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EXPLAINING AND JUSTIFYING A LIMITED TORT OF FALSE LIGHT INVASION OF PRIVACY

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INTRODUCTION

IN THEIR CELEBRATED article—published one century ago—on invasion of privacy as a tort, Warren and Brandeis dealt mainly with what modern lawyers would refer to as disclosure and appropriation.[1] By 1960, a large number of cases had been decided under the auspices of the emerging privacy doctrine. Dean Prosser's famous 1960 article, while recognizing the disclosure and appropriation branches of the privacy tort, also separated out a "false light" branch and subsumed many of the pre-1960 cases under that heading.[2] In 1967, in *Time, Inc. v. Hill*,[3] the Supreme Court extended to false light the first amendment privilege previously recognized in *New York Times Co. v. Sullivan*[4] for defamation actions brought by public officials, thereby requiring the false light plaintiff to show that the defendant published its statement knowing that it was false or with reckless disregard as to its truth.[5]

The first major commentary on *Time v. Hill* was provided by Melville Nimmer in 1968.[6] In his view, the Court had been too

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* Professor, UCLA School of Law. Thanks to Marc Franklin and Robert Rabin.

1. *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Most of the article focused on problems of disclosure. In discussing the unauthorized circulation and sale of photographs, however, the article implicated appropriation as well. *Id.* at 195-96, 213-14.

2. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 398-401 (1960). The fourth branch of privacy identified by the Prosser article is intrusion. *Id.* at 389-402. (In fact, Prosser had previously presented his four privacy categories in the 1955 second edition of his treatise. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 637-40 (2d ed. 1955).)

3. 385 U.S. 374 (1967).

4. 376 U.S. 254 (1964).

5. Time v. Hill, 385 U.S. at 387-88.

6. Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

lenient with the media and insufficiently protective of privacy rights. Yet whatever the restrictiveness of the Court's decision, during the 1970s the false light tort continued to gain judicial support,[7] and in the 1980s a number of additional states came on board.[8] During that latter decade, however, a countermovement began to form. In 1982 and 1983, the highest courts in New York and Ohio used language that cast some doubt on the false light tort.[9] Then, in 1985, the tort was formally rejected in North Carolina, in *Renwick v. News & Observer Publishing Co.*;[10] a year later, the Missouri Supreme Court came close to adopting the North Carolina approach.[11] In 1989, Professor Zimmerman published an article arguing that false light be abolished, on either constitutional or common law grounds.[12] A year later, Professor Zuckman largely agreed with the abolition proposal.[13]

The current challenge to the false light doctrine is quite welcome; it performs an essential service by identifying many problems that accompany false light. In considering (and indeed expanding on) these problems, I appraise one batch of them as

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7. Moreover, in 1974 the Supreme Court decided Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), which could be read as indicating that negligence rather than recklessness should be the criterion for liability in false light actions brought by private parties. *See infra* text accompanying notes 106-10 & 138-41.

8. For an extensive collection of cases recognizing the false light tort, see Annotation, *False Light Invasion of Privacy—Cognizability and Elements*, 57 A.L.R.4th 22, 58-72 (1987).

9. *See* Arrington v. New York Times Co., 55 N.Y.2d 433, 443, 434 N.E.2d 1319, 1323, 449 N.Y.S.2d 941, 945 (1982); Yeager v. Local Union 20, Int'l Bhd. of Teamsters, 6 Ohio St. 3d 369, 372, 453 N.E.2d 667, 670 (1983). The uncertainty expressed in *Arrington* was especially surprising, since it was the New York court that previously had ruled in favor of false light in Hill v. Hayes, 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S. 7 (1965), *rev'd sub nom.* Time, Inc. v. Hill, 385 U.S. 374 (1967), and Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd*, 23 A.D.2d 216, 260 N.Y.S.2d 451 (1965), *aff'd*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated*, 387 U.S. 239 (1967), *aff'd*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969).

10. 310 N.C. 312, 312 S.E.2d 405, *cert. denied*, 469 U.S. 858 (1984). In 1988, the same court abolished the disclosure tort. Hall v. Post, 323 N.C. 259, 271, 372 S.E.2d 711, 714 (1988).

11. *See* Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475, 480-81 (Mo. 1986). In Washington, the issue of abolition was identified and left open in Eastwood v. Cascade Broadcasting Co., 106 Wash. 2d 466, 473-74, 722 P.2d 1295, 1299 (1986).

12. Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364 (1989).

13. Zuckman, *Invasion of Privacy—Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253, 255-59 (1990). Professor Smolla's treatise on defamation reviews *Renwick* and finds that "its logic is not without substantial weight." R. SMOLLA, LAW OF DEFAMATION 10-17 (1990).

quite serious, and I therefore propose that the false light tort be significantly narrowed. Nevertheless, after balancing several factors, I conclude that a limited doctrine of false light is desirable. This article explains the doctrine I recommend and sets forth the justification for that recommendation.

I. HIGHLY OFFENSIVE FALSEHOODS

To be actionable under false light doctrine, the statement published by the defendant must be both false and highly offensive.[14] To state this requirement invites the question of why false statements might be highly offensive.[15] One obvious reason is that the false statement disparages the plaintiff's conduct or character. If it is disparaging, however, the plaintiff evidently has a defamation action against the defendant. According to the *Restatement (Second) of Torts*, "in such a case the action for privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity."[16] Indeed, in a large number of false light cases, the plaintiff pleads false light as an adjunct of sorts to his defamation pleading; the court, primarily discussing defamation, treats the false light claim as a modestly inconvenient add-on. One recent case illustrating this phenomenon is *White v. Fraternal Order of Police*,[17] in which a policeman sued a police officers' association, a local newspaper, and a national television network for statements each had made about a round of drug testing the policeman had undergone. In dealing with these claims, the court encountered difficult issues relating to the scope of various privileges and the doctrine of defamation by implication. The court assumed, however, that these issues play out the same way in defamation and false light. In affirming the plaintiff's cause of action against the association but rejecting his claims against the two media defendants, the court primarily discussed defamation doctrine; in considering the false light claims "in tandem" with the defamation claims,[18] the court added similar holdings relating to false light.

