

TWILIGHT: THE FADING OF FALSE LIGHT INVASION OF PRIVACY

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INTRODUCTION

One hundred twenty years ago Samuel Warren and Lewis Brandeis sowed the first seeds of America's distinct privacy law in their groundbreaking treatise *The Right to Privacy*.¹ Through their work, the pair argued that the common law could, and should, "protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever[] their position or station, from having matters that they may properly prefer to keep private, made public against their will."² Seventy years later William Prosser penned his article *Privacy*, wherein he differentiated and cataloged what he deemed to be the various limbs of the legal sapling planted by Warren and Brandeis.³ In so doing, Prosser succeeded in grafting onto the law a new branch, which he termed "False Light in the Public Eye."⁴ Dimly conceived, Prosser claimed that this "form of invasion of privacy . . . consists of publicity that places the plaintiff in a false light in the public eye."⁵ Adopted by the American Law Institute (ALI) in the Restatement of Torts as "Publicity Placing Person in False Light,"⁶ this tort has faced near constant assault from scholars since its formal recognition.⁷ Just

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1. 4 HARV. L. REV. 193 (1890).

2. *Id.* at 214–15.

3. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

4. *Id.* at 398–401.

5. *Id.* at 398.

6. RESTATEMENT (SECOND) OF TORTS § 652E (1977). The tort will be referred to throughout this Note as either "false light invasion of privacy" or simply "false light."

7. *E.g.*, J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783 (1992); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364 (1989); Jeffrey Deutschman, Note, *Fellows v.*

ahead of the fiftieth anniversary of this tort's academic christening, a decision by the Supreme Court of Florida⁸ has cast further doubt on the continued viability of this troubled offshoot of privacy law. In *Jews for Jesus, Inc. v. Rapp*, Florida's highest court added its state to a list of jurisdictions that do not recognize the tort as part of their common law.⁹ Spurred by the holding in *Rapp*, this Note will press forward with the argument against a cause of action for false light invasion of privacy.

Part I of this Note provides general background by outlining the history and operation of the various underlying theories that comprise privacy law, with a special emphasis on false light; defamation will also be covered in brief. This Part also defines the particular conception of privacy that will be used throughout this Note. Part II presents a summary of the current arguments in favor of the continued recognition of false light followed by a rebuttal analyzing the inherent shortcomings of each defense. Part III offers a novel and untested argument against the tort followed by a few concluding remarks.

In particular, this Note first argues that the scope of the tort is wholly duplicative of the combined interests safeguarded by the law of defamation and the other branches of privacy law thereby depriving it of any independent *raison d'être*. Second, continued recognition of false light invasion of privacy may create an unwarranted chilling effect on free speech while providing little more than a source of mischief for plaintiffs who artfully pad their pleadings to intimidate defendants, bogging down courts in the process. Last, whatever gleam of independent justification may have once existed for the tort has long since faded as there has been a sea change in the way this country experiences privacy. This fundamental shift

National Enquirer, Inc.: *Turn Out the False Light, the Party's Over*, 5 ADELPHIA L.J. 95 (1987-89); Susan Hallander, Note, *A Call for the End of the False Light Invasion of Privacy Action as it Relates to Docudramas*, 15 SETON HALL J. SPORTS & ENT. L. 275 (2005); Bruce A. McKenna, Note, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113 (1979).

8. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098 (Fla. 2008).

9. *Id.* at 1100. The following states have also rejected Prosser's tort: Virginia, *WJLA-TV v. Levin*, 564 S.E.2d 383, 394 n.5 (Va. 2002); New York, *Costanza v. Seinfeld*, 693 N.Y.S.2d 897, 899 (N.Y. Sup. Ct. 1999), *aff'd in part*, 719 N.Y.S.2d 29 (App. Div. 2001); Texas, *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994); Massachusetts, *ELM Med. Lab. v. RKO Gen., Inc.*, 532 N.E.2d 675, 681 (Mass. 1989), *abrogated by* *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20 (Mass. 1990); Missouri, *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 480-81 (Mo. 1986); North Carolina, *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405, 411 (N.C. 1984).

renders false light not merely redundant but unrecognizable against the backdrop of modern privacy norms.

I.

A. “*The Right to be Let Alone*”

As the year 1890 drew to a close, legal scholars witnessed the publication of what many consider to be one of the most influential articles on any topic in American law.¹⁰ Combining pointed social critique with a creative jurisprudential brush,¹¹ the once and future Supreme Court Justice Louis Brandeis and his then-partner at law Samuel Warren argued that as “[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society,”¹² the time had come to acknowledge “the right ‘to be let alone.’”¹³ Borrowing heavily from the courts of England and Ireland—since “there was nothing resembling an explicit notion of privacy in tort law in 1890”¹⁴—*The Right to Privacy*, although “light on hard precedent,”¹⁵ argued eloquently for a law “[t]he general object [of which] is to protect the privacy of private life.”¹⁶

While some observers have detected an ulterior motive in the ostensibly altruistic and egalitarian notion of privacy espoused by Warren and Brandeis,¹⁷ the authors saw their treatise as a bulwark against the slackening of social norms and the growing impropriety of the media. In an oft-quoted passage, the attorneys unleashed a

10. See generally Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990*, 80 CAL. L. REV. 1133 (1992); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (1992); Prosser, *supra* note 3.

11. At least one other writer has commented on the “ingenious manner in which its authors drew on threads of past jurisprudence, constructing a legal concept . . . out of property doctrine, tort law, copyright law, and damage principles.” Bezanson, *supra* note 10, at 1134.

12. Warren & Brandeis, *supra* note 1, at 193.

13. *Id.* at 195. In fairness, Warren and Brandeis borrowed this catchy phrase from Judge Thomas M. Cooley’s earlier work, COOLEY ON TORTS 29 (2d ed. 1888).

14. Gormley, *supra* note 10, at 1345.

15. *Id.*

16. Warren & Brandeis, *supra* note 1, at 215.

17. Although the details are not clear, most agree that the article was born out of Warren’s personal distaste for the newspapers in Boston. See, e.g., Prosser, *supra* note 3, at 383 (alleging that when “the newspapers had a field day on the occasion of the wedding of a daughter . . . Mr. Warren became annoyed”). But see Gormley, *supra* note 10, at 1349 (“These stories, unfortunately, appear to be apocryphal. Warren’s daughter was only six years old at the time the privacy article appeared, making it unlikely that her wedding launched a thousand lawsuits.”) (citation omitted).

withering broadside against the newspaper industry and a public that seemed all too content with the rapidly shrinking sphere of solitude to which a man might still lay claim and the deleterious effects attendant thereto:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. . . . It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly downcast by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feelings. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.¹⁸

As the passage above reveals, *The Right to Privacy* is a product of its day.¹⁹ In the latter half of the 1800s there was a dramatic change in the form and substance of journalism in the United States. Technological innovations—Warren and Brandeis referred to “instantaneous photographs” and “other modern device[s] for recording or

18. Warren & Brandeis, *supra* note 1, at 196.

19. *See also* Bezanson, *supra* note 10, at 1133 (“The *Right to Privacy* w[as] a response to the encroachment of urbanization on rural values and institutions and an attempt to develop communicative norms from contemporary but threatened social conventions.”).

reproducing scenes or sounds”²⁰—coupled with a new business model and shifting societal demographics gave rise to “yellow journalism.”²¹ Moreover, the industrial revolution provided an influx of new readers into America’s major cities, who supplied the demand for this fashionable form of reporting.²²

Given that these massive changes in information technology and media consumption coincided with the beginning of the twentieth century, it would be tempting to characterize *The Right to Privacy* as a mournful ode to a bygone day, put to paper by a pair of curmudgeons unwilling and ill-equipped to deal with modern life. However, to dismiss the men as anachronisms, or their work as expressing an atavistic utopia, would be to overlook the relevance of privacy law, and their influence upon it, 120 years later.²³

B. *The Various Privacy Torts*

Initially adopted in 1939 as “Interference With Privacy,”²⁴ the principle underlying the beginnings of privacy law was inchoate at best. The First Restatement of Torts offered the following brief explanation: “A person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.”²⁵ Twenty-one years later, in an effort to provide a comprehensive overview of

20. Warren & Brandeis, *supra* note 1, at 195, 206.

21. *See generally* SIDNEY KOBRE, *THE YELLOW PRESS AND GILDED AGE JOURNALISM* (1964); FRANK LUTHER MOTT, *AMERICAN JOURNALISM, A HISTORY: 1690–1960* (3d ed. 1962).

22. As one author has pointed out, when

the United States entered the age of industrialism, the nation moved from a rural to an urban emphasis, producing a new working class which swarmed into the cities anxious to know about the new world around them . . . [and w]ith the growing market of barely-educated, immigrant, inquisitive masses in the large cities, newspapers . . . revamped the idea of the old penny press of the 1830s, seeking mass circulation.

Gormley, *supra* note 10, at 1350.

23. Although this paper puts aside any questions as to the wholesale value of privacy law, a few scholars have indeed questioned its general utility. For instance, one early commentator felt that “the concept of a right to privacy was never required in the first place, and that its whole history is an illustration of how well meaning but impatient academicians can upset the normal development of the law by pushing it too hard.” Frederick Davis, *What Do We Mean by “Right to Privacy”?*, 4 S.D. L. REV. 1, 23 (1959); *see also* Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); Dianne L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

24. RESTATEMENT (FIRST) OF TORTS § 867 (1939).

25. *Id.*

the law, Dean William Prosser authored *Privacy*,²⁶ wherein he laid out a taxonomy of the tort that was roughly sketched by Warren and Brandeis seventy years prior.

