims.[191]

In the mid-1930s, states enacted such anti-heart balm statutes out of criticism over the rise in suits between parties for claims such as breach of promise, which came to be perceived as little more than tools of blackmail and extortion.[192] Anti-heart balm statutes sought to effectively foreclose actions for alienation of affections, criminal conversation, and seduction in matrimonial law.[193] In an attempt to avoid heart balm statutes and court decisions abolishing common law claims, aggrieved spouses advanced alternative causes of action, such as intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED").[194]

Such actions were met with success in some jurisdictions.[195] In California, IIED and NIED claims in particular have been viewed with skepticism.[196] However, courts addressing the issue have not squarely explored then-rejected IIED and NIED actions outright on statutory or public policy grounds. California courts seem to focus not only on the substance, but the timing of the statements, acts, or omissions giving rise to the distress or fraud claims (e.g., before marriage, during, or after

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191 CAL. CIV. CODE § 43.5 (West, Westlaw through 2017 Sess.).

192 Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770, 1770–71 (1985).

193 Laura Belleau, *Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family*, 24 J. OF THE AM. ACAD. OF MATRIM. L. 365, 366 (2012); *see also*, Note, *supra* note 192, at 1772–73.

194 *See, e.g.*, Askew v. Askew, 22 Cal. App. 4th 942, 954 (1994) (no cause of action for alienation of affection).

195 S*ee, e.g.*, Henriksen v. Cameron, 622 A.2d 1135 (Me. 1993) (The Maine Supreme Judicial Court upheld a $115,000 jury verdict in favor of the wife who sued for intentional infliction of emotional distress in which, during their marriage, the husband engaged in a pattern abuse, ranging from rape and assault to destruction of property, accusations of infidelity, and threats to burn down the marital home.); Massey v. Massey, 807 S.W.2d 391 (Tex. App. 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993) (affirmed a $362,000 jury verdict against the husband for intentional infliction of emotional distress for a pattern of psychologically abusive conduct against his wife during their twenty-two year marriage, including criticism, belittling, and blaming; temper tantrums involving the destruction of property; and threats of physical violence); Vance v. Chandler, 597 N.E.2d 233 (Ill. App. Ct. 1992) (IIED claim sufficiently stated by the wife whose former husband had hired someone to kill her during their divorce proceedings. The appellate court reversed the trial court's dismissal of the wife's claim for failure to state a claim as a matter of law. The husband's reckless disregard for the possibility that the wife would learn of his plan established pivotal "intent" element of her claim.); Whelan v. Whelan, 588 A.2d 251 (Conn. Super. Ct. 1991) (sustaining a divorced wife's claim of intentional infliction of emotional distress, based on her former husband's false representation to her during the marriage that he had been diagnosed with AIDS).

196 *See, e.g.*, *Askew*, 22 Cal. App. 4th at 947 (affirming the dismissal of a fraud claim; this case may be "gussied up as a fraud action, but it is still essentially a breach of promise suit."); *see generally* Christopher Joseph Whitesell, *Loss of Consortium and Intentional Infliction of Emotional Distress: Alternative Theories to Alienation of Affections*, 67 IOWA L. REV. 859 (1982).

divorce proceedings) in assessing their viability.[197]

On one hand, one can argue that Anna's claims are nothing more than permutations of abolished common law doctrine. Marvin's laments and criticisms are words of hurt and betrayal that a court should be reluctant to address.[198] On the other hand, because the statements serving the basis of Anna's claims occurred after the marriage and were not privileged, her claims are not a typical "broken heart" complaint. Moreover, beyond the distress torts, defamation, privacy, misappropriation, and publicity violations rise out of conduct that goes beyond wrongs one may expect to hear in the context of divorcing spouses. As a result, a more compelling case can be made that Anna's claims are not outright foreclosed.

If her claims are legally cognizable, two additional determinations must be made: (i) whether Anna would be considered a public figure, private figure, or someone in between, and; (ii) whether her divorce from Marvin—or the details of their marriage—were legitimate matters of public interest or concern. Determinations of status and newsworthiness impact burdens of proof and the type of recovery Anna might yield. In fact, plaintiff status and newsworthiness are so critical that their legal propositions will be staked out on the face of the Anna's complaint and Marvin's answer, and will likely be the first substantive issues any court would resolve.

What follows is an application of First Amendment principles surrounding Marvin's legal status, the public figure-private plaintiff distinction, and what can be considered constitutionally legitimate matters of public interest or concern.

A. *MARVIN'S LEGAL STATUS*

State and federal courts alike have wrestled with whether *non-media* defendant First Amendment privileges are co-extensive with *media* defendants. Some courts have concluded that non-media defendants have fewer constitutional prerogatives.[199] So, any actual distinction means, for example, that non-media defendants in communication or distress torts lawsuits could be found liable of simple negligence or may even be held strictly liable if found to have defamed a private figure.[200] Other courts have concluded that since the First

197 *See, e.g.*, *Askew*, 22 Cal. App. 4th at 942 (rejecting fraud claims involving promises made before the marriage); Nagy v. Nagy, 210 Cal. App. 3d 1262 (rejecting an IIED claim based on misrepresentation during the marriage discovered in the course of divorce proceedings).

198 *Askew*, 22 Cal. App. 4th at 957–58.

199 *See, e.g.*, Denny v. Mertz, 381 N.W.2d 141, 153 (1982) ("[P]urely private defamations are not entitled to constitutional protection.").

200 Rebecca Phillips, Comment, *Constitutional Protection for Non-Media Defendants: Should There be a Distinction Between You and Larry King?*, 33 CAMPBELL L. REV. 173, 181–82 (2010).

Amendment makes no such distinctions, neither should they.[201]

While the Supreme Court has not explicitly ruled on the issue, it has repeatedly suggested that other speakers are to be accorded the same constitutional privileges as the institutional media. The landmark *New York Times v. Sullivan* case involved both media and non-media defendants.[202]There, the Court famously held that states may not award public official damages for libel absent proving that the defendant's statement was made with actual malice, that is, "with knowledge that [his statements were] false or with reckless disregard of whether [his statements were] false or not."[203] The statements at issue, however, were not those of *The New York Times* or its reporters, but statements in the form of an editorial advertisement onto which non-media defendant clergymen signed.[204] Without elaboration, the Supreme Court applied its newly announced constitutional malice standard to the non-media defendants, concluding that "there was no evidence whatever that [the clergymen] were aware of any erroneous statements or were in any way reckless in that regard."[205]

The Supreme Court's equal constitutional regard for media and non-media defendants has been stated elsewhere. In *National Bank of Boston v. Bellotti*,[206] the Court rejected the notion that "corporate members of the institutional press [are] entitled to greater constitutional protection than the same communication by" non-institutional-press businesses.[207] In *Citizens United v. FEC*,[208] the Court cited with approval the plurality decision of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[209] which held that "in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals engaged in the same activities."[210] Most

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201 RESTATEMENT (SECOND) OF TORTS § 580, cmt. e; *see also* Robert C. Lind, *The Visual Artist and the Law of Defamation*, 2 UCLA ENT. L. REV. 63, 99 (1995).

202 N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

203 *Id.* at 280.

204 *Id.* at 266.

205 *Id.* at 286 (granting the separate certiorari petitions). "Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support." *Id.*

206 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

207 *Id.* at 782, n.18 (rejecting the "suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by" non-institutional press).

208 Citizens United v. FEC, 558 U.S. 310, 352 (2010) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.").

209 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

210 *Id.* at 784 (Brennan, J., dissenting); *Id.* at 773 (White, J., concurring in the judgment); *see also* Henry v. Collins, 380 U.S. 356, 357 (1965) (per curiam) (applying the *New York Times* standard to a statement by an arrestee); Garrison v. Louisiana, 379 U.S. 64, 67–68 (1964) (applying the *New York Time*s standard to statements by an elected district attorney); Bartnicki v. Vopper, 532

recently, in *Snyder v. Phelps*,[211] the Court extended the constitutional privilege accorded media defendants to individual picketers being sued for invasion of privacy and intentional infliction of emotional distress.[212]

From *New York Times* to *Snyder*, the Court has refused to draw constitutionally significant distinctions between media and non-media speakers. In fact, the Court has gone so far as to say that "any First Amendment distinction between the institutional press and other speakers is unworkable."[213] Any attempt to do so rests on unstable ground, given the difficulty of defining with precision who belongs to the 'media.' In an important sense, given the use of a broadly disseminated medium—an album—Marvin could be considered a media actor on that fact alone. Aside from that proposition, as a matter of constitutional principle, it would surely stand that Marvin would have the benefit of protections traditionally accorded media defendants.

B. *THE PUBLIC FIGURE-PRIVATE PERSON CONTINUUM*

The strength of Anna's constitutional protections will turn on where she rests along the public figure-private person continuum. While the *New York Times* case established the rule that First Amendment privileges must be accorded defendants in defamation suits by public officials, it was in *Gertz v. Welch* that the Supreme Court first articulated a framework applicable to other types of plaintiffs in defamation actions. *Gertz* arose when a regular contributor to Robert Welch's magazine *American Opinion*, wrote a series of stories attacking attorney Elmer Gertz.[214] Gertz had been hired to initiate a civil action on behalf of a family of a youth killed by a Chicago policeman.[215] The writer gave an account about Gertz's appearance at the coroner's inquest and portrayed him as a major "architect" of a nationwide conspiracy to discredit police.[216] The article also asserted Gertz had a long police record, was an official of the Marxist League, and was a "Leninist" and "Communist-fronter."[217] The *American Opinion* editor made no effort to verify the writer's claims.[218]

The majority in *Gertz* held that private citizens need not show constitutional malice as a precondition to recovery for injuries due to

U.S. 514, 525, n.8 (2001). *Contra* Cohen v. Cowles Media, 501 U.S. 663, 669–70 (1991) (holding that the press gets no special immunity from laws that apply to others, including those such as copyright law which target communication).

211 Snyder v. Phelps, 562 U.S. 443 (2011).

212 *Id.* at 459–61.

213 Obsidian Fin. Grp. v. Cox, 740 F.3d 1284, 1291 (9th Cir. 2014).

214 Gertz v. Robert Welch, Inc., 418 U.S. 323, 325–26 (1974).

215 *Id.* at 326.

216 *Id.*

217 *Id.*

218 *Id.*

any false statements.[219] Before reaching that conclusion, however, the Court sought to explicate a meaningful distinction between public and private figures. "Public figure" and "private person" status represent opposite ends of a continuum along which courts adjudicate the rights and responsibilities of parties. On one end of the continuum are general-purpose public figures.[220]

General-purpose public figures are individuals whose fame is pervasive.[221] Business leaders, movie stars, celebrities and musicians such as Marvin possess such a level of fame that "they invite attention and comment."[222] With that notoriety comes an ability to shape events in areas of concern to society at large. Because of their influence, the lives of such individuals are considered public in virtually all contexts—irrespective of their professional discipline or field of renown.[223]

Media agents are accorded greater First Amendment protections in covering public figures because it is presumed that public figures have voluntarily assumed and sustained their special status, thus acceding to the risks that attend greater scrutiny. That scrutiny carries the potential of exposure to critical, even defamatory remarks. Yet like public officials, pervasive public figures are not helpless against such commentary. Because of their fame, public figures are positioned to leverage their media access to affirmatively interject information and opinion into the public sphere. If necessary, they have the capacity to expose any falsehoods and fallacies of defamatory or other injurious talk.[224] As a result of the potential influence they wield, the Supreme Court, in *Curtis Publishing v. Butts* extended the *New York Times* constitutional malice standard to public figures.[225]

Resting at the middle of the continuum are limited purpose public figures. A limited purpose public figure, as described in *Gertz*, is someone who "thrusts [herself] into the vortex" of a particular controversy "in order to influence the resolution of the issues involved."[226] A limited-purpose public figure may also be someone who has attained public distinction in a particular field, such as a nationally-

[219] *Id.* at 398.
[220] 1 RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 2:4–2:8 (2d ed. 2017).
[221] *Gertz*, 418 U.S. at 323, 324 (general purpose public figures are viewed as those with "general fame or notoriety in the community and pervasive involvement in the affairs of society" who have "voluntarily put themselves in the spotlight.").
[222] *Id.* at 345.
[223] *Id.*; 3 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 23.1 (2017).
[224] *Gertz*, 418 U.S. at 323.
[225] Curtis Publ'g v. Butts, 388 U.S. 130, 155 (1967). "Public officials" set on this node of the continuum as well. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
[226] *Gertz*, 418 U.S. at 345, 353.

known college football coach,[227] a doctor who jumps into a public debate on a supposed psychological predisposition to homosexuality,[228] or a local broadcast news anchor.[229] For private persons "who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large,"[230] the constitutional malice privilege may extend to defamatory criticism of their public involvement.