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14. *See* RESTATEMENT (SECOND) OF TORTS § 652E (1976).

15. "What is this tort getting at?" M. FRANKLIN & D. ANDERSON, MASS MEDIA LAW 455 (4th ed. 1990).

16. RESTATEMENT (SECOND) OF TORTS § 652E comment b.

17. 909 F.2d 512 (D.C. Cir. 1990).

18. *Id.* at 518.

In cases of this sort, one can properly ask what is the point of the false light tort—what benefits does it provide that justify the (limited) extent to which it increases the complexity of litigation. At least two states have reacted negatively to these false light claims. California courts have held that if the plaintiff's defamation claim seems capable of fully vindicating her interests, the duplicative false light claim should be dismissed at the outset of litigation.[19] And in North Carolina, the *Renwick* court reasoned that given the frequent defamation/false light overlap, to recognize false light would "reduce judicial efficiency by requiring our courts to consider two claims for the same relief which, if not identical, would not differ significantly."[20]

Admittedly, in considering this overlap one quickly realizes that the defamation tort is surrounded by a number of what are commonly referred to as "restrictions and limitations," some of which are of very early legal origin. Recognizing this raises an obvious question: should the plaintiff, by invoking false light, be able to circumvent the rules that would burden his defamation claim? Many of those who oppose—or at least worry about—false light do so because of its capacity to inappropriately bypass established defamation rules.[21] On the other hand, some who support false light do so because they see false light as an effective way to reform the law, by enabling courts to write on a relatively clean slate. An article by Dean Wade in 1962 not only confirmed Prosser's discovery of the false light doctrine but also perceived that "the myriad rules of defamation and their artificial and conflicting natures conceal and confuse the actual policies involved";[22] false light hence offers the law "a splendid opportunity for reform," an opportunity that certainly "should be welcomed by courts and writers . . . ."[23] More recently, Judge Posner has suggested that many defamation restrictions are "fossil remnants of the tort's prehistory in the discredited practices of Star Chamber and the

19. *See* Kapellas v. Kofman, 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969); Selleck v. Globe Int'l, Inc., 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (1985).

20. Renwick v. News & Observer Publishing Co., 310 N.C. 312, 326, 312 S.E.2d 405, 412-13 (1984).

21. Ironically, even though it was Prosser's 1960 article that provided the impetus for modern false light, that article expressed serious concerns about false light. Prosser, *supra* note 2, at 401.

22. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1123 (1962).

23. *Id.* at 1122.

discredited concept of seditious libel. . . . If they are gotten around by allowing a plaintiff to plead invasion of privacy, there is no great loss."[24]

Despite the effectiveness of the rhetoric employed by those who defend false light, the false light critics here have the better side of the argument. If defamation restrictions do make sense, the plaintiff should not be able to avoid them by presenting an alternative pleading. If there are plausible arguments to the effect that a particular restriction is a mistake, courts should consider these arguments on their merits. In his 1962 article, Dean Wade, having condemned defamation law as being full of "anomalies and absurdities," went on to complain that over the years "efforts at legal reform [of defamation] have proved quite unsuccessful."[25] However accurate this assessment may have been as of 1962, it reveals very little about the more recent legal process. Since the mid-1960s, in tort cases generally—especially those concerning personal injury—modern courts have demonstrated a remarkable capacity to overrule or modify doctrines that no longer seem socially desirable. Beginning with the Supreme Court's ruling in *New York Times Co. v. Sullivan*,[26] courts in the name of the first amendment have reformed substantial portions of the law of defamation. Granted, most of this later effort has been directed at expanding defenses available to defamation defendants. Nevertheless, the entire project initiated by *New York Times* confirms that the judicial capacity to modernize the law—a capacity whose pro-plaintiff potential is amply demonstrated in personal injury cases—can be relied on in defamation as well.[27] Since the option of dispensing with dated restrictions on liability by modifying precedent is clearly available to modern defamation courts, this option should not be distorted or simplified by pretending—through the invocation of false light--that the precedent does not even exist.[28]

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24. Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1133 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986). However, for a much warmer overall view of defamation doctrine, see R. POSNER, THE ECONOMICS OF JUSTICE 287-99 (1990).

25. Wade, *supra* note 22, at 1121-22.

26. 376 U.S. 254 (1964).

27. For an example of a recent case that liberalizes common law defamation restrictions, see Matherson v. Marchello, 100 A.D.2d 233, 473 N.Y.S.2d 998 (1984) (defamation broadcast by radio or television is libel rather than slander).

28. One complicating factor here is that a number of defamation "limitations" are set forth in state statutes rather than common law precedents. The modern process of judicial creativity referred to above might not include the capacity to nullify such statutory

Furthermore, the very idea that defamation law is full of "anomalies and absurdities" plainly entails an unjustified overgeneralization. Indeed, one leading court has recently commended defamation doctrine as generally reflecting a "delicate balance . . . between the individual's interest in redressing injury from published falsehoods, and the protection of society's interest in vigorous debate and free dissemination of the news."[29] Even if this commendation is itself an undue generalization, it is certainly true that many important defamation doctrines do aim to achieve such a "balance." If, however, defamation rules are understood as not applying to overlapping false light claims, then in dealing with those claims courts will frequently be required to go through a costly process of reinventing the wheel. Moreover, in undertaking that process, courts will predictably make some mistakes and end up misdesigning doctrines that had been properly designed in previous defamation cases.