Prosser began by noting that the “law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . ‘to be let alone.’”²⁷ Described generally these torts are:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.²⁸

Although Prosser contends that the privacy torts are exclusive in nature,²⁹ they are in fact quite complementary at times, as will be shown in the proceeding subparts. Additionally, to more fully understand the arguments against false light it is necessary to appreciate the range of alternative claims that may be brought to bear against a defendant for invading the privacy of another. Accordingly, the torts of intrusion upon seclusion, publicity given to private life, and appropriation of name or likeness will be discussed in brief³⁰ followed by a more detailed explication of false light invasion of privacy.

1. Intrusion

The first of the privacy torts laid out by Dean Prosser involves an action that would “overlap, to a considerable extent at least, the action for trespass to land or chattels” in the sense that “there must

26. *Supra* note 3. In addition to being the reporter for the RESTATEMENT (SECOND) OF TORTS, *see infra* note 33, Prosser was the dean of the University of California, Berkeley Law School from 1948–1961. *See* Berkeley Law—Former Deans, <http://www.law.berkeley.edu/529.htm> (last visited Apr. 19, 2010).

27. Prosser, *supra* note 3, at 389 (citation omitted).

28. *Id.*

29. *See supra* note 27 and accompanying text.

30. The explanations provided, *infra* Parts I.B.1–3, are by no means comprehensive and are intended only to familiarize the reader with the most rudimentary facets of these torts, such that they may follow along more easily with the Note’s argument.

be something in the nature of prying or intrusion”³¹ into the private affairs of an individual that “would be offensive or objectionable to a reasonable man.”³² Building upon this general notion, the authoritative definition issued by the ALI³³ states: “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”³⁴ Courts in turn have adopted this formulation with relative uniformity.³⁵ A particularly instructive *précis* offered by the Supreme Court of California in *Shulman v. Group W Productions, Inc.*³⁶ explained that:

Of the four privacy torts identified by Prosser, the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an “invasion of privacy.” It encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying.³⁷

As will become evident in the following subparts, this form of invasion of privacy is notably distinct from the other three varieties in that publicity³⁸ is not an element for making out a viable claim—the intrusion itself constitutes the entirety of the wrong.³⁹ Despite this singularity and Prosser’s contention that the privacy torts are wholly distinct causes of action, this Note will also show the extent to which the privacy torts can overlap. For instance, if a defendant

31. Prosser, *supra* note 3, at 390.

32. *Id.* at 391.

33. It is certainly worth noting that several scholars have described Prosser’s role with the ALI as playing no small part in the adoption of his four torts. For instance, J. Clark Kelso opined that

The influence of the article is only partly attributable to the article itself. By 1960, Prosser was widely recognized as one of the leading torts scholars in the country, and held the influential position of Reporter for the Restatement (Second) of Torts. Many believed that if Prosser said the cases stood for a particular proposition, then it must be true.

Kelso, *supra* note 7, at 789.

34. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

35. For a number of cases applying this standard, see *id.* and RESTATEMENT (SECOND) OF TORTS app. § 652B (1977).

36. 955 P.2d 469 (Cal. 1998).

37. *Id.* at 489.

38. See *infra* note 40.

39. See RESTATEMENT (SECOND) OF TORTS § 652B (1977); *supra* text accompanying note 34.

was to publicize a discovery made by virtue of his unlawful intrusion, then an additional action would exist for Prosser's second tort—publicity given to private life.

2. Publicity Given to Private Life

According to the ALI:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.⁴⁰

As the Second Restatement of Torts makes clear, several limitations are placed on a plaintiff attempting to pursue a claim under this cause of action.⁴¹

First, based on Prosser's formulation, the defendant must somehow publicly disseminate the information he has acquired; a private disclosure to another party will not suffice.⁴² For instance, if a creditor were to contact the employer of an individual in default in an attempt to effect collection, and thereby reveal the fact that the debtor was currently in arrears, then the revelation of this debtor's private financial information would not constitute publicity.⁴³ Conversely, if a creditor were to post in the window of his shop the names of those who were currently in default, then this would constitute publicity.⁴⁴

40. RESTATEMENT (SECOND) OF TORTS § 652D (1977); *see also id.* at cmt. a (“‘Publicity,’ as it is used in this Section, differs from ‘publication,’ as that term is used in § 577 in connection with liability for defamation. ‘Publication,’ in that sense, is a word of art, which includes any communication by the defendant to a third person. ‘Publicity,’ on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.”).

41. RESTATEMENT (SECOND) OF TORTS § 652D (1977). I will also refer to this tort as “disclosure” throughout this Note.

42. Prosser, *supra* note 3, at 393; *see also supra* note 40.

43. *See, e.g.,* Sears, Roebuck & Co. v. Moten, 558 P.2d 954, 958 (Ariz. Ct. App. 1976).

44. *See, e.g.,* Brents v. Morgan, 299 S.W. 967, 971 (Ky. 1927); *Seinfeld: The Little Jerry* (NBC television broadcast Jan. 9, 1997) (telling the story of a man who struggles to have a bounced check removed from display in a local bodega because of the embarrassment it has caused him—in no small part because the check has a picture of a clown holding balloons).

Second, if the information is of “legitimate public concern”—or in other words “newsworthy”—then the plaintiff is barred from bringing suit.⁴⁵ This element of disclosure is difficult to define as there exists a genuine distinction between matters of proper concern to the public and those which are merely of interest.⁴⁶ And, unfortunately, it would seem that courts have adopted a rather permissive and uncritical stance when making such determinations.⁴⁷

Third—and perhaps most problematic because of the inherently subjective character of the question—the matter disclosed must be “highly offensive to a reasonable person.”⁴⁸ Additionally, because this tort deals with statements of true fact, it is, from a First Amendment⁴⁹ standpoint, the most susceptible to attack as the pursuit of truth is often described as a vital corollary to the freedom of speech.⁵⁰ Moreover, the Supreme Court has yet to determine the

45. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977) (“When the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.”).

46. To quote Cass Sunstein, “[T]here is an important difference—as the Constitution’s framers well knew, and as many people today appear to have forgotten—between the public interest and what interests the public.” Cass Sunstein, Op-Ed., *Reinforce the Walls of Privacy*, N.Y. TIMES, Sept. 6, 1997, §1, at 23.

47. See Don R. Pember & Dwight L. Teeter, Jr., *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 76 (1974).

48. RESTATEMENT (SECOND) OF TORTS § 652D (1977). The nature of what constitutes “highly offensive” is clearly susceptible to myriad interpretations depending on the given place and time as well as the party sitting in judgment. Judge Posner, for instance, felt that in order for a disclosure to be sufficiently offensive, a case must involve “details the publicizing of which would be not merely embarrassing and painful but *deeply shocking* to the average person subjected to such exposure.” *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1234–35 (7th Cir. 1993) (emphasis added); cf. *Hussain v. Palmer Commc’ns Inc.*, 60 Fed. App’x 747, 752 (10th Cir. 2003) (applying verbatim Comment c to the RESTATEMENT (SECOND) § 652E); *Machleder v. Diaz*, 801 F.2d 46, 58 (2d Cir. 1986) (noting that “[i]n order to avoid a head-on collision with First Amendment rights, courts have narrowly construed the highly offensive standard”); *Hunley v. Orbital Scis. Corp.*, No. CV-05-1879, No. CV-06-2567, 2007 U.S. Dist. LEXIS 24101, at *6 (D. Ariz. Mar. 27, 2007) (“[A] plaintiff’s subjective threshold of sensibilities is not the measure, and trivial indignities are not actionable.”) (citations omitted).

49. U.S. CONST. amend. I.

50. See, e.g., *Phila. Newspapers v. Hepps*, 475 U.S. 767, 777 (1986) (explaining that a “‘chilling’ effect would be antithetical to the First Amendment’s protection of true speech on matters of public concern”); *Adler v. Bd. of Educ.*, 342 U.S. 485, 511 (1952) (Douglas, J., dissenting) (stating that academic freedom is central to “the pursuit of truth which the First Amendment was designed to protect”).

full scope of its constitutionality⁵¹—also an issue of concern for false light as discussed below.⁵²

Fourth, and finally, the publicized information must be private; liability will not attach to an individual who discloses information of a public nature (e.g., matters of public record such as date of birth or marital status).⁵³ Nor will courts find liability when facts readily apparent to the public are further publicized. For instance, an individual who is out and about cannot be heard to complain when another further publicizes a fact that he has already left open to the public eye.⁵⁴ By way of illustration, a husband and wife were denied relief when their “affectionate pose” at a sidewalk cafe was captured and further publicized.⁵⁵

However, as mentioned earlier, the various privacy torts may act in concert. So, while the facts of a particular case may not support a claim for the tort of disclosure—as was the case with the amorous couple mentioned above⁵⁶—a claim for Prosser’s tort of appropriation, discussed in the next subpart, may still prevail.

3. Appropriation of Name or Likeness

Simply put, this tort “consists of the appropriation, for the defendant’s benefit or advantage, of the plaintiff’s name or likeness.”⁵⁷ The particular interest protected by this branch of privacy law is, generally speaking, the plaintiff’s exclusive right to exploit his name or likeness inasmuch as it may be economically beneficial

51. See RESTATEMENT (SECOND) OF TORTS § 652D Special Note on Relation of § 652D to the First Amendment to the Constitution (1977).