Importantly, a person is deemed a limited-purpose public figure only on "the nature and extent of [her] participation in [a] particular [public] controversy" or on the matter for which she has voluntarily injected herself into the public sphere.[231] On that range of issues, as the *Gertz* court announced, the limited purpose public figure plaintiff faces identical First Amendment burdens and limitations as the general purpose public figure.[232] Conversely, all other aspects of her life—those aspects unrelated to the reasons that make her "public"—are deemed private.[233]

Private figures lie at the end of the continuum opposite pervasive public figures. Unlike the pervasive public figure, a private figure has not relinquished her interest in protecting her name nor her right not to be subject to public scrutiny or ridicule.[234] Private figures assume no "influential role in ordering society."[235] As a result, private figures lack ready media access and thus fewer effective outlets through which to countermand defamatory or otherwise injurious statements. Because private persons do not possess the "self-help" mechanisms available to pervasive and even limited purpose public figures, private figures have a more compelling case to call on the courts for redress. As a result, the balancing of First Amendment interests where purely private figures are involved tip in favor of more solicitous burdens of proof. Given the balance of competing public-private interests, the evidentiary burdens of private plaintiffs are less demanding than the *New York Times* doctrine would otherwise direct.

In *Gertz*, Welch maintained that because the subject was a matter of public interest, Gertz was required (and failed) to prove that Welch's conduct rose to constitutional malice.[236] The district court agreed with

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227 *Curtis Publ'g Co.*, 388 U.S. at 136.

228 Faltas v. State Newspaper, 928 F. Supp. 637 (D.S.C. 1996).

229 *See e.g.*, O'Donnell v. CBS Inc., 782 F.2d 1414, 1417 (7th Cir. 1986) (holding that fired local news editor was limited purpose public figure because he acted as an advocate for an organization concerned with environmental regulation enforcement).

230 *Gertz*, 418 U.S. at 337 (quoting Assoc. Press v. Walker, 388 U.S. 130 (1967)).

231 *Id.* at 352.

232 *Id.*

233 *Id.*

234 *Id.* at 344.

235 Curtis Publ'g v. Butts, 388 U.S. 130, 164 (1967) (Warren, J., concurring).

236 *Gertz*, 418 U.S. at 328.

Welch.[237] The Court of Appeals did as well but relied on the Supreme Court's intervening decision in *Rosenbloom v. Metromedia*,[238] in which a plurality extended the actual malice standard to any statement involving an issue of public importance, regardless of the nature of the citizen involved. In a five-to-four decision (and four separate dissenting opinions), Gertz was found, as a matter of law, to be a private figure.[239] The Court overruled its *Rosenbloom* decision and refused to extend the *New York Times*'s constitutional privilege to defamation of private citizens.[240]

C. *DIVORCE AS A MATTER OF PUBLIC INTEREST OR CONCERN*

Newsworthiness of the Gaye divorce is another lens through which any analysis of Anna's claims must be adjudicated. Matters of legitimate "public interest or concern" exist where the speech at issue can be "fairly considered as relating to any matter of political, social, or other concern to the community."[241] Constitutional privileges attach if a subject is deemed newsworthy, under which a plaintiff will be required to demonstrate that the defendant acted with something more than mere negligence.[242]

In general, dissemination of information about current events qualifies as a matter of public interest or concern.[243] Contemporary matters of governmental affairs, business enterprise, crimes, accidents, fires, natural disasters, and the safety and health of the polity clearly rest on the newsworthy side of the divide.[244] In addition, matters related to

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[237] *Id.*

[238] Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

[239] *Gertz*, 418 U.S. at 352. Gertz had attended the coroner's inquest and filed the civil action on behalf of the family. However, in deeming Gertz a private figure, the Court found significant the fact that he did not discuss his case with the press nor did he play a part in the criminal proceeding.

[240] *Id.* at 347.

[241] Snyder v. Phelps, 562 U.S. 443, 452–53 (2011). Federal and state courts generally have employed the terms "public interest" or "public concern" interchangeably to effect presumably the same meaning. *See, e.g.*, Philadelphia Newspapers v. Hepps, 475 U.S. 767, 777 (1986) and Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749 (1985); *compare* National Nutritional Foods Ass'n v. Whelan, 492 F. Supp. 374, 382 (S.D.N.Y. 1980) ("public interest") *and* Chapadeau v. Utica Observer-Dispatch Inc., 38 N.Y.2d 196, 199 (1975) ("public concern"). However, matters that are "of concern to" or "in the interest of" the public embrace substantially less information than what the public finds to be "interesting." *See* De Vonna Joy, Comment, *The 'Public Interest or Concern' Test—Have We Resurrected a Standard That Should Have Remained in the Defamation Graveyard?*, 70 MARQ. L. REV. 647, 655 n.48 (1987). The term "public interest or concern" also signifies a normative role of the press to disseminate information that a polity *should* be interested or concerned about—especially those matters essential to self-governance and decision making.

[242] Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

[243] RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977); 2 RODNEY A. SMOLLA, LAW OF DEFAMATION § 10:50 (2d ed. 2017).

[244] SMOLLA, *supra* note 243.

the arts, entertainment, sports, and celebrities are deemed newsworthy.[245] The media's success on newsworthy determinations has caused critics to contend that what constitutes "newsworthiness" is anything the media says.[246] The amorphous, self-fulfilling character of what constitutes a public versus private concern makes a bright line difficult to draw.[247]

Divorce lawsuits do not automatically fall on the newsworthy side of the divide. This is clearest when recognizing the distinction between a divorce event (i.e., legal filing) and the factual details about the parties' private lives that arise in the proceedings. Divorce, by virtue of the legal process, is a public act, and a presumption of openness attaches to a divorce cause as it does all judicial proceedings.[248] In several cases, media have successfully brought actions to access divorce proceedings.[249] And, with that, the details about the lives of the parties involved and the divorce process may be considered not only a matter of public record, but also of legitimate public interest or concern.

Or not. A thing is not a matter of public interest or concern just because a defendant says it is or should be. "[M]orbid and sensational prying into private lives for its own sake" can be of no public or concern.[250] Mere curiosity on the part of the public does not elevate private matters to public concern even when the person is of great interest.[251] Certainly, defamatory or false light statements are never accorded the constitutional privilege of being newsworthy.[252]

The Supreme Court spoke squarely on the subject of divorce and tortious injury arising from publication in *Time, Inc. v. Firestone*.[253] In 1964, Mary Alice Firestone filed an action for separation, and her

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245 *Id.*

246 *Id.*

247 Snyder v. Phelps, 562 U.S. 443 (2011). The Court attempted to draw such a line. The Court in *Snyder* affirmed that a newsworthiness determination demands a totality of the circumstances analysis. Courts are to consider (1) *content* of the speech; (2) *form* of the speech; and (3) *context* of the speech. *Id.* at 453. *Snyder* advises that a court look to the "overall thrust and dominant theme" of the message—suggesting that if both public and private matters are implicated, courts are to determine the predominating message. *Id.* at 454.

248 *See, e.g.*, Burkle v. Burkle, 144 Cal. App. 4th 387 (2006) (holding that wife's action to bring civil law action against husband to enforce divorce proceeding was inappropriate as such actions fall under family law).

249 *See, e.g.*, State ex. rel. Gore Newspaper v. Tyson, 313 So. 2d 777 (Fla. Dist. Ct. App. 1975).

250 Virgil v. Time Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) (quoting RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1979)).

251 Keith D. Willis, Note, *Paparazzi, Tabloids, and the New Hollywood Press: Can Celebrities Claim a Defensible Publicity Right in Order to Prevent the Media from Following their Every Move?*, 9 TEX. REV. ENT. & SPORTS L. 175, 189 (2007) (citing Galella v. Onasis, 487 F.2d 986 (2d Cir.1973))

252 SMOLLA & NIMMER, *supra* note 223; Matthew J. Donnelly, Note, *A Newsworthiness Privilege for Republished Defamation of Public Figures*, 94 IOWA L. REV. 1025 (2009).

253 Time, Inc. v. Firestone, 424 U.S. 448 (1976).

husband Russell Firestone Jr., counterclaimed for divorce.[254] In the course of protracted proceedings, allegations of infidelity flew back and forth. One week after the divorce was finalized, it became the subject of an item published in *Time* magazine.[255]

> DIVORCED: By Russell A. Firestone, Jr., 41, heir to the tire fortune:
>
> Mary Alice Sullivan Firestone, 32, his third wife; a one time Palm Beach schoolteacher; on grounds of extreme cruelty and adulteryFalse The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, the judge said, "to make Dr. Freud's hair curl."[256]

After *Time, Inc.* refused to print a retraction, Mary Alice sued for libel in a Florida court and won a judgment of $100,000, which was sustained on appeal by the state supreme court.[257]

Time, Inc. argued to the United States Supreme Court that Mary Alice was a public figure by virtue of the fact that she initiated the court action for separation, and also by virtue of her status as the wife of an internationally known industry scion.[258] It was argued that she was well known amongst the "Palm Beach 400" society and had received so much news coverage she hired a press clipping service.[259] In *Time, Inc.*'s view, those facts demanded that, in accord with *New York Times*, she prove that its intimation of her infidelity was made with actual malice.[260]

The Court rejected *Time, Inc.*'s contentions. Though Mary Alice may have been well-known in the Palm Beach society, "she did not occupy [a role] of especial prominence in the affairs of society," nor did she "thrust [herself] to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."[261] Mary Alice's activities before her divorce did not make her a public figure, or even a limited public figure.[262]

The *Firestone* majority also concluded that a judicial filing for marriage dissolution does not transform the filer into a public figure.[263] Mary Alice was "compelled to go to court by the State in order to obtain

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[254] *Id.* at 450.
[255] *Id.* at 451–52.
[256] *Id.* at 452.
[257] *Id.* at 461.
[258] *Id.*
[259] *Id.* at 484–85 (Marshall J., dissenting).
[260] *Id.* at 453. *See supra* Section IV.A.5 for discussion of actual malice.
[261] *Id.* at 448 (citations omitted).
[262] *Id.* at 453 (Mary Alice Firestone "did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved.").
[263] *Id.* at 460.

legal release from the bonds of matrimony."[264] Her "resort to the judicial process [was] no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court."[265] As a result, Mary Alice was only required to demonstrate that *Time* acted negligently in publishing defamatory information.[266]

D. *CONCLUSION*

For Anna's possible claims, the required level of fault to be proven is tethered to whether she would be considered a general-purpose public figure, a limited purpose public figure, or a private figure. For most any lawsuit that has a communication or distress tort as its cause, a public figure plaintiff is at a disadvantage in prosecuting her claim. Anna would be required to demonstrate constitutional malice to recover even compensatory damages.[267] Moreover, under no circumstances could she recover presumed damages.[268] In defamation and false light actions, where truth is an absolute defense, Anna as a public figure or limited purpose public figure plaintiff (on matters related to her public persona) would carry the burden to prove that Marvin's defamatory or false light statements were in fact false.[269]

If Anna is deemed a private figure, Marvin would be required to prove the truth of matters asserted in Anna's defamation and false light actions.[270] Moreover, in most states, including California, Anna's burden of fault would be negligence if she sought to recover for injury under a communication or (of course) an NIED tort on matters of private concern.[271] However, per *Gertz*, as a private figure, Anna could recover presumed or punitive damages only upon showing Marvin acted with constitutional malice.[272]

Firestone would provide legal standing for Anna as a private figure. However, regardless of her legal status, under privacy and distress torts in which newsworthiness is a constitutional privilege, Anna would have to demonstrate the absence of a legitimate public interest or concern about her divorce or details of her private life. Further, for newsworthy matters, she would be required to demonstrate constitutional malice on her false light, privacy and distress torts. In

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[264] *Id.* at 454.
[265] *Id.* at 448.
[266] *Id.*
[267] Cabrera v. Alam, 197 Cal. App. 4th 1077 (2011).
[268] Khawar v Globe Int'l Inc., 19 Cal. 4th 254 (1998).
[269] Grenier v. Taylor, 234 Cal. App. 4th 471 (2015); Aisenson v. Amer. Broad., 220 Cal. App. 3d 146 (1990); Readers Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 252–253 (1984).
[270] Costa Mesa v. D'alessio Invs., LLC, 214 Cal. App. 4th 358, 378 (2013).
[271] *See, e.g.*, Haley v. Casa Del Rey Homeowners Ass'n, 153 Cal. App. 4th 863, 878 (2007) (unreasonable interference as the burden of proof to recover damages from nuisance and negligence claims); *Cf.* Time Inc., v. Hill, 385 U.S. 374 (1967).
[272] Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974).

contrast, where purely private information is communicated, compliance with the *New York Times* standard is not constitutionally mandated. Disclosure or use of non-newsworthy information can be vindicated on simple negligence grounds—even as against media defendants.