In any event, the entire analysis above, relating to a certain criticism of false light, rests on an assumption that should now be questioned—the assumption that false light cases do enable plaintiffs to bypass defamation restrictions. This assumption turns out to be largely incorrect. The *Restatement* expressly provides that the "privileges" it recognizes for defamation actions also apply in privacy invasion cases.[30] A *Restatement* comment further indicates that "when the false publicity is also defamatory . . ., it is arguable that limitations of long standing that have been found desirable for the action for defamation should not be successfully evaded by proceeding under a different theory of later origin . . . ."[31] In considering whether false light courts ignore defamation restrictions, one can note some confusion in the case law as to whether false light violations can be enjoined.[32] (Defamation, of

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limitations. For courts to circumvent such statutes by allowing plaintiffs to claim in false light would, however, be deeply troubling. *See* Fellows v. National Enquirer, Inc., 42 Cal. 2d 234, 250, 721 P.2d 97, 108, 228 Cal. Rptr. 215, 226 (1986). These are not the kinds of crude early statutes whose "obsolescence" could justify judicial resort to a Calabresian process of implicit overruling. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 68-80 (1982).

29. *Fellows*, 42 Cal. 3d at 248, 721 P.2d at 106, 228 Cal. Rptr. at 225.

30. RESTATEMENT (SECOND) OF TORTS §§ 652F, 652G (1976).

31. *Id.* § 652E comment e.

32. For a list of cases supporting the enjoinability of false light cases, see Annotation, *False Light Invasion of Privacy—Defenses and Remedies*, 57 A.L.R.4th 244, 329-30 (1987). Most of these citations, however, turn out to be inapt. For example, the injunction in Leavy v. Cooney, 214 Cal. App. 2d 496, 29 Cal. Rptr. 580 (1963), was justified on

course, is ordinarily not enjoinable.)[33] Also, one line of cases has enabled plaintiffs, by pleading false light, to escape the one-year statute of limitations that typically applies in defamation actions.[34] Other courts, however, have concluded that the plaintiff's false light claim *is* governed by the short defamation limitation period.[35] Moreover, the limitation period and the no injunction rule seem to be the only defamation restrictions that have provoked an uneven judicial response in false light litigation. In cases involving other defamation restrictions, courts have rather uniformly held that they do apply to the plaintiff's overlapping false light claim. Accordingly, courts have applied to false light actions the defamation doctrines relating to retraction,[36] opinion,[37] innuendo,[38] substantial truth,[39] nonsurvival,[40] "of and concerning,"[41] single publication,[42] bond posting,[43] and special damages.[44]

To summarize, if courts were disingenuously allowing plain-

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grounds of the defendant's breach of contract; and Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610, *cert. denied*, 398 U.S. 960 (1969), was essentially a disclosure case.

33. Of course, the rule against injunctions in defamation cases is not the kind of defamation restriction that Wade and Posner would be inclined to deplore as an "absurdity." Indeed, that rule, while it originated in the common law, may well now be constitutionally required. Furthermore, this requirement may extend to false light cases as well. *See* M. FRANKLIN & D. ANDERSON, *supra* note 15, at 448-49. The failure of a few cases to recognize the no injunction rule illustrates the kinds of mistakes that false light courts can make when they ignore defamation precedents.

34. *See* Annotation, *supra* note 32, at 268-69 (collecting cases).

35. *See id.* at 266-68.

36. *See* Werner v. Times-Mirror Co., 193 Cal. App. 2d 111, 122-23, 14 Cal. Rptr. 208, 215-16 (1961).

37. *See* Rinsley v. Brant, 700 F.2d 1304, 1307 (10th Cir. 1983).

38. *See* Fudge v. Penthouse Internat'l, Ltd., 840 F.2d 1012, 1018-19 (1st Cir. 1988); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 764-67 (D.N.J. 1981); Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1088 (E.D. Pa. 1980).

39. The truth doctrine applied in Machleder v. Diaz, 801 F.2d 46 (2d Cir. 1986), is no less protective of defendants than the doctrine applicable in defamation actions. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 842 (5th ed. 1984).

40. *See* Gruschus v. Curtis Publishing Co., 342 F.2d 775, 776 (10th Cir. 1965); Annotation, *supra* note 32, at 273-74.

41. *See* Michigan United Conservation Club v. CBS News, 485 F. Supp. 893, 904 (W.D. Mich. 1980).

42. *See* Fouts v. Fawcett Publications, 116 F. Supp. 535, 537 (D. Conn. 1953).

43. *See* Grimes v. Carter, 241 Cal. App. 2d 694, 701-02, 50 Cal. Rptr. 808, 813 (1966).