52. See *infra* Part I.B.4.

53. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (“The rule stated in this Section applies only to publicity given to matters concerning the private, as distinguished from the public, life of the individual. There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.”).

54. See *id.* (“[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. . . . Nor is his privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public.”).

55. See, e.g., *Gill v. Hearst Publ’g Co.*, 253 P.2d 441, 442, 445 (Cal. 1953) (finding no liability for defendant when plaintiff sued after a photograph was taken—and later included in a published article—of him and his wife “in an affectionate pose” at a sidewalk cafe).

56. See *id.*

57. Prosser, *supra* note 3, at 401; see also RESTATEMENT (SECOND) OF TORTS § 652C (1977) (“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.”).

to do so.⁵⁸ As a result, the paradigmatic form of appropriation occurs when a defendant makes use of the plaintiff's image to promote a business or product, or in any other way usurps his image for commercial ends.⁵⁹ This tort, like its cousins, does not necessarily operate in isolation, despite Prosser's claim, and may be brought by the plaintiff as an additional theory of recovery. To wit: If in the process of unlawfully using the plaintiff's image the defendant also makes, or attributes, false statements concerning the plaintiff, he will have cast him in a false light.

4. Publicity Placing Person in False Light

Unlike its older cousins whose lineage can be traced back over a century to *The Right to Privacy*,⁶⁰ false light's modest roots go back no further than *Privacy*,⁶¹ in which Prosser himself openly admits that Warren and Brandeis's original conception of the right to be let alone would not have encompassed this new tort.⁶² Instead, Prosser claims that this new species of tort first emerged in 1816 in the English case of *Lord Byron v. Johnston*⁶³ and that it appeared sporadically throughout American law beginning in the early 1900s.⁶⁴ This claim, however, has been contested: Professor J. Clark Kelso, after reviewing the fifty-some cases cited in support of false light's purported jurisprudence,⁶⁵ concluded that "none of the cases Prosser cited in support of false light privacy come close to recognizing such a tort. False light existed only in Prosser's mind."⁶⁶ What then is the nature of this tort born solely from the fertile soil of Dean Prosser's imagination?

Professor Diane Zimmerman of the New York University School of Law explains that

58. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977) ("The interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, *the right created by it is in the nature of a property right*") (emphasis added).

59. See, e.g., *Toffoloni v. LFB Publ'g Group, LLC*, 572 F.3d 1201, 1205–08 (11th Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 1920 (Mar. 1, 2010); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

60. See generally Warren & Brandeis, *supra* note 1.

61. "Prior to Prosser's article, the words 'false light' and 'privacy' are not joined together in any reported American decisions." Kelso, *supra* note 7, at 783.

62. Prosser, *supra* note 3, at 398.

63. (1816) 35 Eng. Rep. 851 (Ch.).

64. Prosser, *supra* note 3, at 398–400.

65. Kelso, *supra* note 7, at 788–816.

66. *Id.* at 787.

[t]he tort of false light invasion of privacy arises either when something factually untrue has been communicated about an individual, or when the communication of true information carries a false implication. Generally, two minimum requirements exist for a false light claim. To be actionable, the falsehood must first be “material and substantial.” Then, communication of the misinformation must reach an audience sufficiently large to constitute widespread publicity.⁶⁷

Another major distinction between false light and the other forms of invasion of privacy, highlighted by the above passage, stems from the fact that the former does not concern itself with facts relating to the private lives of those affected (e.g., their image or habits). Instead, false light, as the name implies, is born out of statements that are either entirely false or, fallacious as a result of the improper juxtaposition of true facts.⁶⁸ So, although Professor Zimmerman’s summation is both clear and precise, further explication of this tort is warranted. And, as luck would have it, the first Supreme Court case to deal with false light, *Time, Inc. v. Hill*,⁶⁹ offers a textbook example of an attempt to pursue a claim for false light.

In September of 1952, a trio of escaped convicts held the seven members of the Hill family captive in their Pennsylvania home for nineteen hours, after which they released the family unharmed.⁷⁰ The father, James Hill, in a brief interview immediately following the ordeal, emphasized that his family had not been mistreated in any way but thereafter fought all attempts to keep his family in the media’s gaze—going so far as to relocate his family to Connecticut in an attempt to evade further attention.⁷¹

The following spring, Joseph Hayes published his novel *The Desperate Hours*, based largely upon the events that had befallen the Hill family the previous year.⁷² However, unlike the Hills, the fic-

67. Zimmerman, *supra* note 7, at 370–71 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967)); see also RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977) (“On what constitutes publicity and the publicity of application to a simple disclosure, see § 652D, Comment a, which is applicable to the rule stated here.”); *id.* at cmt. c (“The plaintiff’s privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.”).

68. See RESTATEMENT (SECOND) OF TORTS § 652E cmt. b, illus. 2 (1977).

69. 385 U.S. 374 (1967).

70. *Id.* at 378.

71. *Id.*

72. *Id.*

tional family in *The Desperate Hours* was made to endure verbal abuse and physical assault.⁷³ At this point it would have been difficult to draw unambiguous parallels between the fictionalized account and the actual events underlying the novel as Hayes had altered some of the specific details. Nevertheless, any doubt was removed when the book was adapted for the stage and LIFE magazine ran a feature explaining that the play was based upon the novel that in turn drew from the Hill family's actual experiences.⁷⁴ The magazine even transported members of the stage cast to the Hill's former residence in Philadelphia and photographed them enacting scenes from the play outside the house.⁷⁵ Considering that the audience may well have been unable to differentiate between a piece of fiction loosely based on true events and the actual subjects after which the work was modeled, the lower courts found that LIFE had indeed cast the Hill family in a false light.⁷⁶

But, although the article and photographs framed the Hills in a false light,⁷⁷ and even though the lower courts found in favor of the aggrieved family—setting aside the a priori question of whether they properly differentiated “between the public interest and what interests the public”⁷⁸—the Court ultimately found for the defendant.⁷⁹ The Court issued its ruling on the ground that the trial judge's instructions to the jury failed to make clear that it was incumbent upon the Hills to prove that LIFE had actual knowledge that it was spreading falsehoods or, in the alternative, had acted with reckless disregard for the truth.⁸⁰

Borrowing from its landmark defamation ruling in *New York Times Co. v. Sullivan*,⁸¹ the Court held that “actual malice”⁸² was the appropriate standard for false light since “sanctions against either innocent or negligent misstatement would present a grave hazard

73. *Id.*

74. *Id.* at 377.

75. *Id.*

76. *Id.* at 379.

77. The public may well have come to believe that the family actually suffered through the fictional events dreamt up by Hayes—a definite falsehood.

78. Sunstein, *supra* note 46.

79. *Hill*, 385 U.S. at 398. It should be noted, however, that the Supreme Court's preliminary vote favored the plaintiff. See BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 240–303 (1985).

80. *Hill*, 385 U.S. at 394–97.

81. 376 U.S. 254 (1964).

82. The court required a finding that the defendant acted “with knowledge that [his statement] was false or with reckless disregard of whether it was false or not.” *Id.* at 280.

of discouraging the press.”⁸³ This, in turn, would jeopardize what the Court had described in *Sullivan* as this country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁸⁴

By drawing on the holding in *Sullivan*, the Court carried over one of the major restrictions in defamation law to its treatment of false light. Consider the ALI’s initial proposal for false light: “One who gives to another publicity which places him before the public in a false light of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy.”⁸⁵ This preliminary formulation clearly does not contemplate scienter as one of the requisite elements for a successful claim. But, due to the Court’s decision in *Hill*,⁸⁶ the prescription for false light formally adopted by the Second Restatement varies substantially in that it reflects the Court’s requirement that the plaintiff prove the defendant’s mental state:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) *the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.*⁸⁷

Considering the Court’s analogous treatment of defamation and false light, along with Prosser’s own belief that the “interest protected [by false light] is clearly that of reputation, with the same overtones of mental distress as defamation,”⁸⁸ it is worthwhile to detour ever so briefly into the law of defamation, since the similarities between these two torts justify, in part, the prescribed abandonment of false light as a recognizable cause of action.

C. *The Law of Defamation*

Generally speaking, a statement is defamatory “if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or deal-

83. *Hill*, 385 U.S. at 389.

84. *Sullivan*, 376 U.S. at 270.

85. RESTATEMENT (SECOND) OF TORTS § 652E (Tentative Draft No. 13, 1967).

86. See RESTATEMENT (SECOND) OF TORTS § 652E cmt. d (1977) (“It is on the basis of *Time v. Hill* that Clause (b) has been set forth.”).

87. RESTATEMENT (SECOND) OF TORTS § 652E (1977) (emphasis added).

88. Prosser, *supra* note 3, at 400.

ing with him.”⁸⁹ Additionally, in order to be actionable, the statement must be 1) false; 2) unprivileged;⁹⁰ and 3) communicated to a third party.⁹¹

At first glance there is an obvious difference between defamation and false light in that the latter does not require a specific harm to reputation; other, more generalized harm—such as the “overtones of mental distress” mentioned by Prosser—are seemingly sufficient. Moreover, while a statement must be “defamatory” to be actionable under the former,⁹² a statement that is “highly offensive” is adequate for the purpose of bringing a false light claim.⁹³ Additionally, while false light requires publicity, defamation requires only “publication”—a term of art that involves only the communication of the defamatory statement to a party other than the defamed.⁹⁴

However, Prosser himself noted that there existed a great deal of overlap between the torts while also recognizing that false light was not, as initially envisioned, constrained to the same extent as defamation.⁹⁵ Interestingly enough, it was this general aspect of false light that worried Dean Prosser even as he laid out his new tort:

It is here, however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of

89. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

90. There exist absolute and conditional privileges under which a party is not held liable for an action that would otherwise be defamatory. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 586 (1977) (“An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding . . . if it has some relation to the proceeding.”).