IV. THE TORTS

Having addressed the issues of Marvin and Anna's status, we can now move on discuss her claims of, and Marvin's possible defenses to libel, false light invasion of privacy, publication of private facts, appropriation of name or likeness of another and right of publicity, negligent and intentional infliction of emotional distress.

A. *DEFAMATION*

Defamation is the false, unprivileged expression of fact of or concerning another person that injures that person's reputation.[273] Defamatory expressions take the form of either slander or libel. Slander occurs through spoken words, transitory gestures, or the tonality given to speech-acts.[274] Libels are conveyed in other permanent forms such as written text, signs, pictures, effigies or even chalk marks on a wall.[275] Because the injury attending a defamatory act turns on the permanence of the expression, music lyrics, though sung, are governed by libel principles.[276]

1. Unprivileged False Statement of Fact

Libelous statements fall within two broad categories: libel per se and libel per quod. Libel per se expressions are those which charge or impute to the plaintiff (a) a serious crime, including one of moral turpitude (e.g., perjury, fraud); (b) misconduct or malfeasance in her official duties or her business, trade or profession; (c) infection with a loathsome disease; or (d) unchasteness.[277] Libel per se expressions are, by their very content, presumed to result in reputational harm.[278]

In libel per quod actions, the key is whether the expression is

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[273] T. Barton Carter, et al., The First Amendment and the Fourth Estate: The Law of Mass Media 87 (11th ed. 2012).

[274] RESTATEMENT (SECOND) OF TORTS § 568(2) (AM. LAW INST. 1977); CAL. CIV. CODE § 46 (West, Westlaw through 2017 Sess.).

[275] RESTATEMENT (SECOND) OF TORTS § 568(1) (AM. LAW INST. 1977); CAL. CIV. CODE § 45a (West, Westlaw through 2017 Sess.). California courts have interpreted its constitution to protect an individual's reputation. *See* Jon H. Sylvester, *How California Governs News Media*, 26 SANTA CLARA L. REV. 381 (1986); *see, e.g.*, Hosford v. California State Pers. Bd., 74 Cal. App. 3d 302 (1977).

[276] RESTATEMENT (SECOND) OF TORTS § 568A (AM. LAW INST. 1977).

[277] RESTATEMENT (SECOND) OF TORTS § 569, cmts. d–f (AM. LAW INST. 1977).

[278] *Id.* at cmt. b.

reasonably capable of defamatory meaning.[279] Most jurisdictions look to give the words comprising the expression at issue their ordinary, ascribed meaning.[280] Even literal truths can be defamatory or slanderous when communicated using certain punctuation, syntax, grammar, typography, or textual juxtapositions. Where the defamatory nature of an expression is not facially apparent, how it might be interpreted by the recipient is dispositive.

If an expression is not facially defamatory, a plaintiff must plead additional facts to establish defamatory meaning directed toward her through inducement, innuendo, or colloquium.[281] Extrinsic facts are induced to supply the premise(s) and context upon which the defamatory meaning is based. Innuendo explains the meaning ascribed to the published expression, either by itself or with the allegation of extrinsic facts. Colloquium is the allegation of the ultimate fact necessary to identify the plaintiff as the subject of the defamation. Colloquium, too, may be apparent in the expression itself, or must otherwise be established through extrinsic evidence.[282]

2. Publication

"Publication" in defamation law is a term of art for a communication to a third party.[283] The publication element is easily established when the expression is published in a newspaper, transcript, or as an artistic work such as *Here, My Dear*. However, a libel action cannot be sustained if its content was known and the plaintiff nonetheless authorized its publication.[284] Nor could an action be sustained if the plaintiff accepted some benefit from the publication, *e.g.*, royalties.

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279 Jack F. Kuhlman, *Libel and Libel Per Se*, 43 CHI.-KENT. L. REV. 24 (1966).

280 Barbara A. Donenberg, *The Reform Of The Innocent Construction Rule In Illinois—Chapski v. Copley Press*, 60 CHI.-KENT L. REV. 263 (1984). (States like Illinois follow the "innocent construction" rule, *i.e.*, there can be no action as a matter of law if an expression can be interpreted to have non-defamatory meaning. California, however, does not subscribe to it.).

281 T. Barton Carter, et al., *supra* note 273, at 91.

282 Harry G. Henn, *Libel-by-Extrinsic-Fact*, 47 CORNELL L. REV. 14, 19–22 (1961). For clarity, an example: A news outlet reported a story of a home burglary at the Smith home in Ms. Jones neighborhood. A reporter states that "[t]he woman who lives in the house two doors east of the Smith home was the only person in the Smith home that night." Anyone who knows that Ms. Jones lives two doors east of the Smiths will surmise (by innuendo) that she committed burglary. In her defamation complaint, Ms. Jones would assert the extrinsic fact that a crime of burglary had indeed occurred in the Smith home that evening (inducement). Ms. Jones must also assert that she is "the only woman who lives in the house two doors east of" the Smith house (colloquium), so that the news item could only be referring to her. T. Barton Carter, et al., *supra* note 273, at 91.

283 RESTATEMENT (SECOND) OF TORTS § 577 (AM. LAW INST. 1977).

284 *Id.* § 583 (AM. LAW INST. 1977).

3. "Of or Concerning" the Plaintiff

The challenged content of *Here, My Dear* must be of or "concerning" Anna.[285] Neither the album's title nor its illustrations signal Anna as its subject. Marvin's lyrics make no explicit reference to "Anna Gordy." With the exception of "Anna's Song," there are no other direct references to an "Anna," much less Anna Gordy. Yet, as with establishing libel per quod, "of and concerning prong" may be established through inducement and colloquy. Anna need not be referred to by name. It is sufficient that there is a description or reference to her such that those who hear or read reasonably understand the plaintiff to be the person intended.[286]

4. Harm

For any injury proximately caused by the album, Anna may be awarded nominal, compensatory, general, special, or punitive damages.[287] Nominal damages are granted where there is a libel or slander per se, but for countervailing considerations (e.g., plaintiff's existing bad reputation, the insignificant harm resulting from the defamatory statement) warrant only some symbolic recovery (e.g., $1.00).[288] While compensatory damages may be recovered for ascertainable economic losses, general damages are awarded for non-economic losses, which includes mental suffering.[289]

Special damages represent a specific, calculable economic value beyond compensatory damages that a plaintiff suffered or is likely to suffer because of the defamatory expression. Lost earnings or lost earning capacity, health care bills and expenses, or expenses incurred in remediating reputational harm are types of special damages. While special damages are presumed in libel per se actions, special damages must be pled and proven to recover for injuries sustained in libel per quod actions.[290]

Punitive damages are awarded against a defendant for the most

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[285] *Id*. § 564.
[286] *Id*. § 564 cmt. b.
[287] *Id*. §§ 620–23.
[288] *Id*. § 620.
[289] *Id*. § 621 cmt. a.
[290] *See* SMOLLA, *supra* note 220, § 7:22–7:25. In libel and slander per se actions, the type of defamatory expressions classified as per se are so egregious (e.g., imputation of committing a criminal act) that injury by reputation impairment can be anticipated. As a result, some states allow prevailing plaintiffs in communication and distress torts to recover presumed damages, without the need to show reputational harm. That said, even with presumed damages, a plaintiff nonetheless must demonstrate through competent evidence the existence of injury. RESTATEMENT (SECOND) OF TORTS § 622A (AM. LAW INST. 1977). However, such damages—especially outsized damages—raise serious due process and First Amendment concerns. *See also* Susan E. Saeger, *Jackpot! Presumed Damages Gone Wild—and Unconstitutional*, 31 COMM. LAW., (2015), https://www.americanbar.org/publications/communications_lawyer/2015/january/jackpot.html.

egregious behavior. However, the Supreme Court has expressed abiding concern about First Amendment rights of media agents being unduly chilled by the prospect of lenient proof burdens when harm from that speech is alleged.[291] As a result, punitive damages in defamation actions are only available upon proof of actual malice.[292]

5. Fault

Anna must show that, in making the allegedly defamatory statements, Marvin acted either negligently or with actual malice. Negligence presumes a duty, a breach of that duty, and proximate causation between the breach and any resulting injury.[293] A breach is established if Anna shows that Marvin knew or, in the exercise of reasonable care, should have known that certain *Here, My Dear* statements were false, would create a false impression in some material respect, or that an injury would occur.

Alternatively, as mentioned earlier, Anna may be required to plead and prove fault beyond negligence, *viz*., actual malice.[294] The "constitutional" malice established in *New York Times* bears explication. *New York Times* arose out of a suit filed by L.B. Sullivan, an elected County Commissioner of Montgomery, Alabama, whose duties, inter alia, involved police and fire department oversight.[295] In March 1960, the New York Times published a full-page editorial advertisement. The text of the "Heed Their Rising Voices" ad inferred that Sullivan was a central figure in state-sanctioned resistance to civil rights efforts in Alabama in the late 1950s-early 1960s. Language of the ad also suggested that Sullivan, in his official capacity, directed a "wave of terror" against non-violent protesters, and sent "truckloads of police armed with shotguns and tear-gas" to meet protesters with "intimidation and violence."[296] Suing under Alabama law, Sullivan's complaint alleged that he had been libeled by statements in the ad, purchased by the NAACP and signed onto by individual defendants.[297]

At issue was the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct. A unanimous Supreme Court ruled against Sullivan, finding that the "rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the

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[291] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974).
[292] *Id.* at 349.
[293] *Id.*
[294] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 254, 279–80 (1964); *see Gertz*, 418 U.S. at 347–48 (Strict liability is not permitted.).
[295] *N.Y. Times*, 376 U.S. at 256–57.
[296] *Id.* at 257–58.
[297] *Id.* at 256.

press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct."[298] The Court concluded that damages may not be presumed as to a public official, and states may not award public official damages absent finding of actual malice.[299]

The constitutional malice established in *New York Times* is not the actual malice in the common law sense, which has been defined variously as acting with "ill will," "spite," or "hatred." The *New York Times* "reckless conduct" element is not measured by whether, objectively, "a reasonably prudent" person would have published the statement or investigated before publishing it.[300] Instead, whether inferred from objective facts or accumulation of appropriate inferences from circumstantial evidence,[301] there must be sufficient evidence to permit the conclusion that the "defendant *in fact* entertained serious doubts as to the truth of his publication."[302] Constitutional malice is also inferred where a defendant fabricates information, relies on sources of doubtful veracity, or makes that statements are "inherently improbable."[303]

Constitutional malice is also inferred where a defendant fabricates information. This was the central issue in *Masson v. New Yorker*.[304] Jeffrey Masson, a noted psychoanalyst, was projects director for the Sigmund Freud Archives.[305] After he was fired from the Archives, Masson was interviewed by Janet Malcolm, an author and contributor to The New Yorker magazine. Malcolm taped several of her interviews of Masson and subsequently wrote a lengthy article about his relationship with the Archives.[306] Masson sued both for libel after it became clear to him that Malcolm's narrative device featuring lengthy passages attributed to Masson in quotations, consisted of statements he had never in fact made.[307] Bound to prove that Malcolm and The New Yorker had misrepresented his actual statements, and had done so with actual malice, the Court established that Masson would prevail only if Malcolm's alterations resulted in a material change in the meaning conveyed by what he actually said.[308]

298 *Id.* at 264.
299 *Id.* at 283.
300 St. Amant v. Thompson, 390 U.S. 727, at 731 (1968).
301 SMOLLA & NIMMER, *supra* note 223.
302 *St. Amant*, 390 U.S. at 731 (emphasis added).
303 *Id.* at 732.
304 Masson v. New Yorker Magazine, 501 U.S. 496, 496 (1991).
305 *Id.*
306 *Id.*
307 *Id.*
308 *Id.* at 513.