44. Defamation special damage rules have been applied to false light claims in McCabe v. Village Voice, Inc., 550 F. Supp. 525, 529 n.9 (E.D. Pa. 1982); Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1088 (E.D. Pa. 1980); and Fellows v. National Enquirer, Inc., 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986).

tiffs to escape appropriate defamation doctrines by asserting that defendants disparaging statements placed them in a false light, that disingenuity would provide a solid reason for opposing the false light tort. By and large, however, courts have not been enticed in this way; rather, they have typically ruled that defamation doctrines apply to overlapping false light claims. Given this proper pattern of judicial holdings, the plaintiff's false light claim turns out to be little more than an administrative annoyance in dealing with what is primarily and essentially a defamation action.[45] As California and North Carolina courts have realized, there is no reason why the judiciary should tolerate this annoyance: these false light claims are a cumbersome superfluity. While false light is hardly unconstitutional in these cases, one can still say that constitutional values are disturbed when defamation litigation for no good reason is rendered more complex and expensive. Accordingly, false light actions should be disallowed (or at least strongly disfavored) when defendants' false statements are highly offensive to plaintiffs on account of their disparaging character. This recommendation can be slightly extended by suggesting that whenever the defendant's false statements are obviously and significantly disparaging, courts should presume that they are highly offensive because of their disparaging quality.

Moreover, in reviewing actual false light cases, one finds that the large majority result from defendants' statements that seem clearly disparaging. Acceptance of this article's recommendation would therefore eliminate most of the false light claims that are currently asserted. Given that elimination, the jurisdiction of false light would encompass defendants' false statements that are nondisparaging but still highly offensive. While such cases currently comprise only a limited number of all false light cases,

45. Sometimes it is suggested that since defamation law focuses on the plaintiff's interest in reputation, the false light tort does a better job in providing remedies for the plaintiff's emotional distress. *See, e.g.*, Braun v. Flynt, 726 F.2d 245, 252 (5th Cir. 1984). This suggestion seems unsound. Despite the emphasis on reputation in defamation law, protecting against emotional distress is one of defamation law's significant purposes. *See* R. SMOLLA, *supra* note 13, at 1-16. Moreover, a large portion of the typical defamation verdict is attributable to the plaintiff's emotional distress. Since false light almost always overlaps with libel rather than slander, false light cases typically avoid the special damage problems that are associated with the doctrine of slander per se. Furthermore, the doctrine of libel per quod that sometimes requires special damages in defamation actions has been rejected by the *Restatement*. RESTATEMENT (SECOND) OF TORTS § 569 comment c (1976). However, on lingering special damage issues in false light, see the cases cited *supra* note 44.

these are the cases in which the tort is of genuine practical importance--in that false light here has the capacity to generate liability that could not be derived from the defamation tort. In addition, these false light cases contain genuine intellectual interest, since they raise the intriguing issue of statements that can be highly offensive because of their falsity even though the falsehoods themselves are not really disparaging.

Do such statements indeed exist? And if some number can be identified, what can be said about the general circumstances under which statements can be highly offensive on account of their nondisparaging falsity? Drawing largely on the facts of actual cases and the hypotheticals in the existing false light commentary, I present below a nontrivial number of nondisparaging false statements that might be regarded as highly offensive to reasonable people. Also, these statements are grouped under various headings —though these headings should be understood as suggestive rather than exhaustive.[46] It can be assumed not only that these statements are false but also that their falsity is due to the defendant's intent or recklessness. This assumption embodies the false light standard of liability that Part III recommends; as that Part suggests, a false statement becomes more offensive when its falsity is perceived to be intentional or reckless.

First, consider a group of statements that make false claims about private aspects of plaintiffs' lives. A biography of the baseball star Warren Spahn, for example, invents an elaborate narrative about his courtship of his wife,[47] their relationship during her pregnancy,[48] and his supposedly symbiotic relationship with his father.[49] Or, a tabloid publishes a headline story falsely reporting

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46. Setting forth such headings reduces the problem of the vagueness of the false light tort. On the general constitutionality of the tort, see *infra* text accompanying notes 106-10.

47. The Spahn book falsely described Spahn's supposed initial impressions of his eventual wife at their first meeting; it invented obstacles to their marriage plans and narrated how they overcame those obstacles; it made up a highly melodramatic scene in which Spahn surprised his wife upon returning from Europe. *See* Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 229-30, 250 N.Y.S.2d 529, 540 (Sup. Ct. 1964).

48. *See id.* at 230, 250 N.Y.S.2d at 540:

> [W]henever the Braves' road games were against an eastern team, Warren flew home between pitching assignments to be with his wife. . . . On the western swings, Warren sat fidgeting on the bench, his uneasy mind a thousand miles away. Often, in the middle of a game, he would bolt from the dugout, rush into the clubhouse and call home to assure himself that Lorene was all right.

49. Much of one chapter, for example, falsely sets forth "a grim portrayal of the supposed grave psychological effect of Spahn's injury to his elbow . . . upon the elder

that Clint Eastwood and Tanya Tucker are deeply involved in a romantic relationship.[50] Eastwood and Tucker are appealing personalities, so the claim of a romance between the two involves no obvious disparagement; moreover, assuming that both of them are single and unattached, the headline implies no infidelity.[51]

A second and related group of statements make false claims about the deeply personal thoughts or emotions of the plaintiff. Consider a plaintiff who had come close to drowning after his boat capsized; a journal then publishes a false account of the ideas that supposedly filled his consciousness as he faced the likelihood of death.[52] The Warren Spahn biography, while describing certain external events in Spahn's professional life, invents accounts of all the emotions and anxieties he internally experienced as he encountered those events.[53] A newspaper article, having correctly explained how the plaintiff's husband died, falsely describes her con-

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Spahn." *Id.* at 228-29, 250 N.Y.S.2d at 539.

This biography was written for an audience of youthful readers (apparently junior high school students). Professor Zimmerman thinks that this provides a justification for the book's falsehoods. *See* Zimmerman, *supra* note 12, at 442. One can agree that the special needs of this audience may afford a privilege for the fabrication of quotations. But the dimensions of Spahn's personal life that this book narrates are dimensions that *any* serious biography would need to explore.