91. *Id.* § 558.

92. *But see* *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976) (“States could base [defamation] awards on elements other than injury to reputation, [such as] personal humiliation and mental anguish and suffering.”) (internal quotation marks omitted).

93. *See supra* notes 85 and 87 and accompanying text.

94. *See* R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 154 (17th ed. 1977).

95. Prosser, *supra* note 3, at 400–01.

freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?⁹⁶

Nevertheless, in spite of his own misgivings as to the creation that he was prepared to unleash upon the world—like Victor Frankenstein before him—the good dean was simply unable to stop himself.

D. Of Which Privacy Shall We Speak?

In constructing their tort, Warren and Brandeis explained that the “general object in view is to protect the privacy of private life.”⁹⁷ This is, however, but one among several forms of privacy of which the law is cognizant. As such, it is worth taking a moment to ensure that in going forward it is clear which particular interest is being discussed when this Note refers to “privacy.”

If one begins with Warren and Brandeis’s proposition that the right to privacy is an effort to protect the private lives of citizens—the right to be let alone—one is then obliged to ask: Against whom are we exercising this right? According to Professor Ken Gormley, this deceptively facile question is unanswerable by any unified theory as “legal privacy consists of four or five different species of legal rights which are quite distinct from each other and thus incapable of a single definition.”⁹⁸ Under the professor’s proposed system of classification, the following compose the spectrum of interests encompassed by privacy:

1. Tort privacy (Warren and Brandeis’s original privacy);
2. Fourth Amendment privacy (relating to warrantless governmental searches and seizures);
3. First Amendment privacy (a “quasi-constitutional” privacy which exists when one individual’s free speech collides with another individual’s freedom of thought and solitude);
4. Fundamental-decision privacy (involving fundamental personal decisions protected by the Due Process Clause of the Fourteenth Amendment, often necessary to clarify and “plug gaps” in the original social contract);
5. State constitutional privacy (a mish-mash of the four species, above, but premised upon distinct state constitutional guarantees often yielding distinct hybrids).⁹⁹

96. *Id.* at 401.

97. Warren & Brandeis, *supra* note 1, at 215.

98. Gormley, *supra* note 10, at 1339.

99. *Id.* at 1340.

So, while each class of privacy interest outlined by Gormley in some way reflects the fundamental notion of the right to be let alone, this Note is concerned with false light as it relates to the first of these groups—“tort privacy.” However, while this answers the question at the most basic level, it is still unclear as to what exactly is meant by tort, or common law, privacy. The responses to this question are legion: The form of privacy that relates to false light has been described as “the individual control over the disclosure of confidential personal information in a more complex milieu of personal and social relationships;”¹⁰⁰ the protection of an individual’s “inviolate personality;”¹⁰¹ “selective anonymity;”¹⁰² or simply “the withholding or concealment of information.”¹⁰³

To be certain, the purpose and scope of common law privacy admit of more than one definition and in the end privacy may be more of a gestalt or ad hoc concept¹⁰⁴—one which judges and juries tentatively feel out on a case-by-case basis, using their “gut” as much as anything else. Unfortunately, any such attempt at a cohesive theory of privacy is well beyond the modest aims of this Note, and so it is sufficient for present purposes to say that 1) the exclusive focus of the remaining inquiry will center on common law privacy and; 2) within the realm of public interest, this form of privacy stands as a safeguard against the unwarranted intrusion of the many against the one.

II.

This Part proceeds by laying out the current rationales in support of a false light tort and then presents the counterarguments advocating its abandonment. However, to better understand the school of thought defending false light, it makes sense to provide at the outset at least one example where false light has been extinguished as a cause of action. As such, this Part begins with the case that has served as the impetus for this Note.

100. Bezanson, *supra* note 10, at 1135.

101. Warren & Brandeis, *supra* note 1, at 205.

102. Zimmerman, *supra* note 7, at 365. This is the idea “that individuals ought to have legal power to control dissemination of information about themselves when that information relate[s] to nonpublic aspects of their lives.” *Id.*

103. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 393 (1978).

104. See Kalven, *supra* note 23, at 333 (arguing that the tort has “no legal profile”).

A. *“To Recognize or Not to Recognize—That is the Certified Question”*¹⁰⁵

In *Jews for Jesus, Inc. v. Rapp*,¹⁰⁶ the Supreme Court of Florida declined to recognize the tort, “conclud[ing] that false light is largely duplicative of existing torts, but without the attendant protections of the First Amendment.”¹⁰⁷ The factual background of the case is as follows. Plaintiff Edith Rapp’s husband (Marty Rapp) had taken ill and was not expected to survive.¹⁰⁸ As a result, plaintiff’s stepson Bruce Rapp, the biological son of Marty Rapp, came to visit his ailing father fearing he would not have another chance to do so.¹⁰⁹ Bruce, an employee of Jews for Jesus, Inc., would later recount in the Jews for Jesus newsletter that during this visit his stepmother—a woman of the Jewish faith—made inquiries of her stepson regarding Jesus, asked God for forgiveness, and repeated with Bruce the sinner’s prayer.¹¹⁰ This account was published on the internet and seen by at least one of plaintiff’s relatives.¹¹¹ Following the publication of the newsletter containing the story, Edith Rapp filed suit alleging that “Jews for Jesus falsely and without her permission stated that she had ‘joined Jews for Jesus, and/or [become] a believer in the tenets, the actions, and the philosophy of Jews for Jesus.’”¹¹²

The trial court dismissed all of Edith’s claims,¹¹³ and the Fourth District of the Florida District Courts of Appeal affirmed, with one exception.¹¹⁴ Edith Rapp claimed, inter alia, false light invasion of privacy, and the Fourth District, relying on the Restatement, “noted that the tort involved a ‘major misrepresentation’ of a person’s ‘character, history, activities or beliefs’ and that just as a misrepresented political party affiliation could be such an example, so too could misrepresentation of a person’s religious beliefs.”¹¹⁵ Although the Fourth District was prepared to facially reject the tort, it was concerned that state precedent ran contrary to its preferred solution and, accordingly, certified to the Supreme Court of Florida

105. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1103 (Fla. 2008).

106. *Id.*

107. *Id.* at 1100.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1101.

112. *Id.* (alteration in original).

113. *Id.*

114. *Id.* at 1101–02.

115. *Id.* at 1102. The Fourth District Court of Appeal quoted the RESTATEMENT (SECOND) OF TORTS § 625E in defining Rapp’s cause of action. *See id.*

the question of whether the state recognized false light invasion of privacy as a viable theory of recovery.¹¹⁶

After providing the reader with an abridged history of false light,¹¹⁷ Justice Pariente explained that the court had reviewed its past treatment of false light and felt compelled to “conclude that the Court was simply repeating citations from academic treatises or law review articles about privacy torts in general or discussing an alternative tort in particular.”¹¹⁸ In essence, the court recognized that “none of these cases actually involved a claim of false light.”¹¹⁹ Realizing that the court had never directly addressed the desirability of adopting false light as part of Florida’s common law, Justice Pariente moved into a discussion of the policy concerns that spoke against acknowledging the tort. As an opening to this inquiry, she observed that

courts rejecting false light have expressed the following two primary concerns: (1) it is largely duplicative of defamation, both in the conduct alleged and the interests protected, and creates the potential for confusion because many of its parameters, in contrast to defamation, have yet to be defined; and (2) without many of the First Amendment protections attendant to defamation, it has the potential to chill speech without any appreciable benefit to society.¹²⁰

After a general comparison of the elements and application of false light and defamation,¹²¹ the court arrived at the heart of the first question under review: whether the nature of false light was sufficiently independent to merit recognition as a stand-alone tort.

Answering this question in the negative, the court first explained that the primary justification for false light is the supposed disparity in the nature of the rights protected under the law of defamation and false light¹²²—the former protects against injuries to reputation while the latter, purportedly, guards against mental pain and the like. However, the court went on to declare that this “may be a distinction without a difference in practice because conduct that defames will often be highly offensive to a reasonable person, just as conduct that is highly offensive will often result in injury to

116. *Id.*

117. *Id.* at 1102–03.

118. *Id.* at 1103.

119. *Id.*

120. *Id.* at 1105.

121. *Id.* at 1105–08.