6. Anna's Libel Claims

On *Here, My Dear*, Anna is referenced in only the vaguest terms. Even Curtis Shaw, Marvin's lawyer, who also wrote the album liner notes, dutifully avoids naming her. *Here, My Dear* "takes us on a musical trip through a personal experience we can all relate to . . . a love that once was . . . love promised . . . love denied . . . love gone astray."[309] Shaw applauds Marvin for having the "guts to express to that 'special someone' things we all sometimes find difficult."[310] Shaw only alludes to her, and "Anna's Song," is a loving tribute to her. Thus a case must be made that the defamatory aspects of the album are "of or concerning" Anna.

Only when considered in the context of the lyrics do the album's title, female statuary, the hand above the monopoly board, and Shaw's notes make sense. In several songs on *Here, My Dear*, Marvin uses pronouns "you" or "we" to reference actions and events that can only be imputed to Anna (e.g., "I married you," "We were over Gwen's . . . trying to make amends," and "How could you turn me into the police?"). Through colloquium and the inducement of extrinsic facts we know, conclusively, that Marvin's "Dear" "special someone" is indeed Anna.

Through inducement, innuendo and colloquy, *Here, My Dear* paints a scornful picture of Anna. Marvin's portrait of Anna as cunning and avaricious begins in earnest on "When Did You Stop Loving Me, When Did I Stop Loving You." He asks Anna "do you remember all of the bullshit baby?"[311] and cites the ways in which her love for him has malformed into implacable vindictiveness. Referring to her settlement demands, he muses: "If you really loved me with all of your heart, you'd never take a million dollars to part."[312] Alluding to the time she directed her attorney to obtain a bench warrant for his arrest for child support delinquency, he wonders "if you loved me, how could you turn me into the police?"[313] On "When Did You Stop Loving Me, When Did I Stop Loving You," where he claims, "you've said bad things, and you've lied,"[314] Marvin flirts with per se libel, accusing Anna of perjury.

Anna's envy and materialism animate, "Is That Enough," was recorded just after he was deposed.[315] "Is that Enough" exudes Marvin's frustration. In his words, he was a "young and fine" but "a dumb little

309 MARVIN GAYE, HERE, MY DEAR (Tamla 1978) (inside gatefold).
310 *Id.*
311 GAYE, *supra* note 112.
312 *Id.*
313 *Id.*
314 *Id.*
315 GAYE, *supra* note 113; RITZ, *supra* note 1, at 238.

fool" that Anna "plucked . . . clean."[316] Over and over, Marvin accuses Anna of being "too possessive [and] jealous" and wonders whether, even if he were faithful, would Anna ever "be satisfied."[317] It was her "flair for style" that would "break" him."[318] Anna's insatiability, Marvin claims is because "you just love of that expensive stuff."[319]

"You Can Leave, But It's Going To Cost You" presents Anna at her most malevolent. On this song, Marvin vividly recalls a particular argument "like it was yesterday:" they were "over Gwen's . . . tryin' one more time to make amends."[320] When the subject turned to Jan, with her "eyes red as fire, intoxicated," he purports to quote Anna saying "you said '[y]ou can leave, but it's going to cost you.'"[321] Over five and a half minutes, on top a screaming, scatting, lead guitar and high-pitched keyboard riff, Marvin recounts Anna's threat over and over again ("she said", "you said"), alternatively as mocking, "'that young girl is gonna cost you!'", as signifying "'it's gonna cost you-ha!-dearly!'" or as warning: "'if you want happiness, you'll have to pay!'"[322]

In other passages, Marvin references Anna's spiteful recriminations. On "When Did You Stop Loving Me, When Did I Stop Loving You," he recalls how "you tried to have them shackle me, bring me in."[323] On "Is That Enough," he accuses Anna of "trying to take my riches, my child too."[324] On "You Can Leave, But It's Going To Cost You," Marvin accuses Anna of antagonizing Jan ("trying to upset my woman") and of trying to expose his darkest secrets for strategic advantage ("examining my soul").[325] "You Can Leave, But It's Going To Cost You" fades as Marvin makes a mocking aside: "You used to say, 'Ah, what a gorgeous hunk of man.' / That didn't help me baby when you was on the stand."[326] Line after line, phrase after phrase, Marvin vilifies Anna.

If the harm inflicted by *Here, My Dear* was merely unflattering, annoying, or embarrassing, Anna would have no legally cognizable claim.[327] But if mental or physical injury can be shown, Anna could be

316 GAYE, *supra* note 113.
317 *Id.*
318 *Id.*
319 *Id.*
320 GAYE, *supra* note 114.
321 *Id.*
322 *Id.*
323 GAYE, *supra* note 112.
324 GAYE, *supra* note 113.
325 GAYE, *supra* note 114.
326 *Id.*
327 Robert T. Langdon, Note, *The Communications Decency Act § 230: Make Sense? Or Nonsense?—A Private Person's Inability to Recover if Defamed in Cyberspace*, 73 ST. JOHN'S L. REV. 829 (1999); David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 283 (2010).

awarded actual, general, special or punitive damages. Damages would be available as long as she can show that *Here, My Dear* was a substantial factor in causing such injury.[328] Damage to her reputation, community standing, or any loss of good will would be compensable.[329] Any personal humiliation, exposure to hatred, contempt or ridicule, and mental or physical suffering would be compensable as well.[330] Marvin could be additionally liable for reasonably probable future damages, reasonable and necessary medical expenses, and for lost income or wages or for any diminution of Anna's earning capacity.[331]

Anna would seek to show Marvin created *Here, My Dear* with actual malice. There would seem to be abundant circumstantial evidence to show that Marvin was at least unreasonably reckless in his excoriation of Anna and her conduct in their divorce proceedings. Per *Masson*, a court could infer constitutional malice if Anna can prove that she did not threaten to extort Marvin with claims that "that young girl is gonna cost you" and its spiteful permutations. His dismissive comments after *Here, My Dear's* release strongly suggest not only intended spite, but a reckless disregard for truth borne out of a desire to win a "war." Marvin spoke of needing to "get that stuff out of me" after all the depositions and Anna's "lies"—in fact, going into the studio to record at times when he was at his peak.

7. Marvin's Defenses

Truth, fair comment and opinion, and accurate accounts of judicial proceedings are types of absolute or qualified defensive privileges available to Marvin in defense. Truth or "substantial truth" is an absolute privilege.[332] The "substantial truth" doctrine emerged in *Masson* as the Court addressed the fact that several of the actionable statements in Malcolm's article were not literally true.[333] The Court acknowledged that a fabricated quotation may injure reputation by attributing an untrue factual assertion to the speaker, or by indicating a negative personal trait or an attitude the speaker of the purported quotation does not hold. Yet the *Masson* majority held that even deliberate alterations to statements are constitutionally privileged. Inaccuracy does not equate with falsity so long as the "gist" or "sting" of the statement was true.[334]

Fair comment is a qualified privilege particularly relevant to *Here, My Dear*. Fair comment is a statement based on the writer's honest

328 CALIFORNIA CIVIL JURY INSTRUCTIONS § 1701–05.
329 RESTATEMENT (SECOND) OF TORTS § 621 (AM. LAW INST.1977).
330 SMOLLA, *supra* note 243, ch. 9.
331 RESTATEMENT (SECOND) OF TORTS § 281 (AM. LAW INST.1977).
332 RESTATEMENT (SECOND) OF TORTS § 582 (AM. LAW INST.1977).
333 Masson v. New Yorker Magazine, 501 U.S. 496, 518–20 (1991).
334 *Id.*at 517.

opinion about a matter of public interest or concern.[335] An extension of the fair comment doctrine, "pure" opinion is an assertion made based upon one's impression where it is apparent that no objective fact is being stated.[336] Whether a statement is one of "fact" or "opinion" is determined by the "totality of the circumstances" giving rise to the expression.[337] So long as statements cannot be construed as libel disguised as opinion, fair comment is a qualified bar to recovery. [338]

The contours of what constitutes pure opinion were addressed at length in *Milkovich v. Lorain Journal*.[339] In order to be constitutionally privileged, the opinion (i) must be of legitimate public concern; (ii) the facts upon which the opinion is based must be truly stated or well known; (iii) the opinion must be the writer's honest opinion; and (iv) the expression must be made without constitutional malice.[340] While refusing to carve out a constitutional privilege for all opinion, the Court demanded that, where opinion is in issue, the first step is to determine whether a statement can in fact be construed as an opinion *ab initio*. To be sure, part of the *Milkovich* rationale for refusing to carve out a First Amendment opinion privilege was that opinion speech was already protected under its previous decisions.[341]

The pre-*Milkovich* line of cases acknowledged two categories of expressions which are non-actionable as a matter of law: (i) expressions that fail to contain a provably false factual connotation (rhetorical hyperbole) and (ii) those seen as being incapable of interpreted as stating "actual facts" about an individual.[342] Some opinion-giving is so broad and vague as to not assert a provable fact (e.g., "'In my opinion Mayor Jones shows his *abysmal ignorance* by accepting the teachings of Marx and Lenin.'").[343] Opinion using "loose, figurative, or hyperbolic language," which cannot be proven true or false, can never support a defamation cause of action. [344]

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335 RESTATEMENT (SECOND) OF TORTS § 582 (AM. LAW INST. 1977).

336 Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990).

337 *Id.* at 9. In determining whether a statement is best construed as privileged opinion, courts will examine: (1) the common usage or meaning of the specific language of the challenged statement itself; (2) the degree to which the statements are verifiable; (3) the context in which the statement occurs; and (4) the broader social context into which the statement fits. *See* Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *see also* Gorilla Coffee v. N.Y. Times, 936 N.Y.S.2d 58 (2011); Tiffany Frigenti, *Ambiguity in the Realm of Defamation: Rhetorical Hyperbole or Provable Falsity*, 28 TOURO L. REV. 615 (2012).

338 A defendant who bases his opinion on his own expression of defamatory facts may be liable for the factual expression but not the expression of the opinion. *Milkovich*, 497 U.S. at 12; *see, e.g.*, Freedlander v. Edens, 734 F.Supp. 221 (E.D. Va. 1990).

339 *Milkovich*, 497 U.S. at 18.

340 *Id.* at 9.

341 *Id.*

342 *Id.* at 1–2.

343 *Id.* at 20.

344 *Id.* at 20–21 ("imaginative expression;" "loose, figurative, or hyperbolic language"); Letter Carriers v. Austin, 418 U.S. 264, 285–86 (1974) (holding that rhetorical hyperbole is not

"Vigorous epithets," "imaginative" language, and satire are other non-actionable expressions. [345] For example, at issue in *Hustler v. Falwell* was the magazine's ad parody of public figure evangelist Jerry Falwell in which he discussed his "first time" as a drunken encounter with his mother in an outhouse. Hustler's ad "could not 'reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated,"[346] thus it was not actionable expression.