50. *See* Eastwood v. Superior Court, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983); *see also* RESTATEMENT (SECOND) OF TORTS § 652E illustration 5 (1976) (a movie about the plaintiff's life includes a "non-existent romance"). The *Eastwood* facts are here simplified: the tabloid's actual story portrayed a romantic triangle involving Eastwood, Tucker, and another woman. The case came up to the court of appeal on an appropriation issue. Eastwood had also sued, however, under false light. The defendant demurred to the appropriation claim but did not dispute the legal sufficiency of the false light claim. For discussion of the court's reasoning on the appropriation claim, see *infra* text accompanying note 103.

51. In Fellows v. National Enquirer, Inc., 42 Cal. 3d 234, 721 P.2d 91, 228 Cal. Rptr. 215 (1986), a tabloid claimed that TV producer Arthur Fellows was romancing actress Angie Dickinson. For whatever reason, the plaintiff did not complain that this story, standing alone, was actionable. Rather, he alleged that it placed him in a tortious false light inasmuch as some readers knew of his long-standing marriage to another woman. At this point, however, his false light claim overlapped his defamation claim and raised an issue of the special damage requirement that sometimes accompanies cases in which defamation is established with the aid of extrinsic facts.

False light differs from defamation by way of the requirement imposed by the former that the defendant's false statement be widely publicized. *See* Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 87-88 (W. Va. 1983). This publicity requirement might not be satisfied if the offensively false character of the defendant's false statement is attributable to extrinsic facts known by only a limited number of readers.

52. This hypothetical borrows from the facts of Dempsey v. National Enquirer, 702 F. Supp. 934 (D. Me. 1989); *see infra* note 152.

53. *See Spahn*, 43 Misc. 2d at 232-33, 250 N.Y.S.2d at 544.

tinuing emotional condition in the aftermath of that death.[54] A magazine publishes an article that lays out what supposedly are the plaintiff's fundamental views about sexuality, religion, or politics; in fact, these are not his views at all.[55]

A third group involves false statements that portray plaintiffs as having been severely victimized by a variety of circumstances.[56] For example, a story is published falsely reporting that the plaintiff is suffering from cancer or from another serious illness such as Huntington's disease.[57] Or, a story falsely reports that the plaintiff has been raped,[58] or that the plaintiff has been assaulted and nearly murdered,[59] or that the plaintiff has been kidnaped and badly treated by his kidnapers.[60]

In a further group of situations, the defendant ascribes virtues to the plaintiff that the plaintiff has in no way earned. The plaintiff, for example, has served in an honorable—yet still quite ordinary—way in the military; his biography, however, claims

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54. *See* Cantrell v. Forest City Publishing Co., 419 U.S. 245, 248 (1974); *see also* Varnish v. Best Medium Publishing Co., 405 F.2d 608 (2d Cir. 1968) (tabloid falsely described husband's reaction to wife's suicide), *cert. denied*, 394 U.S. 987 (1969).

55. The sexual views of a rabbi were falsely portrayed in Goldberg v. Ideal Publishing Corp., 210 N.Y.S.2d 928 (Sup. Ct. 1960). In Jonap v. Silver, 1 Conn. App. 550, 474 A.2d 800 (1984), a plaintiff recovered in false light after the defendant falsely signed his name to a letter sharply criticizing the policies of the FDA. A confusing *Restatement* illustration deals with an implied misstatement of the plaintiff's political party affiliation. RESTATEMENT (SECOND) OF TORTS § 652E illustration 4 (1976).

56. One case affirmed the false light claim of the plaintiff—a woman miner—who alleged that she had been falsely portrayed as having been subjected to serious sexual harassment and discrimination in the course of her employment. Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (W. Va. 1984).

While a false statement that the plaintiff is dead is not defamatory, *see* Cohen v. New York Times Co., 153 A.D. 242, 138 N.Y.S. 206 (1912), such a statement could provide the basis for a false light action. However, by merely appearing in public the plaintiff can fully refute the statement, at least with respect to those who are exposed to his appearance.

57. When Elizabeth Taylor was hospitalized recently, *The National Enquirer* reported that she was suffering from lupus (an often fatal disease) and also that she was drinking while she was in the hospital. She sued, and her suit recently settled for a quite substantial amount. *See* N.Y. Times, May 29, 1991, at B3, col. 1. According to her lawyer, the part of her suit that complained about the false disease report relied mainly on the false light doctrine. Telephone interview with Neil Papiano (May 29, 1991).

58. *See* Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., 50 T.L.R. 581 (C.A. 1934) (discussed *infra* text accompanying note 83).

59. The issue of criminal attacks is considered in Douglass v. Hustler Magazine, 769 F.2d 1128, 1133 (7th Cir. 1985), *cert. denied*, 472 U.S. 749 (1986) (dictum); and Zimmerman, *supra* note 12, at 372 n.45.