122. *Id.* at 1108–09.

one's reputation."¹²³ As evidence for its own position, the court cited to the growing similarity in the actual treatment of the two torts within other jurisdictions.¹²⁴

However, despite the practical homogeneity of false light invasion of privacy and defamation, Justice Pariente expressed grave concern over a significant difference between the two torts. Citing a case from the Ohio Supreme Court¹²⁵—ironically one which recognized false light—Justice Pariente seemed willing to accept, for the sake of argument, that the interest protected by false light was “the *subjective* one of injury to [the] inner person” as compared to “the *objective* one of reputation” guarded by defamation.¹²⁶ Nonetheless, acceptance of the foregoing created an entirely new problem:

[T]he very fact that false light is defined in subjective terms is one of the main causes for concern because the type of conduct prohibited is difficult to define. Unlike defamation, which has a defined body of case law and applicable restrictions that objectively proscribe conduct with relative clarity and certainty, false light and its subjective standard create a moving target whose definition depends on the specific locale in which the conduct occurs or the particular sensitivities of the day.¹²⁷

This in turn gave rise to fears regarding the constitutionality of such a cause of action since “utilizing a subjective standard that fails to draw reasonably clear lines between lawful and unlawful conduct may impermissibly restrict free speech under the First Amendment.”¹²⁸ In short, Justice Pariente feared that “the ‘highly offensive to a reasonable person’ standard runs the risk of chilling free speech because the type of conduct prohibited is not entirely clear.”¹²⁹ Although the possibility of extending the restrictions placed on defamation to false light is mentioned in passing,¹³⁰ such action would lead us back to the first question confronted by the court: What useful purpose would false light serve if it were wholly duplicative of defamation? To this question the court answered: none.¹³¹

123. *Id.* at 1109.

124. *Id.* at 1109–10.

125. *Welling v. Weinfeld*, 113 Ohio St. 3d 464, 2007-Ohio-2451, 866 N.E.2d 1051.

126. *Rapp*, 997 So. 2d at 1109 (alteration in original) (quoting *Weinfeld*, 2007-Ohio-2451, at ¶ 47).

127. *Id.* at 1110 (internal quotation marks omitted).

128. *Id.* (citation and internal quotation marks omitted).

129. *Id.*

130. *Id.* at 1112.

131. *Id.* at 1112–14.

Having seen one example of the judicial abandonment of false light,¹³² the stage is properly set to present, and rebut, the current arguments supporting false light invasion of privacy.

B. There is No Alternative

One of the favorite claims made by those who see a continued place for false light in the common law is that defamation is not a perfect cognate for the privacy tort in terms of the interest protected, and, as such, a particular class of harms may go unremedied in its absence.¹³³ The type of injury in question stems from the alleged damage wrought by “false statements that are nondisparaging but still highly offensive.”¹³⁴ As the argument goes, since defamation requires a statement that falsely vilifies the injured party, untrue statements that are “nondisparaging” but harmful nevertheless—because they manage to offend or in some other way distress the victim—are irremediable without a false light tort that is ostensibly tailor-made for just such an occasion. Unfortunately, what these authors have presented is a false choice and their claim simply does not hold up.

To begin with, this argument flies in the face of legal reality. Although the proponents of false light believe that defamation is insufficient, the Supreme Court disagreed with this position in *Time, Inc. v. Firestone*.¹³⁵ Discussing recovery for claims of defamation, the Court noted that “*States could base awards on elements other than injury to reputation, specifically . . . personal humiliation, and mental anguish and suffering a[re] examples of injuries which might be compensated consistently with the Constitution upon a showing of fault.*”¹³⁶ A fair reading of the above passage indicates that defamation is, on a practical level, capable of doing the work of false light if, as the defenders of false light contend, the only major obstacle is defamation’s reliance on disparaging statements and its inability to compensate for subjective harms to the individual’s feelings. Moreover, it would appear as though the Supreme Court has

132. See also *Denver Publ’g Co. v. Bueno*, 54 P.3d 893, 904 (Colo. 2002) (holding that “false light is too amorphous a tort for Colorado”).

133. See, e.g., Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885, 900 (1991); Jacqueline Hanson Dee, Comment, *The Absence of False Light from the Wisconsin Privacy Statute*, 66 MARQ. L. REV. 99, 120–21 (1982); Robin Baker Perkins, Note, *The Truth Behind False Light—A Recommendation for Texas’ Re-adoption of False Light Invasion of Privacy*, 34 TEX. TECH. L. REV. 1199, 1209–29 (2003).

134. Schwartz, *supra* note 133, at 892.

135. 424 U.S. 448 (1976).

136. *Id.* at 460 (internal quotation marks omitted and emphasis added).

made a self-fulfilling prophecy out of Prosser's concern in *Privacy* by agreeing, in *Zacchini v. Scripps-Howard Broad. Co.*,¹³⁷ that "[t]he interest protected in permitting recovery for placing the plaintiff in a false light is *clearly that of reputation, with the same overtones of mental distress as in defamation.*"¹³⁸ At this point it would be difficult to argue that false light is not, in terms of its general purpose, wholly interchangeable with defamation. Regardless of whether the former is actionable without disparagement or the latter is intended to protect reputation, the two serve a common and undifferentiated purpose.

However, assuming arguendo that without false light, courts "might well be inclined awkwardly to stretch the concepts of defamation in order to justify the granting of relief,"¹³⁹ adherents to this either-or dichotomy have yet to explain how, or why, the other privacy torts in conjunction with intentional infliction of emotional distress (IIED) are insufficient replacements. To demonstrate this point, this Note will examine a pair of cases generally trotted out by the champions of false light as exemplars of its continued relevancy.

1. *Braun v. Flynt*

In *Braun v. Flynt*,¹⁴⁰ the magazine *Chic* published photos of the plaintiff, Jeannie Braun, in their "Chic Thrills" section.¹⁴¹ At the time, Mrs. Braun was employed at an amusement park in Texas where she performed in an act billed as "Ralph, the Diving Pig."¹⁴² In this particular spectacle, the plaintiff would tread water in a swimming pool into which Ralph would dive, having been lured by a bottle of milk wielded by the plaintiff.¹⁴³ An editor from *Chic*, having seen the show, contacted the amusement park's public relations director in order to secure permission to run photos of the plaintiff's performance after having explained that his was a "men's magazine containing men's fashion, travel and humor."¹⁴⁴ Following the photo's appearance in defendant's publication—juxtaposed

137. 433 U.S. 562 (1977).

138. *Id.* at 573 (internal quotation marks omitted and emphasis added).

139. Schwartz, *supra* note 133, at 900.

140. 726 F.2d 245 (5th Cir. 1984).

141. *Id.* at 247.

142. *Id.*

143. *Id.*

144. *Id.*

with other, more explicit fare¹⁴⁵—plaintiff sued for defamation and false light invasion of privacy.¹⁴⁶ At trial, the jury found

that a false impression as to Mrs. Braun's reputation, integrity or virtue had been created and that *Chic* knew or should have known that such a false impression was created; that *Chic* had acted willfully and with reckless disregard for Mrs. Braun's reputation by publishing her picture; [and] that *Chic* had published Mrs. Braun's picture in a manner highly offensive to a reasonable person.¹⁴⁷

On appeal, the Fifth Circuit noted that there had been recovery for both defamation and false light “even though the two actions contain *identical* elements of damages.”¹⁴⁸ Cognizant that a plaintiff may only recover once where the cause of damage alleged is the same under multiple theories,¹⁴⁹ the court moved to disentangle the source of plaintiff's award. This, the court realized, would be difficult since “[a]lthough we recognize that the principal element of injury in a defamation action is impairment of reputation, while an invasion of privacy claim is founded on mental anguish . . . Mrs. Braun was entitled to recover actual damages for mental anguish under *both* causes of action.”¹⁵⁰ In the end, the court found that “it is, as a practical matter, *impossible to distinguish between damages Mrs. Braun suffered from defamation and from invasion of privacy.*”¹⁵¹

With the court's above findings in mind, one must ask: What, if anything, did false light add to this case? This Note asserts that the answer is: nothing whatsoever. This conclusion finds support in Professor J. Clark Kelso's authoritative survey of the approximately 650 cases ostensibly involving false light occurring between *Privacy's* publication in 1960 and 1992.¹⁵² Based on the results of his research, Professor Kelso concluded that “there is not even a single good case in which false light can be clearly identified as adding anything distinctive to the law.”¹⁵³ However, in fairness, the above

145. *Id.* at 248.

146. *Id.*

147. *Id.* at 248–49 (internal quotation marks omitted).

148. *Id.* at 250 (emphasis added).

149. *Id.*

150. *Id.* (emphasis added).

151. *Id.* at 251 (emphasis added).

152. See Kelso, *supra* note 7.

153. *Id.* at 785. Kelso goes on to opine that “false light is simply added on at the end of the complaint to give the appearance of greater weight and importance.” *Id.*; see also Schwartz, *supra* note 133, at 892 (noting that quite often “plaintiff's false light claim turns out to be little more than an administrative annoyance

case will first be examined in a world where false light no longer shines.

Assuming for the moment 1) the absence of false light; and 2) that defamation would be inapplicable to anything beyond harm to reputation (i.e., not actionable upon grounds of suffering, humiliation, or mental anguish), the plaintiff in *Braun* would be no worse off. To begin with, because defamation encompasses statements that are literally true but create a false and defamatory impression (defamation by implication),¹⁵⁴ it would be incorrect to argue that recovery for factually accurate representations that are contextually false is solely within the purview of false light. Therefore, the core of the plaintiff's theory—that publishing a photo of her performance in a “glossy, oversized, hard-core men's magazine”¹⁵⁵ implied that she was involved in pornography—would remain viable. Next, even if defamation was not viable as a means of recovery for plaintiff's psychological harm, there exist several alternatives.