To the extent that on *Here, My Dear* Marvin is articulating statements made in his actual divorce case, he may be entitled to raise another relevant defense.[347] The Court's *Cox Broadcasting Corp. v. Cohn* decision affirmed a "fair report" privilege,[348] holding that states may not impose sanctions for the publication of truthful information contained in reports taken from official court records open to the public.[349] However, the privilege is a qualified one. The statements must be accurate and based on records open to the public.[350] If a matter from public record is erroneously or defamatorily reported, a defendant would not be able to assert the *New York Times* constitutional malice standard as a shield against liability to a private plaintiff.[351]

B. *PRIVACY*

While defamation doctrine protects one's reputational interests, the privacy interests at issue for Anna relate to her rights to be left alone, keep certain information confidential, and preserve her individual dignity.[352] There are four "branches" of privacy interests protected by law: (1) intrusion upon seclusion, (2) false light, (3) publication of private facts, and (4) the wrongful appropriation of another's name or likeness—and its related tort, the right of publicity.[353] The latter three branches represent the most colorable privacy-based claims available to Anna.[354]

actionable opinion, and "lusty and imaginative expression" is not actionable); *see also* Franklin v. Dynamic Details, Inc., 10 Cal. Rptr. 3d 429 (2004).

345 Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14 (1970) ("vigorous epithet"); *see generally* SMOLLA, *supra* note 243, ch. 6.

346 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 46 (1988).

347 A party's malicious statements and falsehoods spoken in the context of judicial proceedings enjoy absolute privilege so long as they have a reasonable connection to the legal action and made in furtherance of litigation. CAL. CIV. CODE § 47 (West, Westlaw through 2017 Sess.). Here, however, we are not dealing with Marvin's colorable expressions made in a judicial proceeding, but outside of it.

348 Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

349 *Id.*

350 *Id.*

351 *Id.*

352 SMOLLA & NIMMER, *supra* note 223, § 23:2.

353 RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

354 Since the tort of intrusion, or trespass, is not at issue here, this Section explains and applies the other privacy branches under which Anna's claims might fall. With respect to the first element of an intrusion claim—intentional invasion into the private affairs of another—courts generally

1. False Light Invasion of Privacy

Erroneous attributions made to Anna's traits, conduct or beliefs may give rise to a false light invasion of privacy claim.[355] A false light depiction must identify the plaintiff with knowing or reckless disregard of the fact that the published material will place the plaintiff in a false light which is highly offensive to a reasonable person.[356]

The underlying interest protected in false light actions is not just reputational. Individual self-determination interests are at the core of false light precepts, viz., the autonomy to choose whether, where, and how to place oneself in the public gaze.[357] As a result, a false light depiction need not be *defamatory*. It is enough that the depiction be *different* than one's true persona, and unreasonably offensive.

While defamation claims specifically concern a statement's absence of truth, false light is more broadly about the false *implications* of statements.[358] False light occurs through embellishment, distortion, or fictionalization.[359] Embellishment is the result of adding false material to otherwise true facts.[360] Distortion, or contextual false light, arises when a narrative omits facts or when the setting in which material is published makes an otherwise accurate story appear false.[361] Fictionalization occurs when some truths, like identifying characteristics (e.g., name, age) are used to build a false story.[362] While negligence is the fault standard,[363] the Supreme Court, in *Cantrell v. Forest City Publishing, Co.*[364] affirmed that placing persons in a false light deliberately or recklessly is not protected by the First Amendment. For infringement upon her privacy interests in this manner, Anna could

require that the intrusion take the form of a "physical trespass." Shulman v. Grp. W Prods., Inc., 18 Cal. 4th 200, 231 (1998).

355 SMOLLA & NIMMER, *supra* note 223, § 24:3.

356 *Id.*

357 Bruce A. McKenna, *False Light Invasion of Privacy*, 15 TULSA L. REV. 113, 117 (1979).

358 Gill v. Curtis Publ'g Co., 38 Cal. 2d 273 (1952).

359 RESTATEMENT (SECOND) OF TORTS, § 652E, cmt. b (AM. LAW INST. 1977); *see, e.g.*, Time, Inc. v. Hill, 384 U.S. 374, 388 (1966).

360 RESTATEMENT (SECOND) OF TORTS, § 652E, cmt. b (AM. LAW INST. 1977).

361 Michael Sewell, Note & Comment, *Invasion Of Privacy In Texas: Public Disclosure Of Embarrassing Private Facts*, 2 TEX. WESLEYAN L. REV. 411, 414–15 (1995).

362 *Id.*

363 RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

364 Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 245 (1974). The Cleveland Plain Dealer newspaper ran a feature article about a bridge collapse that killed 44 people. In a feature story profiling a surviving family, one passage observed that "Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of non-expression she wore at the funeral. She is a proud woman. Her world has changed. She says that after it happened, the people in town offered to help them out with money and they refused to take it." *Id.* at 248. The problem was that the writer, Joe Esterhaus, had interviewed the son of the decedent, but not Cantrell. The Cantrells successfully sued for false light, claiming that by publishing the false feature story about made them the objects of pity and ridicule, and the respondents caused Mrs. Cantrell and her son to suffer outrage, mental distress, shame, and humiliation. *Id.*

recover general, compensatory, special, or punitive damages for suffering outrage, mental distress, shame, or humiliation.[365]

Another false light feature distinctive from defamation is that false light claims can succeed without a need to show reputational injury.[366] That said, false light claims are subject to the same absolute and qualified privileges applied to defamation claims.[367] While the burden of proof to demonstrate harm is relatively easier to meet, the Supreme Court, in *Time, Inc. v. Hill*, left open the question as to whether, in false light claims, the constitutional malice privilege applies to all plaintiffs on any subject.

Hill arose out of a 1952 incident in which three escaped convicts held James Hill and his family hostage in their home.[368] The entire family survived the incident unharmed.[369] They later moved away and Hill discouraged further publicity efforts about the incident. In 1954, Joseph Hayes crafted a novel around the incident, entitled "The Desperate Hours," which was subsequently adapted to a theatrical play.[370]

Life magazine, a periodical and Time, Inc. property, published an article in advance of the play's opening.[371] Its story described the play in the form of a pictorial re-enactment, and used photographs of scenes staged in the former Hill home. However, the theatrical version of the hostage situation depicted considerable violence.[372] Thus, the magazine's account inferred that the family was abused; the father and son were beaten, and the daughter had endured verbal sexual assault.[373] In fact, no such conduct occurred; the family had endured no violence or other molestation.[374]Alleging that the *Life* article knowingly gave the false impression that the family had suffered humiliating maltreatment, Hill sued for damages under New York's right of privacy law.[375] He

365 RESTATEMENT (SECOND) OF TORTS § 652 (AM. LAW INST. 1977).

366 SMOLLA, *supra* note 220, § 24:3. For example, in Arkansas, a cause of action for both false-light invasion of privacy and for defamation can be joined in the same action; however, there can be but one recovery for any particular publication. *See, e.g.*, Wal-Mart Stores, Inc. v. Lee, 74 S.W.3d 634 (2002).

367 RESTATEMENT (SECOND) OF TORTS §§ 652F, 652G (AM. LAW INST. 1977).

368 Time, Inc. v. Hill, 385 U.S. 374 (1966).

369 *Id.*

370 *Id.*

371 *Id.*

372 *Id.*

373 *Id.*

374 *Id.*

375 The relevant statute in this case was sections 50–51 of the New York Civil Rights Law, which provided a cause of action by "a person whose name or picture is used by another without consent for purposes of trade or advertising." *Id.* at 376, n.1; *see also* N.Y. CIV. RIGHTS LAW §§ 50-51 (LexisNexis 2017). Although this statute specifically prohibits only the use of the name or picture of the plaintiff, it was construed broadly to allow causes of action when the purpose was not for trade or advertising. *Hill*, 384 U.S. at 381–82.

was awarded $30,000 in damages, which was upheld on appeal.[376]

Reversing the New York Court of Appeals' finding, the Supreme Court held, five-to-four, that constitutional protections for speech and press precluded recovery under the right of privacy statute for "false reports of matters of public interest" in the absence of proof that the report was published "with knowledge of its falsity or in reckless disregard of the truth."[377] The Court refused to sanction a right of action where a person's name, picture, or portrait was the subject of a "fictitious" article.[378] If the core matter was the subject of public interest, only "material and substantial falsification" would be actionable, and then recovery is available only upon a showing of constitutional malice.[379]

But in ruling against the family, Justice Brennan's majority opinion did two remarkable things: by extending the constitutional rationale announced in New York Times, *Hill* basically established that privacy interests are subordinate to rights of speech and press.[380] Secondly, *Hill* extended its newsworthiness framework toward matters of general public interest. As "essential as those are to healthy government," Brennan wrote, "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs."[381]

Anna would claim that the implications of Marvin's depictions falsely cast her as manipulative, greedy, and vengeful. Under this cause, she would not have to prove any harm to her reputation. Because of the

376 *Hill*, 384 U.S. at 379.

377 *Id.* at 388. *Hill* is basically an extension of the constitutional rationale in *New York Times* into the area of privacy.

378 *Id.*

379 *Id.* The Supreme Court, reversing the New York Court of Appeals, held that constitutional protections for speech and press preclude recovery under the right of privacy statute for "false reports of matters of public interest," in the absence of proof that the report was published "with knowledge of its falsity or in reckless disregard of the truth." *Id.* at 387–88. *Hill*, however, does not necessarily mark a complete abdication of the Court's person-oriented view of the freedom of expression. Lurking in the background of the opinion is the fact that the members of the Hill family had "involuntarily [become] the subjects of a front-page news story." Hence, the issue of public personage may remain a significant ingredient in the first amendment defamation cases. Thus, the Court rid the New York Times rule of the "public official" and "official conduct" shackles. Under *Hill*, the test hinges on whether the actionable expression concerns a matter of public interest. *Cantrell*, decided seven years later, did not elaborate on *Hill*, as the parties, on appeal, did not raise the issue. *See* Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 250–51 (1974) ("[T]his case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the . . . [*Hill*] standard . . . applies to all false-light cases.").

380 Time, Inc. v. Hill, 384 U.S. 374 (1966).

381 *Id.* at 388. The Court held that "[w]e have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. 'The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press].'" *Id.* (citing Winters v. New York, 333 U.S. 507, 510 (1948)).

possibility of false light claims being successful without proving impairment to reputation, from a strategic standpoint it would make sense to plead with her defamation claim. However, the concern with possible double recovery has rendered false light the least recognized and most controversial invasion of privacy tort.[382] Some states do not recognize it as a separate cause of action.[383] While California does recognize false light claims, Anna would be required to aver operative facts different from her defamation facts to form the basis of her false light action.[384]

2. Publication Of Private Facts

Unlike defamation or false light claims—which concern themselves with false expressions—publication of private facts actions involve the communication of *true* facts.[385] Anna could sue for the unprivileged publication of private, intimate facts not of legitimate public concern which, if revealed, would be highly embarrassing to a reasonable person.[386]

Prohibition on the publication of private facts is founded on the goal of protecting an individual's dignity and peace of mind, balanced against the public's right to know personal details about that person'ss life.[387] The private facts at issue need not only concern illegal or offensive matters—they may simply be facts that she reasonably believes are not for public consumption. Examples of private facts that were exposed and then vindicated in publication of private facts actions relate to a plaintiff's financial condition, medical information, sexuality, or sexual habits.[388]

Publicity of private facts must be sufficient "so that they may be considered disclosed to the public at large, or to so many persons that the matter is likely to become one of public knowledge."[389] Disseminating private facts within one's closest social circles likely visits greater injury than placing private information about another into the general public; thus publication to co-workers, neighbors, church

382 RESTATEMENT (SECOND) OF TORTS § 901 (AM. LAW INST. 1977).

383 6 AM. JUR. 3D *Proof of Facts* § 585. There is some disagreement amongst different jurisdictions regarding the need in a false light invasion of privacy action to prove the element of **"**actual malice**"** in the case of a private figure, and the need to prove special damages, issues that arise in an action based on defamation. *Id.* § 11.

384 *See, e.g.,* McClatchy v. Superior Court of Fresno Cty., 189 Cal. App. 3d 961, 965 (1987); Selleck v. Globe Int'l, Inc., 166 Cal. App. 3d 1123 (1985); Kapellas v. Kofman, 1 Cal. 3d 20, 35 n.16 (1969).