60. This is an expansion on the facts in Time, Inc. v. Hill, 385 U.S. 374 (1967). In that case, a kidnaping had in fact occurred. But the claim of brutality was false; rather, the kidnapers had behaved politely. *Id.* at 378.

that he won a Bronze Star for many brave acts that the biography vividly describes, for example, racing out of his bunker in the teeth of the enemy's barrage.[61] Or, a student newspaper reports that a particular entering student has the highest college board scores in the freshman class; in fact, that student's scores are quite ordinary. In cases of this sort, the defendant's false statement, far from impairing the plaintiff's reputation in a defamation-like way, actually enhances that reputation. The statement achieves this result, however, in a factually unjustified way that places the plaintiff in a distinctly awkward position, as he approaches his associates with a reputation that he knows is undeserved and realizes that he is bound to disappoint them.[62]

The statements described above involve nondisparaging false statements that reasonable subjects could properly regard as "offensive." Are those statements, however, "highly offensive"? A showing of highly offensive is of course necessary in order to satisfy the requisites of the *Restatement*. In addition, 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. Certainly, not every statement that falls within the categories described above should be appraised as highly offensive and therefore actionable. In this regard, the *Restatement*'s distinction between "major" and "minor" misrepresentations of the plaintiff's "character, history, activities or beliefs" is helpful, even though obviously imprecise.[63] In a false light action, the plaintiff's claim that a statement is highly offensive should be subjected to careful scrutiny by judge[64] and jury. And

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61. *See Spahn*, 43 Misc. 2d at 228, 250 N.Y.S.2d at 538-39. For a similar example, see RESTATEMENT (SECOND) OF TORTS § 652E illustration 9 (1976). Professor Smolla hypothesizes a Vietnam veteran whose own military record is satisfactory yet undistinguished, who has witnessed real courage and real death, and who is then written up in the local newspaper during a War anniversary as a John Wayne-like hero who has performed dramatic acts of valor, which the newspaper invents. This veteran "would be profoundly disturbed and embarrassed at being made out as something he is not." R. SMOLLA, *supra* note 13, at 10-19.

In *Time v. Hill*, the magazine article reported that the plaintiff, having been subjected to a kidnaping, valiantly resisted the kidnapers. In truth, the plaintiff passively acquiesced in the kidnapping. 385 U.S. at 378.

62. Moreover, "a laudatory treatment may make one appear more ridiculous than a factual one, at least to those who know the truth." *Spahn*, 23 A.D. 216, 221, 260 N.Y.S.2d 451, 456 (1965).

63. RESTATEMENT (SECOND) OF TORTS § 652E comment c.

64. The role of the trial judge in screening the plaintiff's "highly offensive" claim is

in false light cases it is hardly clear that juries would approach their tasks with any undue bias or sympathy in favor of plaintiffs.[65] In order to persuade judge and jury, the plaintiff as a practical matter may be required to offer an explanation as to why she experienced the defendant's nondisparaging statement as highly offensive.

Yet even if these procedural precautions are acknowledged, one can still expect an adequate number of cases in which juries could make proper findings of highly offensive.[66] Given this expectation and given as well a requirement that the falsehoods be intentional or reckless, recognition of the false light tort seems appropriate. The case for its recognition is bolstered, moreover, by several lines of argument developed in Part III.

What, however, is the "interest" that false light protects? Blaustein's suggestion that all of privacy is a subcategory of the broader interest in "human dignity" is unsatisfactory.[67] Human dignity can be called into question by a wide variety of practices in society that have nothing to do with privacy and for which the law makes no effort to provide a remedy.[68] One should also be wary of affiliating privacy with the notion of the plaintiff's "inviolate personality," as set forth by Warren and Brandeis;[69] indeed, the language of "personality" seems so inappropriate here as to lead one to wonder whether the term had a different set of implications a century ago than it has today. As far as the false light branch of privacy is concerned, an appropriate appraisal is that false light statements can easily impugn or confound the individual's identity in society, his sense of self within society.[70] By conveying to the public seemingly essential information about the

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emphasized in Dempsey v. National Enquirer, 702 F. Supp. 934, 938 (D. Me. 1988).

65. Juries might be especially skeptical in those cases in which the plaintiff complains about false praise conferred on him by the defendant.

66. The damages awarded in these false light cases should be commensurate with the sense of offensiveness that the plaintiff has borne. This, presumably, is how damages are also measured in intrusion and disclosure actions, both of which depend on the defendant's conduct being "highly offensive" to a reasonable plaintiff. RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D (1976). For discussion of one social function served by damage awards in false light cases, see *supra* text accompanying note 150.

67. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 991-93, 1000-07 (1964).

68. *See* Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 259-60 (1977).

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

70. For valuable discussion of the "social" dimension to selfhood, see Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 963 (1989).

plaintiff, these statements can be said to affect the plaintiff's "reputation." In a defamation action, the plaintiff complains that the defendant's statement has diminished his reputation; the statement's falsity comes in by showing that this diminution is not justified. In a false light action, the defendant's falsehood brings about a mismatch or conflict between the plaintiff's actual identity and his identity in the minds of others, a conflict that itself can be offensive or disorienting.

To what extent, however, is the interest affirmed by false light properly cognizable in privacy terms? Ruth Gavison's description of the concept of privacy suggests that false light cases do not in fact raise privacy issues.[71] However, one association between privacy and false light can be affirmed by noting that nondisparaging false light statements often relate to very private portions of the subject's life. Even Professor Zimmerman, so skeptical about false light harms, acknowledges that false light claims are most appealing when the defendant's false statement includes intimate allegations about the plaintiff.[72] Professor Nimmer's article advances the view that a statement should be actionable under privacy-oriented false light doctrine if that statement—were it true—would be actionable as a privacy-invading disclosure.[73] The example he gives is the defendant that publishes a nude photograph, supposedly of the plaintiff, which in fact consists of the plaintiff's head superimposed on the nude body of some other person.[74] Were the photograph entirely of the plaintiff, Nimmer points out, it would be actionable as a disclosure; the defendant should not escape liability merely because the body turns out to belong to some other person.[75] Consider, now, an accurate state-

71. Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 422, 436 (1980). Tom Gerety sees false light as protecting the interest in the plaintiff's "public identity," and he regards this interest as "in need of legal protection"; he nevertheless denies that the interest is a privacy interest. Gerety, *supra* note 68, at 258-59. Gerety misses, however, the "private" quality in many false light cases, as discussed here in the text.