The plaintiff is free to allege intentional infliction of emotional distress.¹⁵⁶ Nevertheless, advocates of false light are likely to view this option with some skepticism as the bar for IIED is quite lofty: “Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”¹⁵⁷ Additionally, it could well be argued that *Chic's* behavior, although reprehensible, would not rise to the level of “Outrageous!” but may certainly have qualified under false light's murky standard of “highly offensive to a reasonable person.”¹⁵⁸

in dealing with what is primarily and essentially a defamation action”); Zimmerman, *supra* note 7, at 366 (calling false light “a tool for discomfiting defendants”).

154. Defamation by implication arises, not from what is stated, but from what is implied when a defendant ‘(1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct.’

Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823, 827 (Iowa 2007) (quoting DAN B. DOBBS, PROSSER & KEETON ON THE LAW OF TORTS § 116, at 117 (Supp. 1988)) (alteration in original).

155. *Braun*, 726 F.2d at 247.

156. “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

157. *Id.* at cmt. d.

158. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

However, an approach to measuring the value of torts that focuses on the results rather than the means misses the point entirely. The proper rubric is not whether a tort's general existence is justified because in its absence a plaintiff in a single instance would be unable to obtain relief under a particularized set of facts. Instead, it is whether an interest—in this case the victim's emotional interest in privacy—is protected by any tort whatsoever. In other words, the law should avoid the possibility of *damnum absque injuria* for an entire class of wrongs but need not guarantee recovery for every occurrence thereof; the issue of individual compensation is best left to judge and jury. Since even the proponents of false light must be satisfied by the fact that emotional and dignitary interests are afforded protection under privacy law, defamation, and IIED, despite the absence of false light, the legal community is left to wonder if, as Professor Kelso doubts, the tort adds anything of value whatsoever. Moreover, all is not lost for the plaintiff who must make do without false light under the facts of *Braun* since the current hypothetical is still framed by the either-or fallacy between false light and defamation—a fallacy that overlooks the availability of other privacy claims.

Plaintiffs in this parallel legal universe devoid of false light could still bring a privacy claim to protect their emotional well-being even if defamation were off-point and IIED's standard too high to satisfy. In the case of *Braun*, for instance, there is no reason why a claim of appropriation would be insufficient to recompense the victim for the harm to her privacy interest. As mentioned earlier, this branch of privacy law “consists of the appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness.”¹⁵⁹ And, from the facts outlined above, it is clear that defendant's magazine appropriated Mrs. Braun's image with the intent of satisfying its readership and promoting circulation—twin aims that serve a commercial end and therefore come squarely within the wheelhouse of appropriation.

Given that the tort appears to fit well with the facts of the case, it is entirely unclear why appropriation does not adequately serve Mrs. Braun's interest in privacy in lieu of false light. Granted, there are critics who might point to the limited nature of the tort as a remedy for pecuniary loss rather than noneconomic intrusion upon an individual's privacy.¹⁶⁰ Such complaints, however, overlook the fact that this cause of action “is not limited to commercial appropri-

159. Prosser, *supra* note 3, at 401.

160. *See supra* notes 58–59 and accompanying text.

ation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one."¹⁶¹

In short, there is nothing that false light provided Mrs. Braun that could not have been accomplished through the use of defamation, intentional infliction of emotional distress, and/or one of the remaining privacy torts—in this case, appropriation. Having hopefully converted a few false light adherents through the preceding exploration of *Braun v. Flynt*, this Note now moves into its second case study, *Spahn v. Julian Messner, Inc.*,¹⁶² to examine a unique and troubling aspect of false light, which serves to cast additional shadows on its already dim existence.

2. *Spahn v. Julian Messner, Inc.*

The Warren Spahn Story, written by Milton J. Shapiro, was an unauthorized biography of the left-handed Cy Young award winner and Baseball Hall of Fame inductee.¹⁶³ Spahn sued for invasion of privacy under New York law alleging that defendant, as publisher of the biography, circulated an account of his life that contained serious factual inaccuracies.¹⁶⁴ Following the trial, wherein plaintiff prevailed in obtaining both injunctive relief and damages under the statute,¹⁶⁵ the New York Court of Appeals affirmed¹⁶⁶ what commentators have described as a finding of false light invasion of privacy.¹⁶⁷ Yet, what makes this case different, and all the more

161. RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977).

162. 221 N.E.2d 543 (N.Y. 1966), *vacated*, 387 U.S. 239 (1967) (requiring further consideration in light of *Time v. Hill*, 385 U.S. 374 (1967)).

163. *See Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529, 531 (1964), *aff'd*, 221 N.E.2d 543 (N.Y. 1966), *vacated*, 387 U.S. 239 (1967).

164. *Id.* New York Civil Rights Law codified invasion of privacy as follows:

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use

N.Y. CIVIL RIGHTS LAW § 51 (1921).

165. *Spahn*, 250 N.Y.S.2d at 544.

166. *Spahn*, 221 N.E.2d at 546.

167. *See, e.g.*, Schwartz, *supra* note 133, at 893–94; Nathan E. Ray, Note, *Let There Be False Light: Resisting the Growing Trend Against an Important Tort*, 84 MINN. L. REV. 713, 716 (2000).

disquieting, is the nature of the falsities upon which plaintiff's recovery was grounded. To wit, the trial court found, *inter alia*, that [t]he book mistakenly states that Warren Spahn had been decorated with the Bronze Star. In truth, Spahn had not been the recipient of this award, customarily bestowed for outstanding valor in war. Yet the whole tenor of the description of Spahn's war experiences reflects this basic error. Plaintiff thus clearly established that the heroics attributed to him constituted a gross non-factual and *embarrassing* distortion as did the description of the circumstances surrounding his being wounded.¹⁶⁸

What is notable about the type of falsehoods highlighted in the above passage is that they are, by most accounts, flattering. To have served in battle with the sort of bravery and distinction that merits formal recognition hardly seems like a slight in the traditional sense. In point of fact, this probably explains why Spahn chose not to allege the more established tort of defamation and why proponents of false light often fall back on this case when defending the tort.¹⁶⁹

Instead, what is presented—according to those who see *Spahn* as justifying a role for false light—is a subspecies of “false statements that are nondisparaging but still highly offensive.”¹⁷⁰ However, unlike the variety of offensive and nondisparaging fabrications that turn on the negative connotations drawn therefrom, the agents of false light also believe that “[i]t is possible for a plaintiff to recover for a so-called ‘laudatory’ false light.”¹⁷¹ According to one commentator who subscribes to this theory, recovery for harm in these instances is premised upon the notion that “[u]ndeserved praise might cause the same discomfort and embarrassment to a person with integrity as does an unmerited attack and could create an impression that such a person invited the unearned honors.”¹⁷²

Taking into account the already tenuous standard under which relief is granted for false light,¹⁷³ the prospect of further loosening the tort's moorings to anything that resembles an objective stan-

168. *Spahn*, 250 N.Y.S.2d at 538–39 (emphasis added).

169. *See supra* note 167 and accompanying text.

170. Schwartz, *supra* note 133, at 892.

171. Bryan R. Lasswell, Note, *In Defense of False Light: Why False Light Must Remain a Viable Cause of Action*, 34 S. TEX. L. REV. 149, 172 (1993).

172. Ray, *supra* note 167, at 715–16.

173. *See* *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1110 (Fla. 2008); *see also* Zimmerman, *supra* note 7, at 394 (“[F]alse light is relatively unencumbered by common law restrictions; the major limitations are the *rather vague* requirements of substantiality and offensiveness.”) (emphasis added).

dard seems to be patently incongruous with this nation's avowed dedication to upholding the right to free speech.¹⁷⁴ At its most basic, the problem with acknowledging laudatory false light is that "a plaintiff upset by a flattering untruth is in as good a position to sue as someone who complains of a false allegation of criminal conduct"¹⁷⁵—a scenario wherein the incentives created are clearly misaligned with the basic notion that the law, whether primed for deterrence or retribution, must differentiate and make allowances for offenses that are inherently dissimilar.

So while the sort of acclamatory prevarications found in *Spahn* may be objectionable, to say that they cause "discomfort and embarrassment" is in no way equivalent to finding them highly offensive—a prerequisite of the Second Restatement of Torts to properly allege false light invasion of privacy.¹⁷⁶ Even Professor Schwartz, who lobbied in favor of false light as a limited cause of action, admitted that 1) "unless nondisparaging false statements actually rise to the level of highly offensive, the harm they bring about may not be substantial enough to justify all the costs involved in the recognition and administration of a false light tort,"¹⁷⁷ and 2) "[i]f defamation restrictions do make sense, the plaintiff should not be able to avoid them by presenting an alternative pleading."¹⁷⁸ In *Spahn*, both of these problems appeared front and center.

As hypothesized earlier, Spahn seems to have brought a privacy claim as the factual inaccuracies described by the court do not appear blatantly defamatory. Regardless, as with *Braun*, there is no reason to believe that false light is the only privacy tort capable of protecting Spahn's interest in preventing the spread of disinformation in regards to his personal life. In fact, despite attempts to cast this case as one supporting false light,¹⁷⁹ the truth is that while the trial court mentioned false light twice in its ruling,¹⁸⁰ the New York Court of Appeals *never once discussed the tort in its opinion*.¹⁸¹ Instead, the latter court upheld the decision in Spahn's favor under the relevant state statutory provision, which appears on its face to be more akin to appropriation than false light as it specified recovery "where

174. See, e.g., *Sullivan v. N.Y. Times Co.*, 376 U.S. 254, 270 (1964).

175. Zimmerman, *supra* note 7, at 394.

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

177. Schwartz, *supra* note 133, at 896.

178. *Id.* at 889.