385 RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

386 *See, e.g.*, Catsouras v. Dep't of Cal. Highway Patrol, 104 Cal. Rptr. 3d 352, 361 (2010) (citing Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 478 (Cal. 1998).

387 SMOLLA & NIMMER, *supra* note 223, § 24:5.

388 *Id.*

389 *Id.*

colleagues, or one's peers has satisfied the publication prong of private fact actions.[390]

While private facts need not be distributed, for example, via newspaper or broadcast, there is no doubt that *Here, My Dear* meets the publication element of this privacy tort. One who has proven unprivileged publication of private facts may recover damages for any mental suffering, embarrassment, and humiliation that results.[391] Because the tort vindicates the act of unauthorized publication of private facts, truth or substantial truth are not viable defenses. Aside from consent, newsworthiness and fair comment are the two most common responses to such claims.[392] Facts that are already a legitimate topic of public consumption cannot be the basis of an unprivileged publication action.[393]

A determination of the private nature of the facts considers the social value of the information, the extent of the intrusion and whether the plaintiff voluntarily placed herself into the public eye. Consequently, the strength of Anna's claims will largely turn on her legal status and/or the newsworthiness of the Gaye divorce. As a consequence, Anna might claim that her divorce and details of she and Marvin's life ("after fighting, we're making love,"[394] "take a bath in milk"),[395] or their arguments ("we were over Gwen's/and we were trying one more time to make amends")[396] are the type of private facts not suitable for publication. If these facts revealed are "so offensive as to shock the community's notions of decency,"[397] Marvin would be found liable for publication of private facts.

3. Appropriation of Another's Name or Likeness and Right of Publicity

Name or likeness appropriation law exists to protect an otherwise private person's dignitary interests that are infringed through unwanted identity exploitation.[398] Anna's prima facie case for appropriation of her

390 *Id.*

391 *Id.*

392 RESTATEMENT (SECOND) OF TORTS § 652F (AM. LAW INST. 1977).

393 SMOLLA & NIMMER, *supra* note 223, § 24:5; *see, e.g.*, Diaz v. Oakland Tribune, Inc. 139 Cal. App. 3d 118, 131 (1983).

394 GAYE, *supra* note 114.

395 GAYE, *supra* note 125.

396 GAYE, *supra* note 114.

397 Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 541 (1971).

398 The Restatement defines the tort as: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977). Infringement upon one's right of publicity occurs when another leverages the "commercial value of a person's identity . . . for purpose of trade." *Id.* § 652C (Case Citations). A right of publicity violation impinges upon or leverages "reputation, prestige, social or commercial standing, public interest, or other values of

name or likeness would claim that, without permission, Marvin used some aspect of her identity or persona in a way that makes her identifiable, and caused her some mental or physical injury.[399] That identity or persona can be her name (even only her first name), voice, photograph, face, or unique performance or attribute.

The "right of publicity" is a related tort. In California, right of publicity is both a common law and statutory right under section 3344 of the California Civil Code.[400] A common law action arises when a defendant trades upon the identity, name, or likeness of another for his own benefit.[401] The statute specifies proscriptions on the use of name, voice, signature, photograph, or likeness.[402] At bottom, right of publicity protections, statutory or otherwise, seek to bar the unprivileged exploitation of another's persona.[403]

Appropriation of name and likeness and right of publicity law have a common historical basis; as a result, the two torts have sometimes been confused with each other. Under common law, celebrities were accorded remedy because they could demonstrate commercial value to their identity.[404] Private, non-celebrity plaintiffs, whose name and persona carried no commercial value, were challenged to identify damages arising from unauthorized appropriations.[405] It was further recognized that regardless of the commercial or non-commercial purpose of the unauthorized exploitation of another's identity, the exploitation is the fundamental concern.[406] Because liability attaches regardless of any economic purpose behind the use, "appropriation of a name or likeness" for one's own benefit best captures two torts.[407]

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the plaintiff's name or likeness." *Id.* § 652C cmt. c; *see also* 1 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY & PRIVACY § 5:63 (2d ed. 2017); James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 641 (1973); Harold Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 555 (1960).

399 *Compare* Eastwood v. Superior Court, of California, 149 Cal. App. 3d 409 (1983) *and* Daly v. Viacom, Inc., 238 F.Supp.2d 1118 (N.D. Cal. 2002).

400 Daly v. Viacom, 238 F.Supp.2d at 1122.

401 *See, e.g.*, White v. Samsung, 971 F.2d 1395, 1397 (9th Cir. 1992); CAL. CIV. CODE § 3344(d) (West, Westlaw through 2017 Sess.).

402 CAL. CIV. CODE § 3344(d) (West, Westlaw through 2017 Sess.).

403 *Compare* RESTATEMENT (SECOND) OF TORTS § 652C, cmt. s, a–b, illustrations 1–2 (AM. LAW INST. 1977) *and* RESTATEMENT (THIRD) UNFAIR COMPETITION § 46, cmt. b (AM. LAW INST. 1995). The distinction between the right of publicity and privacy actions, however, relates primarily to the nature of the harm suffered by the plaintiff. Similar substantive rules govern the determination of liability. *Id.*

404 Robert T. Thompson III, *Image As Personal Property: How Privacy Law Has Influenced The Right Of Publicity*, 16 UCLA ENT. L. REV. 155, 160–163 (2009).

405 *Id.*

406 *Id.*

407 In what has been erroneously considered a milestone in right of publicity jurisprudence, *Zachinni*, is in fact about copyright infringement. *See* Zachinni v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977). Hugo Zacchini was the star of an act during which he was propelled out of a cannon. *Id.* at 563. The "human cannonball" was performing in Cleveland, Ohio, in a fenced-in

Compensatory,[408] punitive, and special damages may be awarded to Anna if she suffered any mental or physical harm that might ensue from the non-privileged appropriation of her name of likeness.[409]For exploitation of her name for commercial benefit, her damages would be measured by the injury to the value of her identity and persona, and any financial gains Marvin might have amassed as a result of the misappropriating her name.[410] In California, statutory remedies are cumulative and in addition to other remedies lawfully available.[411]

However, as with other privacy causes of action, defenses of newsworthiness and fair comment would be available to Marvin. Moreover, creative works such as *Here, My Dear* in particular enjoy heightened First Amendment protection against misappropriation and right of publicity claims.[412] A court must be satisfied that *Here, My Dear* contains significant transformative elements, does not actually mislead listeners that Anna has endorsed it, and does not derive its value primarily from Anna's notoriety. These conditions, reviewed following what is known as the *Rogers* Test, if met, would preclude a defendant's liability under a misappropriation for commercial benefit claim. [413]

area, surrounded by grandstands at the local fairground. *Id.* In late August 1972, a reporter and broadcaster attended the show. The reporter had a small movie camera. Zacchini asked him not to film, but the reporter came back the next day and did. *Id.* at 563–64. On its newscast that evening, the news program aired his act—*the entire act*. Zacchini sued, claiming that the broadcast station "showed and commercialized the film of his act without his consent," and that airing the fifteen-second performance "was an unlawful appropriation of plaintiff's professional property." *Id.* at 564. In *Zacchini*, the issue was whether the respondent immune from charge of right of publicity on the basis of a newsworthiness privilege or alternatively, whether Zacchini was obligated to prove that the broadcaster acted with constitutional malice. The Supreme Court answered no to both questions and held the broadcaster liable for the economic injury Zacchini sustained. *Id.* 576, 579. What made *Zacchini* not a right of publicity case, and the infringement not like other precedent was the type and degree of appropriation that took place. In *Zacchini*, the Court was not confronted with facts similar to *Hill*, *N.Y. Times*, *Rosenbloom*, *Gertz*, and *Firestone*—which all involved the reporting of *events*. In *Zacchini*, the broadcaster did not just use his name, a photograph, or even an excerpt of the act, but the *entire act* for which he was ordinarily paid. *Id.* at 575.

408 4 NEIL M. LEVY, ET. AL, CALIFORNIA TORTS, §§ 46.05, 46.06[4][b] (Matthew Bender, ed., 2017).

409 MCCARTHY, *supra* note 398, § 3:2. A plaintiff may recover for the loss of exclusive use of the identity so appropriated. RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).

410 *See, e.g.*, Zim v. Western Publ'g Co., 573 F.2d 1318 (5th Cir. 1978); Ainsworth v. Century Supply Co., 693 N.E.2d 510 (Ill. App. Ct. 1998) (damages will be presumed if someone infringes on another's identity). Establishing that it is likely to cause damage is sufficient once the other elements of the cause of action have been proven. *See* MCCARTHY, *supra* note 398, § 3:2; *see, e.g.*, Mattel, Inc. v. MCA Records, 296 F.3d 894, 901–02 (9th Cir. 2002); E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1099–01 (9th Cir. 2008).

411 CAL. CIV. CODE § 3344(d) (West, Westlaw through 2017 Sess.).

412 *Id*. ($750 basic damages); *see, e.g.*, Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 409 (2001).

413 Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989). A trademark and intellectual freedom case over the movie, *Ginger and Fred*, established the *Rogers* test for protecting uses of names and identities in artistic titles. Actress Ginger Rogers, citing 15 U.S.C. § 1125(a) of the Lanham Act, claimed screenwriter Frederico Fellini, the movie's producers, and the movie's distributor traded

C. *NEGLIGENT OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS*

Negligent or intentional infliction of emotional distress torts are exclusively concerned with mental and physical injury that may arise out of a defendant's conduct.[414] Because NIED and IIED can arise from harmful speech, they are often pled along with communication torts subsumed under defamation and invasion of privacy claims.[415]

In California, a NIED claim is not an independent tort but falls within the general tort of negligence. Thus, recovery is determined under the elements of duty, breach of duty, and injury.[416] If it was reasonably foreseeable to Marvin that his conduct would cause the physical or mental harm,[417] general damages in the form of pain and suffering would be available to Anna, as would actual, compensatory, and/or punitive damages.

IIED subjects one to liability when "extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another."[418] Courts have emphasized that mere insult, indignity, annoyance, or threats without aggravation is not enough to sustain an IIED claim. The conduct 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."[419] Emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry.

As mentioned earlier, NIED or IIED actions between spouses have not been absolutely rejected. Should Anna be successful in making out a NIED or IIED claim, punitive damages would be unavailable under the

on her name for their own economic value. The Second Circuit adopted a test that looks first at whether the name or likeness use is "wholly unrelated" to the content of the work, or "explicitly misleads" consumers into believing that Rogers endorsed the work. *Id.* at 999, 1004. The court found that the title was clearly related to the content of the movie and was not a disguised advertisement for the sale of products or services, affirming the District Court's summary judgment in favor of the defendants. Other circuits, including the Ninth Circuit, have adopted what is now called the *Rogers* test in cases involving expressive works. *See, e.g*., Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1110 (9th Cir.1992) (celebrity suit against snack manufacturer for unauthorized use of his distinctive voice in a commercial).

414 RESTATEMENT (SECOND) OF TORTS § 46f (AM. LAW INST. 1977). *Compare* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) *and* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987).

415 DAVID L. HUDSON, JR., LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH § 5:14 (2012).

416 *See* Wong v. Jing, 189 Cal. App. 4th 1354, 1377 (2010).

417 Molien v. Kaiser Foundation Hosps., 27 Cal. 3d 916, 924–31 (1980) (plaintiff need not allege physical injury).

418 RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1977) (A defendant is liable for any bodily harm that might result to others to liability for such emotional distress, and "if bodily harm to others results from it, for such bodily harm.").

419 *Id.* at cmt d.

latter as duplicative; the "outrageous quality of the defendant's conduct form(s) the basis" of IIED actions. Marvin might also benefit from the absolute and qualified privileges (and their caveats) recognized with defamation actions (e.g., truth, fair comment). His good faith heeding of his lawyer Shaw's assurances that he would not be liable for any harms to Anna that might flow from *Here, My Dear* could stand as an affirmative defense.[420]

D. *CONCLUSION*

Each of Anna's possible claims—libel, false light invasion of privacy, publication of private facts, appropriation of another's name or likeness of another and right of publicity, and negligent and intentional infliction of emotional distress—find some factual substantiation in *Here, My Dear*. The question becomes one of degree because Anna would need to prove each claim with clear and convincing evidence.[421] While there would seem to be sufficient evidence of Marvin's recklessness, if not malice, in telling his "story,"[422] his defenses are compelling. While all of her claims are cognizable, success upon them is not assured. That fact aside, Anna's status, and the newsworthiness of their divorce are what may, in part, doom Anna's chances to prevail on any claim.