72. Zimmerman, *supra* note 12, at 372-73 & n.49.

73. Nimmer, *supra* note 6, at 963.

74. *See id.* One later case illustrates the process by which life can imitate the law professor's artful hypothetical. *See* Lerman v. Flynt Distrib. Co., Inc., 745 F.2d 123 (2d Cir. 1984) (plaintiff's name attached to the nude photograph of another woman), *cert. denied*, 471 U.S. 1054 (1985).

75. Nimmer's example is not entirely satisfactory: it involves what seems to be an attempted disclosure by the defendant, an attempt that flukishly just misses as a real disclosure, and which, as a near miss, produces about the same harm that a real disclosure would entail. The example therefore obscures the extent to which in a strong false light case it is exactly the falsity of the defendant's statement that produces the offense to the

ment about the plaintiff's private conduct that is a prima facie disclosure; the disclosure claim, however, is blocked by the defense of newsworthiness, which results from the plaintiff's status as a public figure or his involvement in a public event. Assume now that the statement made by the defendant is factually quite false. If offended by that falsity, the plaintiff can sue under false light. The fact that the false statement relates to the private portion of the plaintiff's life that receives prima facie protection from the disclosure tort helps show why, for false light purposes, the falsity of that statement makes it highly offensive to reasonable people.[76]

To be sure, the analogy between false light and disclosure is incomplete. If it were complete, it might deny liability to Clint Eastwood, since his romance with Tanya Tucker—had it existed—might well have been on display in such public places as concert halls and restaurants.[77] The analogy is nevertheless useful by way of establishing a considerable association between the false light and disclosure branches of the privacy tort. For that matter, there are also significant associations between false light and the

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plaintiff.

76. One hears the suggestion that a false light action is really a disclosure action in which the falsity in the defendant's statement prevents the defendant from invoking the defense of newsworthiness. Analytically, however, this suggestion is unsatisfactory. If the defendant's statement *is* false, then the statement simply is not capable of inflicting disclosure harm: for it does not actually reveal the facts of the plaintiff's private life. If the false statement *is* highly offensive, that offensiveness must be due to the its falsity. Hence false light rather than disclosure provides the necessary frame for analysis.

As a descriptive matter, plaintiffs whose real complaint lies with the defendant's truthful (but privileged) disclosure might fasten on a few instances of falsity in the defendant's story in order to bring a false light action. The lawyer for the Hill family has described in the following way the impact of the magazine story on Mrs. Hill:

> At trial there had been testimony that the *Life* article had caused Mrs. Hill lasting emotional injury. . . . Two eminent psychiatrists had explained [that] she had come through the original hostage incident well but had fallen apart when the *Life* article brought back her memories transformed into her worst nightmares and presented them to the world as reality.

Garment, *Annals of Law: The Hill Case*, NEW YORKER, Apr. 17, 1989, at 90, 109. Finding this passage somewhat ambiguous, I have invited the lawyer, Leonard Garment, to clarify. He reports that the Hill family was undeniably quite unhappy with those truthful aspects of the *Life* magazine article that alerted the world to their earlier kidnaping. But he also emphasizes the extent to which Mrs. Hill suffered extra distress on account of that article's falsities—its false portrayal of the "blood and gore" and the "leering sexuality" in the kidnaping. Telephone interview with Leonard Garment (May 17, 1991).

77. Indeed, Nimmer was aware that his criterion did not suffice to explain all cases in which liability is properly imposed under the false light doctrine. Nimmer, *supra* note 6, at 964 & nn.96-97. His point seems to be that the rationale for false light liability in cases of this sort is something other than privacy pure and simple; however, by not explaining what that rationale is, his evaluation falls somewhat short.

appropriation branch of privacy, and between false light and the tort of intentional infliction of emotional distress.[78]

This article, in favoring a limited false light doctrine, proposes a certain division of responsibility between the defamation and false light torts, with defamation exercising jurisdiction over statements that are disparagingly false while false light assumes authority over false statements that are highly offensive even though nondisparaging. This division of responsibility should be healthy for each of these torts. As for false light, it is useful to reconsider here the "victim" cases in which the plaintiff is falsely reported as having been the victim of a serious disease or crime. These cases fit quite adequately within a false light framework. To be described as such a victim could offend a reasonable person by portraying him to the public as struggling against obstacles that do not exist and by evoking in others unwarranted attitudes of pity,[79] compassion, and even awe.

Assume that the false light tort is not available in these victim cases and that the plaintiff, seeking a recovery, is therefore led to attempt a defamation action. In such a case the court would almost certainly agree that the false statement does not in any rational sense disparage the plaintiff.[80] Nevertheless, the court might sense that such a statement awkwardly affects in a variety of ways the relationship between the plaintiff and his associates; the court might also sense that this is a case in which liability is appropriate. In the absence of false light, this court might well be inclined awkwardly to stretch the concepts of defamation in order to justify the granting of relief. Such distortions of doctrine seem unfortunate in their own right. Furthermore, they can make a bad situation worse. It is an unfortunate fact that because of nonrational instincts some portion of the population stigmatizes the woman who has been raped and the person who is undergoing the agonies of cancer.[81] Were liability only available under defa-

78. These associations are described below. *See infra* notes 102-05 & 114-19 and accompanying text.

79. *See* Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1134 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986).