179. See sources cited *supra* note 167.

180. See *Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529, 532, 543 (1964), *aff'd*, 221 N.E.2d 543 (N.Y. 1966), *vacated*, 387 U.S. 239 (1967).

181. See *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543 (N.Y. 1966), *vacated*, 387 U.S. 239 (1967).

a person's 'name, portrait or picture is used within this state for advertising or for the purposes of trade' without that person's written consent."¹⁸² As such, it could well be argued that Spahn's award was upheld on the basis of appropriation, not false light, which results in another situation wherein the tort looks as if it serves no discernible purpose.

All the same, having conceded that defamation is inapposite to cases of laudatory false light, and even assuming that neither intentional infliction of emotional distress nor any of the remaining privacy torts are sufficient, this Note suggests that there is an alternative source of relief.

C. *Public Disclosure Estoppel*

In cases of nondisparaging false light, whether laudatory or not, an estoppel claim suffices to permit recovery under the privacy tort of disclosure when defamation, the remaining privacy claims, and IIED are inapplicable. This solution—substituting the tort of disclosure for false light—was toyed with but rapidly dismissed by Decker McLean, a professor of journalism, who wrote that absent false light, “[a]nother option for such plaintiffs would be to recast their claims as public disclosure privacy invasion claims. In such recasting they would have to assert that what was published was true, but was embarrassing, unconscionably published, and logically disconnected from any public matter.”¹⁸³ The only problem identified by the author is the need for plaintiffs “to assert that what was published was true”—a minor impediment, easily overcome by the following proposal.

As explained above, unlike false light invasion of privacy, the tort of disclosure concerns itself with the unlawful revelation of facts that are true, highly offensive, and of no genuine concern to the public.¹⁸⁴ Clearly, the tort was not meant to address fictional allegations concerning the victim's private life. However, by importing a specialized breed of estoppel from the law of copyright, it should be possible to bridge the gap between the two privacy torts leaving us with a world wherein false light is truly and utterly redundant.

According to *Nimmer on Copyright*, the seminal treatise on the law, there exists “a rule of estoppel whereby one who represents his work to be completely factual may not in a subsequent . . . action

182. *Id.* at 544.

183. Decker McLean, *False Light Privacy*, 19 COMM. & L. 63, 70 n.27 (1997).

184. See also RESTATEMENT (SECOND) OF TORTS § 652D (1977).

prove that part of the work was fictional.”¹⁸⁵ Put another way, “[u]nder the doctrine of copyright estoppel, once a . . . work has been held out to the public as factual the author[] cannot then claim that the [work] is, in actuality, fiction.”¹⁸⁶ In pertinent part, this strain of estoppel doctrine, if applied to nondisparaging fabrications, prevents defendants from fictionalizing a more exciting or attractive reality concerning their subject in order to attract readership—and so reap the benefits—while, at the same time, disclaiming harm for having publicized their imagined narrative. Assuming then that state courts are willing to accept this novel adaptation of a doctrine that has already been widely adopted among federal courts,¹⁸⁷ there seems to be little in the way of genuine objection to the idea that the tort of disclosure is entirely suited to replacing false light.

For instance, beginning with the basic requirements of disclosure and false light, it is possible to see—aside from the former’s initial confinement to truthful matters—congruity with respect to the basic requirements. To start with, both torts require the defendant to have publicized the matter in question; merely communicating with someone other than the subject is insufficient and the account must reach the public.¹⁸⁸ Next, the matter given publicity must be of the sort that a reasonable person would find its widespread dissemination highly offensive.¹⁸⁹ Third, while disclosure only permits actions against matters that are “not of legitimate concern to the public,”¹⁹⁰ a similar condition has been read into false light requiring the fabrication to be both “material and substan-

185. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.11[C], at 2-178.12 (2009).

186. *Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26, 28 (C.D. Cal. 1984).

187. See, e.g., *HGI Assocs., Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 875 (11th Cir. 2005); *Carson v. Dynegy, Inc.*, 344 F.3d 446, 453 (5th Cir. 2003); *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960).

188. Compare RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defining disclosure as “giv[ing] publicity to a matter concerning the private life of another . . .”), with RESTATEMENT (SECOND) OF TORTS § 652E (1977) (defining false light as “giv[ing] publicity to a matter concerning another that places the other before the public in a false light . . .”).

189. Compare RESTATEMENT (SECOND) OF TORTS § 652D (1977) (“if the matter publicized is of a kind that would be highly offensive to a reasonable person”), with RESTATEMENT (SECOND) OF TORTS § 652E (1977) (“if the false light in which the other was placed would be highly offensive to a reasonable person”).

190. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

tial.”¹⁹¹ In point of fact, disclosure may actually outperform false light in guarding an individual’s interest in privacy since, under the former, the matter disclosed need be neither material nor substantial as long as it is not a matter of justifiable public interest.¹⁹² Additionally, the caveat that the matter need be of no legitimate public concern should, in theory, have little impact on disclosure’s applicability when considered alongside Professor Sunstein’s admonition that “there is an important difference . . . between the public interest and what interests the public.”¹⁹³ Nonetheless, there is at least one notable difference.

While the ALI has required that in order for a plaintiff to proceed under false light invasion of privacy the defendant must have acted either with knowledge of the truth or in reckless disregard thereof,¹⁹⁴ courts have not necessarily required the same of plaintiffs in order to recover under disclosure. In fact, there is case law supporting the position that merely negligent conduct is sufficient.¹⁹⁵ On the one hand, this would suggest that disclosure could be an even more powerful shield than false light for warding off unwarranted publicity—the assumption being that the need to show only negligence lessens the burden on defendants, which would lead to an increase in successful claims. On the other hand, there is the potential of increasing the tension between this tort and the bedrock principle of American constitutional law “that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’”¹⁹⁶ guaranteed to all citizens.

But, before free speech concerns make a short-lived affair out of this proposal, it must be remembered that the Supreme Court in *Time, Inc. v. Hill* imposed the “actual malice” standard on false light¹⁹⁷ as reflected in the ALI’s requirement that “the actor had

191. *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967); *see also* *Rinsley v. Brandt*, 700 F.2d 1304, 1308 (10th Cir. 1983); RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (1977).

192. *See supra* Part I.B.2.

193. *See* Sunstein, *supra* note 46.

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

195. *See* *Rinehart v. Toledo Blade Co.*, 487 N.E.2d 920, 923 (Ohio Ct. App. 1985) (holding that a disclosure action is sustainable without establishing recklessness on the part of the defendant).

196. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

197. *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967). The Court borrowed the requirement from its earlier defamation ruling in *New York Times Co., v. Sullivan*. *See Hill*, 385 U.S. at 387.

knowledge of or acted in reckless disregard as to the falsity of the publicized matter.”¹⁹⁸ There is, therefore, no reason why the actual malice standard could not likewise apply to the tort of disclosure should the concerns regarding its potential to chill free speech become manifest. Moreover, unlike false light invasion of privacy, carrying over this requirement from defamation to disclosure would not render the latter superfluous as the interests protected by the two torts in no way overlap. Disclosure guards against the emotional harm that attends the improper dissemination of embarrassing, private details,¹⁹⁹ whereas defamation safeguards an individual’s reputational interest against false and injurious statements.²⁰⁰ Lastly, although critics may contend that the viability of this proposal depends on the plaintiff’s apparent willingness to allow the defendant to assert that the publicized fiction was true—a seemingly contradictory position for a party who is bringing a claim based on the fabrication of intimate details regarding their life—this objection ignores two basic facts.

The first is the nature and extent of the recovery available to a victim through a court of law. If a plaintiff’s ultimate goal is to avoid further public scrutiny, then he would be well-advised to stay as far away from the courthouse as is humanly possible. If, instead, the aggrieved party’s true goal is vindication before the masses, then he would do well to make his case directly to the people rather than relying on a piece of legal paper to do the work in his stead. The American judicial system has never been able, nor was it expressly intended, to overrule the fearsome and informal public jury, which weighs and measures a man’s guilt outside the courtroom. The examples are countless but one need only ask former NFL great Orenthal James Simpson if his triumph in criminal court did anything to alter public perception as to his culpability in the murder of his wife. Practically speaking, courts are ill-equipped to return the genie to the bottle once it has been set free, and the most a plaintiff can hope for is to prevent further dissemination of the falsehood through injunctive relief and monetary recovery for past harm.

The second fact overlooked by potential critics of this proposal is that the estoppel bars only the *defendant* from recanting his alleged story.²⁰¹ As currently formulated, there is nothing in copyright estoppel which would force the plaintiff into complicity with

198. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

199. *See supra* Part I.B.2.

200. *See supra* Part I.C.

201. *See supra* notes 185–86 and accompanying text.

the defendant's fabrication since the doctrine prevents only "the author" or the "one who represents his work to be completely factual" from later claiming that the story was fictitious.²⁰² Therefore, if copyright estoppel was adopted in the context of privacy law without substantial revision, a plaintiff would still be able to deny the entirety of the defendant's alleged story while still forcing the defendant to litigate as though it were true for the purpose of assigning liability. However, even assuming the worst (i.e., that a plaintiff would have to remain passive in the face of the alleged fiction in order to obtain legal or equitable recovery in court), the plaintiff would not be formally estopped from turning around and pleading his case to the public. If such were the case, the a priori question that a potential plaintiff must ask of himself is what type of relief is most desired and which trier of fact, judicial or public, is best able to satisfy his needs.