V. ANNA'S LIKELIHOOD OF SUCCESS AGAINST MARVIN FOR HERE, MY DEAR

Where a court might fall on the public-private figure and newsworthiness-non-newsworthiness issues could be determinative. As a private plaintiff, Anna would "only" need to demonstrate that Marvin acted negligently in publishing *Here, My Dear* under all but her IIED claim. Moreover, the burden would lie with Marvin, not Anna, to establish the truth of the matters asserted under her defamation and false light claims. Anna would still bear the higher burden of disproving newsworthiness and proving constitutional actual malice under her NIED claim if she were to claim presumed or punitive damages flowed from *Here, My Dear*'s release. Nonetheless, under each of her causes of

[420] *See generally* Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, CARDOZO L. REV. DE VOVO 300 (2010) (discussing *Snyder v. Phelp*s and intentional infliction of emotional distress tort).

[421] RESTATEMENT (SECOND) OF TORTS § 613 cmt. f (AM. LAW INST. 1977). Most jurisdictions demand clear and convincing evidence; others require proof by a "preponderance of the evidence." SMOLLA & NIMMER, *supra* note 223, § 23:7.50. However, there is an ongoing debate over whether a plaintiff's burden of proving falsity includes a requirement that falsity be proven with clear and convincing evidence or merely a preponderance of the evidence. *Id.* Moreover, burden of persuasion may vary depending on whether she is a private person or public figure, or whether her divorce from Marvin was of legitimate public interest or concern.

[422] RITZ, *supra* note 1, at 235.

action, Anna would at least be entitled to some recovery without a need to demonstrate actual malice.

In contrast, Marvin would contend that Anna is a public figure, and their divorce proceedings were of legitimate public interest. If Marvin prevailed, Anna would be held to the highest burdens of proof and fault. The burden would also be hers to establish the falsity of Marvin's defamation or false light claims. Actual malice on the part of Marvin would also be hers to demonstrate under every claim in order to prevail. Under this public plaintiff/public matter scenario, Anna would be virtually unable to recover under any emotional distress claim. As we will see, Anna's likelihood of success even under her ideal legal framework is doubtful.

A. *ANNA IS A PRIVATE FIGURE. . .*

Anna's status is certainly contestable. On one hand, a case can be made that by 1976, Anna was a private figure. Her stature was not so pervasive such that her life invited comment or conjecture—nor was she so esteemed as to be called upon to opine on events of the day. While well-known in the music industry and the celebrity set early on, by the mid-70s, Anna's herself was of modest renown. Interestingly, *Firestone*, decided in the year she filed for divorce, makes a strong supporting argument for Anna as a private person.[423]

To draw upon *Firestone*, the fact that she initiated divorce proceedings should not be a factor to weigh in any determination of her public status.[424] As the *Gertz* decision made clear, those who have been thrust into the public eye through the engagement of legal processes do not cede their private persona to any First Amendment speech analysis.[425] Rather than actively engaging or initiating a public debate, Anna's *People* magazine interview *in response to* the release of *Here, My Dear* could be best described as pulling her, involuntarily, into the spotlight.

On the other hand, Anna, at least, could be characterized as a limited purpose public figure. As the sister of an industry titan and wife of a musical icon, she was doubtlessly well-known in the music industry. Yet her renown first emerged independently, out of her career as a music impresario. As the former owner of her record label, and as a songwriter herself,[426] Anna did occupy a realm of celebrity, albeit perhaps a narrow one.

The counterargument would be that her self-made music enterprise

[423] Time, Inc. v. Firestone, 424 U.S. 448 (1976).
[424] *Id.* at 487.
[425] Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).
[426] Time, Inc. v. Firestone, 424 U.S. 448 (1976).

was in her distant past. After dissolving her record label in 1978, Anna's fame was more than anything the product of being Berry's sister and Marvin's wife. While Anna was highly engaged socially at the time of her divorce, the most compelling case would be that Anna Gordy, like Mary Alice Firestone, was a private figure.

B. . . .*BUT THE DIVORCE AND ITS DETAILS WERE NEWSWORTHY*

A conclusion as to the newsworthiness of Marvin and Anna's marital strife potentially shifts any legal advantage Anna would warrant as a private figure. Details of the Gaye's sex life, marital woes, and the fact that she filed for divorce seem to be the type of private facts which should be shielded from public view. The *Firestone* Court addressed this newsworthiness issue as well.[427] The majority felt that prurient curiosity that attends to reporting on the lifestyles of the rich and famous did not rise to a subject of legitimate public interest it could sanction.[428] Moreover, were it to decide otherwise, it could open the privacy floodgates were the Court to hold that a person's initiation of divorce action—legally required and a matter of public record—would convert divorce proceedings into a de facto matter of public interest.[429] The *Firestone* Court's reasoning supports a claim that the Gaye divorce should not be a matter of legitimate public interest or concern.

Because *Hill* did not rule that the details of what the family endured was not a topic of legitimate public interest, that decisiondoes not help Anna. We can be reasonably certain that courts would find that one's conduct in one's bedroom ("she took me home and made love to me")[430] or bathroom ("take a bath in milk"),[431] if they are true, are also private facts. Even when matters relate to persons who are of legitimate public interest, certain private facts should never be publicized. But for a private person, the argument against newsworthiness is even more compelling. Ultimately, the fact that those aspects of Anna's private life might, as a matter of law, be newsworthy is likely to rest upon a more obscure reason: a lushly orchestrated, aching prelude to *Here, My Dear* that closes Marvin's 1973's *Let's Get It On* album.

"Just To Keep You Satisfied" closes *Let's Get In On*, and unlike the rest of that release, it is not a paean to Jan. It is an extraordinary elegy to the end of Anna and Marvin's relationship. Out of a swell of

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[427] *Firestone*, 424 U.S. at 488, n.1.

[428] *Firestone*, 424 U.S. at 450.

[429] *Id.* at 454 ("Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public.").

[430] GAYE, *supra* note 106.

[431] GAYE, *supra* note 125.

strings, Marvin opens with "You were my wife, my hopes and dreams / For you to understand what this means—I shall explain." [432] He talks of standing the "jealousy, all the bitchin' too."[433] Where once they had a love that "set [his] . . . soul on fire," the pain she caused was too much to bear: "It's time for us to say farewell."[434] As he closes he sings, "It's too late for you and me, much too late for you to cry," and then whispers "oh well, all we can do—is that we both can try to be happy."[435] The kicker: Anna is credited as a co-writer.[436] The song was originally recorded in 1969 by a fledging Motown group, the Monitors, and then again in 1971 by a more successful "second tier" Motown act, the Originals.[437] Although never released as a single, Anna did receive payments for the song's appearance on those works.[438]

Anna's work as a songwriter thus yields a pivotal twist. In "Just To Keep You Satisfied," released just one year before she filed for divorce, Anna openly discusses her marital woes. By placing a song about the end of her marriage with Marvin into the public sphere, Anna consented to inviting public exposure. In short, Anna made *Here, My Dear*, and the details of her relationship with Marvin, a matter of public interest.

VI. APPLYING THE LAW—THE TORTS

Examining Anna's claims through the lens of a private plaintiff litigating matters that are of legitimate public interest or concern makes it plain that, but for her false light action, her claims would largely be without merit.

A. *Libel*

Anna would assert that every defamatory statement Marvin directs toward her is false and injurious. Marvin accuses her as having "lied" on the witness stand. She would claim his charges that she is the "possessive" and "jealous"[439] type are false. She would assert that she never tried to take his child(or, as Marvin sings, used "this son of mine to keep me in line").[440] She would further aver that his claims that she

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[432] MARVIN GAYE, *Just To Keep You Satisfied*, *on* LET'S GET IT ON (Tamla 1973). With Marvin, Anna also co-wrote "God Is Love" and "Flyin' High (In the Friendly Sky)," which were featured on *What's Going On*. *See* GAYE, *supra* note 21.

[433] GAYE, *supra* note 432.

[434] *Id.*

[435] *Id.*

[436] *Id.*

[437] "Just To Keep You Satisfied," Wikipedia, https://en.wikipedia.org/wiki/Just_to_Keep_You_Satisfied

[438]Conversation with Mary Jo Morgan, former Associate Secretary, Motown Corporation, Mary Jo Moore.

[439]GAYE, *supra* note 113.

[440]*Id.*; GAYE, *supra* note 100.

"plucked me clean" and that it is her "flair for style"[441] compels her to "take a million dollars to part"[442] are similarly defamatory. "You said 'You can leave, but is going to cost you,'"[443] is a more damning type of per quod defamatory statement, as the quotation marks suggest that Anna threatened to extort Marvin—a more intentional, maliciously defamatory act.

Marvin's first line of defense would be that nothing he said constituted actionable defamation. Indeed, several arguably defamatory statements on the album are not provably false. Marvin's accusations of Anna as "possessive," "jealous,"[444] and having a "flair for style"[445] sounds like creative hyperbole common to storytelling. Even though the terms can be interpreted as stating actual facts about Anna, the terms are not provably false, and thus would not likely actionable. Similarly, saying Anna "plucked" Marvin "clean" and tried to "break" him is nothing more than the use of figurative language to describe what Marvin perceived happening in divorce proceedings.[446] As a matter of law, Anna's claims on these terms would not likely make it past the motion to dismiss stage.

Marvin's second line of defense would be that his claims that Anna used Marvin III as a pawn, wanted a million dollars and attempted to turn him into the police were true (or substantially true), and/or were taken verbatim from his divorce proceedings (provided the records were public). It was true that Anna asked for a million dollars as a divorce settlement.[447] Anna did, in fact, seek a bench warrant for Marvin's arrest for failure to pay child support,[448] and sought sole custody of their child.[449] If sufficiently shown, those statements would be protected.

As a third line of defense, Marvin would argue that much of what he said constituted fair comment on a matter of public interest. Marvin's post-release description of *Here My Dear* as his "story"[450] suggests that the album presents his perspective and nothing more. Marvin would then assert that his claims about Anna as "possessive," "jealous," and having a "flair for style," or that she "plucked him clean" and tried to "break" him, is protected opinion.

However, because opinion is not absolutely protected, some of Marvin's accusations might fall outside of summarily privileged

[441] GAYE, *supra* note 113.
[442] GAYE, *supra* note 112.
[443] GAYE, *supra* note 114.
[444] GAYE, *supra* note 113.
[445] *Id.*
[446] *Id.*
[447] RITZ, *supra* note 1, at 233–34.
[448] *Id.* at 235.
[449] *Id.*
[450] RITZ, *supra* note 1, at 235.

exceptions. The most viable defamation claim for Anna would be Marvin's imputation that she committed perjury on "When Did You Stop Loving Me, When Did I Stop Loving You."[451] On that point, *Milkovich* is instructive. *Milkovich* arose when Michael Milkovich bought a libel suit against the Lorain News-Herald. Milkovich was a Maple Heights High School wrestling coach whose team was involved in wrestling meet altercation with Mentor High School.[452] At a subsequent hearing convened by the state athletic association, Milkovich testified about the altercation. J. Theodore Diadiun, a News-Herald journalist, who attended the meet, also attended the hearing and subsequently wrote a story that appeared in the paper the day after the hearing.[453]

Diadiun's column was headlined "Maple beat the law with the 'big lie,'" beneath which appeared Diadiun's photograph and the words "TD Says."[454] The headline on the page continuing the story read "Diadiun says Maple told a lie."[455] In his suit, Milkovich alleged that the headline of Diadiun's article and several passages accused him of the crime of perjury—an indictable offense in Ohio—and libel per se. The Supreme Court agreed. Yet in doing so, the Supreme Court established no special First Amendment protection for "opinion."[456]

Applying that rule, the majority concluded that the plain import of Diadiun's assertions was that Milkovich, inter alia, committed the crime of perjury in a court of law. Diadiun did not use "the sort of loose, figurative, or hyperbolic language that would negate the impression" that he was accusing Milkovich of perjury.[457] Nor did the article's "general tenor negate" the impression. Moreover, the connotation that Milkovich committed perjury was "sufficiently factual to be susceptible of being proved true or false."[458] The Court concluded that Diadiun's statements in issue were "factual assertions as a matter of law" and not constitutionally protected as Diadiun's opinions.[459]

Statements that imply a provably false fact, or those which rely upon stated facts that are provably false are not "opinion" and thus not

[451] GAYE, *supra* note 112.
[452] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
[453] *Id.*
[454] *Id.*
[455] *Id.*
[456] In fact, the majority saw no need to. In the majority's reasoning, the *Bresler–Letter Carriers–Falwell* line of cases already provided protection for statements that cannot "reasonably [be] interpreted as stating actual facts." *Id.* at 20. The speech protected under the First Amendment prior to *Milkovich* was still protected after it—the Court had simply reversed the order of analysis, asking first whether the speech at issue was "factual" rather than whether it should be characterized as "opinion." *Id.*
[457] *Id.* at 21.
[458] *Id.*
[459] *Id.*

constitutionally protected. [460] Consequently, if Anna could prove that she never said those words of extortion ("that young girl is gonna cost you"),[461] the other most viable libel claim Anna would have is when Marvin sings that Anna "lied."[462] Anna's challenge, however, would be to convince a trier of fact that that *per se* defamation could be reasonably interpreted to mean that Marvin accused her of lying while under oath at a hearing or deposition, and not just in some general sense. However, for his lyrics which could only be described as rhetorical hyperbole or opinion, a court would likely find them either too subjective or vague to be actionable.

B. *False Light Invasion of Privacy*

Marvin, Anna would claim, knowingly placed her in a false light through embellishment or, as he and Shaw claim, as the co-subject of an anonymized fictional account of a marriage gone bad. The tone and tenor of *Here, My Dear*'s, characterizes Anna shrewd, rapacious, and vengeful. The ascriptions could reasonably be seen as highly offensive. To prevail, the statements upon which Anna based her false light claim would have to be different from those she proffers to support her defamation action. A California court would not likely allow Anna to simultaneously maintain a defamation and a false light claim based on the same set of facts.[463]

The problem for Anna on her false light claim is that there are no other references to her on *Here, My Dear* which are offensively derogatory but not necessarily defamatory. She would be compelled to pursue one cause or the other. In consideration of the relatively easier burdens of persuasion, Anna's most viable claim would have been an action for false light. California law would also require Anna to prove that Marvin made his false light statements with actual malice. Given Marvin's statements after *Here, My Dear*'s release, a reasonable fact finder might conclude that Marvin depicted Anna in a false light with actual malice.

C. *Publication Of Private Facts.*

In no event could Anna successfully claim that her divorce from Marvin was a private matter. Ultimately fatal to any privacy claim,

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[460] *Id.* at 18–21. The issue as to whether the challenged statement is one of fact or opinion is still a jury question.

[461] GAYE, *supra* note 114.

[462] GAYE, *supra* note 112 (e.g., "you've said bad things and you've lied").

[463] *See, e.g.*, McClatchy Newspapers, Inc. v. Superior Court of Fresno Cty., 189 Cal. App. 3d 961, 965 (1987); Selleck v. Globe Int'l Inc., 166 Cal. App. 3d 1123 (1985).

however, is Anna's contribution to *Just To Keep You Satisfied*.[464] Moreover, even if Anna had no hand in that composition, she still would not likely prevail on her privacy claim.

News of the Gaye divorce was well-known prior to *Here, My Dear*'s release. By the tort's own terms, there can be no cause of action when facts at issue are already known to the public. Granted, Anna could then contend that while their divorce may have been of legitimate public interest, *details* of the divorce, or other ostensibly private information disclosed on *Here, My Dear* was off-limits. Statements that Anna "took me home and made love to me,"[465] describing her as taking "a bath in milk," "laying on satin sheets," and "making love all night long,"[466] if true, are indeed private facts.[467] Even so, it is near impossible to envision that a trier of fact would find disclosure of such facts unreasonably offensive.

D. *Appropriation of Anna's Name or Likeness for the Marvin's Benefit*

Anna's appropriation of name or likeness claim would not likely succeed either. First, *Here, My Dear* does not use an image of Anna, nor does it otherwise visually depict her likeness. The female statuary, and the hand reaching over the Judgement board are symbolic representations of Anna—which can never be the basis of a right of publicity or appropriation of likeness claim.[468] While Anna could make a case for the unauthorized use of her name, it is impossible to imagine how its use in "Anna's Song" causes her injury as a private person. Unlike so much else about *Here, My Dear,* "Anna's Song" is actually quite flattering—making it difficult to establish how it may have caused actionable mental anguish.

Nor does Marvin's use of her name impose right of publicity liability. For Anna to claim that Marvin leveraged the value of her social and commercial standing for his financial benefit would be to claim celebrity status, inconsistent with the private figure status that she would want to use to frame her other claims.[469] In any event, *Here, My Dear*'s fleeting use of her name passes muster under the *Rogers* test: the title is relevant to the song lyrics and Marvin does not mislead the listener as to who created the song.

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[464] Credits, MARVIN GAYE, LET'S GET IT ON (Tamla 1973); Credits, MARVIN GAYE, JUST TO KEEP YOU SATISFIED (Tamla 1973) (Written by Marvin Gaye, Elgie Stover, Anna Gordy Gaye).

[465] GAYE, *supra* note 106

[466] GAYE, *supra* note 125.

[467] Samantha Barbas, *When Privacy Almost Won:* Time, Inc. v. Hill, 18 J. CONST'L LAW 505 (2015). But *Hill* substantially diminished privacy rights; today it is difficult if not impossible to recover against the press for the publication of non-defamatory private facts. *Id.* at 589.

[468] Lind, *supra* note 201, at 77.

[469] CAL. CIV. CODE § 3344(d) (West, Westlaw through 2017 Sess.).

Albeit limited, artists have First Amendment rights to use the name and likeness of celebrities for their own commercial purposes, especially in relationship to a newsworthy topic. As an imagined account of events in Marvin and Anna's marriage, a court would likely conclude that Marvin was within his First Amendment rights to invoke Anna's name in this fictional or semi-fictional work.[470] Anna's role in publicizing her marital strife would also compromise her appropriation claims.[471]

E. *Anna's Distress Claims*

Assuming no outright rejection of her claims as contrary to anti-heart balm statutes, the prospect of Anna's recovery under NIED or IIED would be equally bleak. In alleging the same facts which support her defamation claim as NIED and IIED actions, a court would likely be skeptical toward Anna's attempt to use her distress claims as alternative theories of recovery.[472] However, Anna's NIED claim would fail fundamentally because it could not withstand the non-newsworthiness-actual malice requirement. Moreover, *Here, My Dear* does not remotely approximate the types of cases in which IIED liability has been successfully established.[473]

Aside from distress torts as end-runs around anti-heart balm statutes which might lead a court to dismiss Anna's distress claims at the outset, NIED and IIED claims are especially problematic when plaintiffs seek to recover for distressing *speech* rather than for *conduct*. In a variety of pure-speech contexts, the Supreme Court has found that the First Amendment's demand for the free exchange of ideas trumps the interests in compensating for any emotional distress.

Hustler was the first Supreme Court case to establish a First Amendment layer to IIED claims. Falwell, a public figure, had sued for libel, invasion of privacy and IIED.[474] With only the latter claim surviving, the Court was bound to determine the constitutional limitations of a state's interest in protecting public figures from intentional emotional distress. Writing for the majority, Chief Justice Rehnquist, found that, standing alone, the "outrageousness" standard was constitutionally insufficient because there has been a "longstanding

[470] *See, e.g.*, Hicks v. Casablanca Records, 464 F.Supp. 426 (S.D.N.Y. 1978); Guglielmi v. Spelling Goldberg Prods., 603 P.2d 454 (Cal. 1979).

[471] *See, e.g.*, ETW Corp. v. Jireh Publishing, Inc., 99 F. Supp. 2d 829 (N.D. Ohio 2000); Parks v. LaFace Records, 76 F. Supp. 2d 775 (E.D. Mich. 1999).

[472] In both *New York Times* and *Gertz*, the Supreme Court disallowed the plaintiffs to take advantage of the defendants' lessened First Amendment protections as applied to their non-defamation claims. *See* SMOLLA, *supra* note 243, § 11:33.

[473] *See, e.g.*, Molko v. Holy Spirit Ass'n, 46 Cal. 3d 1092 (1988) (brainwashing as part of "forced" recruitment and indoctrination in a church); Aweeka v. Bonds, 20 Cal. App. 3d 278 (1971) (landlord's retaliatory actions).

[474] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48–9 (1988).

refusal to allow damages to be awarded just because the speech in question may have an adverse emotional impact[.]"[475]

Rehnquist noted the critical role of parody in political and public debate. He acknowledged that Hustler's parody was "at best a distant cousin of the political cartoons" scribed by Thomas Nast and other political illustrative satirists"and a rather poor relation at that."[476] Yet, without a principled mechanism to distinguish the Hustler parody and Nast satire, the Court was loathe to draw a bright line that would risk chilling such traditionally valuable speech.[477]

Rehnquist's *Falwell* precepts were most recently affirmed in *Snyder* when Roberts asserted that "regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech."[478]

Intentionally injurious speech is by design, outrageous. That same conclusion was acknowledged in *Snyder*, which in addition to extending *Hustler*'s rule to speech directed toward private persons, also extended the constitutional malice privilege to distress torts based on any newsworthy matter. "Outrageous" opinion on such matters—even if it is directed toward a private party—is not actionable under an intentional infliction of emotional distress theory absent falsity and actual malice.[479] While *Here, My Dear* may have been hurtful, it is not likely that Marvin's indictments of Anna would cause a reasonable person to exclaim "Outrageous!"[480]

VII. CONCLUSION

It has been said that "autobiography is probably the most respectable form of lying."[481] In telling "my story, not hers,"[482] *Here, My Dear* operates as a gendered text, where we see how Marvin's self-doubts informed his relationship with Anna, and manifested themselves in his account-giving. Any masculine authority wielded on *Here, My Dear*—to the extent it is wielded at all—is not asserted through any lyrical or vocal foregrounding. As a result, those expressions we might expect as male mourning proxies—verbal aggression, acting out, derisive sexualization of the spouse—are not evident in Marvin's *Here, My Dear* performance. Instead, we hear Marvin as a blameless man

475 *Id*. at 55.
476 *Id*.
477 *Id*.
478 Snyder v. Phelps, 580 F.3d 206, 218 (4th Cir. 2009); Andrew Merkins, *Distressing Speech After* Snyder*—What's Left Of IIED?*, 107 NW. L. REV. 1000 (2013).
479 Snyder v. Phelps, 580 F.3d 206, 218 (4th Cir. 2009).
480 Merkins, *supra* note 478, at 1006.
481 West, *supra* note 19, at 932 (citing biographer Humphrey Carpenter).
482 RITZ, *supra* note 1, at 235.

felled by Anna, basking in self-pity.

In general, artists are ceded a degree of artistic, literary or poetic license to engage in expression which often comes from a very personal place—in Marvin's case, a bitter, acrimonious divorce. However, artistic license is not a blank check. *Here, My Dear* fell well short of, but flirted with inflicting very real, actionable harms against Anna. Realizing the challenges to her success on any colorable claims is perhaps why Anna ultimately decided against filing the suit she publicly threatened. Ultimately, Anna's own role in publicizing their marital woes would likely prove fatal to all but her false light claims.

Here, My Dear remains one of the most fascinating accounts of a marriage deterioration ever put to music. From a legal perspective, *Here, My Dear*'s legacy rests in its balance of personal narrative and tortious harm. In its tale of marital strife, the album touches upon doctrine that defines the limits of free speech. *Here My Dear* blurs—but does not cross—the line between self-expression and tortious injury.