The preceding arguments against false light invasion of privacy have largely focused on the practical reality that the tort is, by any of the measures discussed above, utterly dispensable. In contrast to this positivist line of reasoning, the final Part of this piece proposes a new normative rationale for extinguishing false light.

III.

The case against false light invasion of privacy has thus far consisted of illustrations as to how the complementary nature of defamation, IIED, and the original privacy torts have left no independent, legally cognizable justification sufficient to merit the existence of a tort that is administratively taxing, constitutionally suspect, and devoid of real-world value. Ironically, the minnows seem to have swallowed the whale despite Dean Prosser's initial concern that the tort of false light would devour whole the law of public defamation.²⁰³ In reality, false light has not turned out to be the leviathan of which Prosser foretold.²⁰⁴ In addition to the damning evidence against the utilitarian worth of false light, there exists

202. See NIMMER & NIMMER, *supra* note 185; see also *supra* notes 185–86 and accompanying text.

203. See Prosser, *supra* note 3, at 400–01; *supra* text accompanying notes 95–96.

204. A decade or more ago it was predicted by knowledgeable observers that invasion of privacy would play an ever-expanding role in tort law. . . . The expectation has not been fulfilled. Even in jurisdictions where the tort is recognized, actions for "false light" invasion of privacy have continued to play a secondary role to defamation.

ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 401 (1980).

a strong theoretical argument against its lingering survival. As such, the final Part of this paper will endeavor to explain how the world has turned and left false light in the dark—just where it was before appearing in Prosser’s imagination.

A. *Then . . .*

As originally conceived by Warren and Brandeis, the law of privacy was only one component of the “general right to the immunity of the person[]—the right to one’s personality.”²⁰⁵ In turn, this basic right flowed from the common law’s ability to grow and change in accordance with an evolving society.²⁰⁶ In particular, it was the drastic evolution of America’s sociopolitical landscape during the end of the nineteenth century²⁰⁷ that prompted Warren and Brandeis to respond by drafting the model for a new area of American law, which they intended to “preserve a ‘civilized’ and ‘cultured’ society, particularly in an evolving . . . democracy that placed a premium on the individual.”²⁰⁸ So motivated, *The Right to Privacy* was born. However, seven decades later, William Prosser’s effort has, in retrospect, failed to flourish, and the question of “why?” still remains.

The core of this failure is most readily perceived in light of one author’s insightful observation into the developmental history of the various and distinct forms of privacy. To wit, this commentator has remarked that

the most distinctive characteristic of privacy . . . is its heavy sensitivity to historical triggers. . . . [E]ach type of privacy . . . has been directly jolted into existence by transformations in American life and technology, which have created a societal mood powerful enough to incubate a new, legally protected right.²⁰⁹

Bearing the above in mind, the late 1800s—an era heavily marked by industrialization, technological innovation, yellow journalism, increasing immigration, and a population shifting from the outlying countryside to the new urban centers—was the perfect soil in which to plant the first seeds of common law privacy. In other words, it was the right tort at the right time. It reflected the fears of

205. Warren & Brandeis, *supra* note 1, at 207.

206. *See id.* at 193.

207. This included “industrialization, the growth of mass urban areas, and the impersonalization of work and social institutions, including institutions of communication.” Bezanson, *supra* note 10, at 1137; *see also* Gormley, *supra* note 10, at 1350–53.

208. Gormley, *supra* note 10, at 1352.

209. *Id.* at 1439.

the day and filled a much-needed gap created when society's growth outran the common law's ability to keep pace. Unfortunately for Dean Prosser, while the sixties were a decade marked by significant change and innovation—the Vietnam War, Martin Luther King and the Civil Rights movement, Apollo 11, the assassination of J.F.K, and Woodstock, to name just a few—this country did not undergo the sort of fundamental societal transformation that resulted in the favorable climate for Warren and Brandeis's privacy. Take, for instance, the ease with which the authors of *The Right to Privacy* were able to identify and express the issues of their period and the attendant harm to which their tort was addressed.²¹⁰ By comparison, in the scant four pages that he dedicates to false light,²¹¹ Prosser hardly seems sure of how to classify the nature of his tort or the new and distinct harm to be redressed, aside from likening its scope to that of defamation—a comparison that has ultimately led to significant uncertainty.

Regardless of whether the conditions in the sixties were, comparatively speaking, as poor as suggested for false light invasion of privacy, with five subsequent decades to gain a sure footing in the loam of America's common law one would assume that if Prosser's tort were ever to take off, it would have done so by now. Why then are courts and commentators today more likely to either weed out false light entirely or shape it into something more closely resembling defamation than they are to cultivate it? Although academics and courts have failed to settle upon an exact harm to be remedied by false light²¹²—a fact readily conceded by even its most ardent advocates²¹³—it is reasonable to imagine that Prosser had actually intended it to guard against injury that “affects how the individual views himself in the community, as with unwanted publicity placing him in a false light.”²¹⁴ Essentially, the tort may be said to guard against the cognitive dissonance that arises when a false projection of the individual clashes with his own self-image. With that basic explanation in mind, this Note now proceeds to discuss why the tort has failed to capture the support of courts and academics.

210. See Warren & Brandeis, *supra* note 1, at 196; *supra* text accompanying note 18.

211. See Prosser, *supra* note 3, at 398–401.

212. See Zimmerman, *supra* note 7, at 371–72.

213. See Ray, *supra* note 167, at 728.

214. *Id.* at 743.

B. . . . And Now

It has been said that in olden times “privacy reflected the fact that personal identity developed in discrete institutions such as the extended family and the circle of friends and associates that are perhaps best captured in the term ‘local community.’”²¹⁵ Today, however, there has been a monumental shift away from reliance on kith and kin as the primary determinant of individual mores and self-identity. It is this change in the process of enculturation—the traditional notion that “the individual’s identity was generally secure in a relatively few stable and local relationships”²¹⁶—which has wholly obviated the need for false light invasion of privacy. It is self-evident that nowadays “identity through association is more elusive and complex; it does not draw on a small number of stable institutions, but instead depends on many specialized and changing relationships.”²¹⁷ If this is true, it becomes practically impossible to deduce with any certainty the mental harm suffered by someone when it is not possible to define with any precision the social backdrop against which he has elected to identify himself. In other words, the type of harm anticipated by false light is no longer cognizable if, as a prerequisite, it is necessary to first firmly identify the relevant social environment within which the plaintiff has formed his sense of identity. Why is this step necessary though?

To begin with, false light is concerned with statements that “would be highly offensive to a reasonable person.”²¹⁸ Both of these elements—the offensiveness of the statement and the reasonableness of the person—are dependent upon the social context in which the plaintiff is found. This in turn requires agreement as to which community is most relevant to making this determination—a task made increasingly difficult by virtue of the fact that the “emerging functionality and multiplication of groups results in less dependence on the part of individuals on any specific group.”²¹⁹ Put differently, how do courts begin to establish a basis for determining whether the plaintiff has suffered an injury when it is uncertain as to how many groups the plaintiff belongs and what, if any, role a particular group has played in the development of his identity? And although some will inevitably point out that false light purports

215. Bezanson, *supra* note 10, at 1139.

216. *Id.* at 1141.

217. *Id.*

218. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

219. Bezanson, *supra* note 10, at 1148 (quoting Ferdinand Schoeman, Privacy and Social Freedom 48–50 (Sept. 4, 1989) (unpublished manuscript, on file with the author)).

to encompass a set of subjective and internal interests distinct from an individual's objective and external reputation—defamation's territory—the former relies as much upon the outward community as does the latter. This is so because the harm, although personal, arises when “false light statements . . . impugn or confound the individual's identity in society, his sense of self within society.”²²⁰

Essentially, false light has lost its punch; it is not feasible to satisfy its already vague and amorphous “highly offensive to a reasonable person” standard because “as the community's role in shaping the individual and promoting survival and transmission of strategies for common life becomes distributed among more restrictive functional associations, more relationships will arise from which aspects of people's lives become irrelevant or at least less central.”²²¹ In short, without being able to fully weigh the impact of nondisparaging but supposedly offensive statements on an individual's emotional well-being—for lack of a sufficiently identifiable social setting against which to make this determination—it is impossible to say with any certainty that false light invasion of privacy in fact protects man's “spiritual nature . . . feelings . . . and intellect.”²²²

CONCLUSION

As an independent cause of action in today's common law, false light invasion of privacy is both a redundant and conceptually bankrupt plaything for overzealous plaintiffs. Taking into consideration the well-established law of public defamation, the more recent but widely accepted tort of privacy (as conceived by Samuel Warren and Lewis Brandeis), and the even younger tort of intentional infliction of emotional distress, there is little room in an overly crowded market for a tort that is unable to distinguish itself in any meaningful way from the competition. In addition, there is the constitutional issue of false light's potential to unnecessarily chill free speech. Lastly, false light has revealed itself to be without relevance in a world that has come to value disparate, transitory, and compartmentalized groups in place of more stable and holistic social enclaves. But for those who bemoan the end of this tort's fifty-year march into oblivion, it may well be time to cease raging against the dying of false light and to simply go quietly into that good night.

²²⁰. Schwartz, *supra* note 133, at 897.

²²¹. Bezanson, *supra* note 10, at 1150 (quoting Schoeman, *supra* note 219, at 51–52).

²²². Warren & Brandeis, *supra* note 1, at 193.