80. In Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1282 (3d Cir. 1979), the court reasoned that it is not defamatory to falsely report that the plaintiff has cancer or some other similarly serious disease. "The public's reaction today to a victim of cancer is usually one of sympathy rather than scorn, support rather than rejection." *Id.* In *Chuy* itself, the defendant had falsely publicized a claim that the plaintiff had polycythemia vera, a potentially fatal disease. *Id.*

81. *See* S. SONTAG, ILLNESS AS METAPHOR 57 (1978); *Naming Names*, NEWSWEEK,

mation theory, then the plaintiff, in seeking liability, would be required to focus exclusively on this nonrational response; and the court, in affirming liability, would be led to legitimize that response by emphasizing that it is within the realm of respectability.[82] Moreover, in assessing the extent of liability, the court would be required to ignore all the effects of the false statement on those in the audience who see the statement as clearly relevant to their attitude towards the plaintiff even though they reject any notion of stigma. In fact, one 1930s English court affirmed the defamation claim of a woman whom a movie had falsely suggested had been raped; yet to bring this case within the coverage of defamation, the court felt obliged to emphasize that the supposed rapist—Rasputin—was a person of the "worst possible character."[83] Even in the heyday of defamation, however, it is doubtful that a court could have fit an attempted murder case or a serious disease case within the confines of defamation.[84] Were a rape case to arise today in a jurisdiction whose law includes false light, one can appreciate that the court would feel far more comfortable placing the plaintiff's claim within the framework of false light.

The proposed division of responsibilities likewise suggests that some cases, having been decided in the past under false light, should be reassigned to defamation. In *Leverton v. Curtis Publishing Co.*,[85] a magazine published a story about pedestrians whose carelessness brings about their own injuries in highway accidents. The story was illustrated with a photograph of the plaintiff, a pedestrian injured in an auto accident in fact involving no carelessness on her part. The story, entitled "They Ask To Be Killed,"

Apr. 29, 1991, at 26, 32 (quoting Professor E. Mark Warr).

82. On the "respectable minority" doctrine in American defamation law, see R. SMOLLA, *supra* note 13, at 4-8.

83. Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., 50 T.L.R. 581, 584 (C.A. 1934).

84. *See supra* note 80. The common law of defamation regarded it as slanderous per se to state that the plaintiff was suffering from a "loathsome disease." American courts, however, have rarely invoked this doctrine, and the leading treatise disdains it as an "anachronism" of the "dark ages [of] social prejudice." R. SMOLLA, *supra* note 13, at 7-9 to 7-10. As Smolla points out, however, in some cases loathsome diseases clearly imply sexual misconduct in a way that makes a defamation action appropriate. *Id.* at 7-10. Also, some American courts have shifted the focus from "loathsome" diseases to "contagious" diseases; so refocused, the doctrine can perhaps be defended, since a claim that the plaintiff has a highly contagious disease would lead many people to terminate their relationships with the plaintiff. *Id.*

85. 192 F.2d 974 (3d Cir. 1951).

talked about pedestrians who "invite massacre" by their own carelessness, who "commit suicide by scorning laws that were passed to keep them alive."[86] In *Gill v. Curtis Publishing Co.*,[87] the plaintiff's picture was used to illustrate a story on "love at first sight." This "love" was described as being based on "100% sex attraction" rather than on genuine "affection" and "respect"; it is, indeed, the "wrong" kind of love, certain to drive a marriage to the point of divorce.[88] In *Douglass v. Hustler Magazine Inc.*,[89] *Hustler*'s layout of the plaintiff's nude photographs was understood by the court as conveying to the public the false claim that the plaintiff had voluntarily posed for *Hustler*; in addition, the court, having reviewed that magazine, was properly willing to assume that there is something distinctly "degrading" about voluntarily contributing to *Hustler* in this way.[90]

In all these cases, recovery was granted under false light, even though the plaintiffs obviously objected to the defendants' falsehoods on account of their disparaging quality. Given the analysis recommended here, cases such as these should be pleaded candidly in defamation rather than awkwardly in false light. In *Leverton* the defendant's description of the plaintiff's conduct as "careless" plainly had the purpose and effect of criticizing that conduct. While this criticism might seem mild, recall the defendant's language as to "inviting massacre" and "committing suicide." This language is plainly hyperbolic, and hence on its own would not justify a defamation claim. Nevertheless, the language certainly confirms that the defendant, in calling the plaintiff's conduct careless, itself regarded that criticism as quite a serious matter. In such a case, a court should be willing to grant a recovery under defamation doctrine. The idea of a defamation recovery is even more attractive in cases like *Gill* and *Douglass*. Current courts seem hesitant to affirm defamation recoveries in cases of this sort;[91] to this extent what is here recommended is a limited

86. *Id.* at 978.

87. 38 Cal. 2d 273, 239 P.2d 630 (1952).

88. *Id.* at 275, 239 P.2d at 632.

89. 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986).

90. *Id.* at 1135. In fact, the plaintiff had posed for a freelance photographer, who had secured from her a general release. Much later, after the plaintiff had acquired celebrity as an actress, the photographer sold the set of pictures to *Hustler*.

91. In *Leverton*, the plaintiff had dropped her defamation claim at trial; and the court declared, without explanation, that the defendant's statement "was not libelous." 192 F.2d at 978. In *Douglass*, Judge Posner thought that a defamation claim would be "difficult." 769 F.2d at 1135. *Gill* is confusing. Apparently, the plaintiffs did *not* explicitly plead

expansion of defamation coverage. On the other hand, should courts, in rejecting this recommendation, find that defendants' statements in such cases are for defamation purposes de minimis, these courts should not be willing to circumvent their own evaluations by conferring false light claims on plaintiffs.

This point can be clarified by considering Professor Smolla's observation that false light cases frequently result from disparaging statements that are "amorphous, watered down, or less intensely damaging" in a way that makes a defamation recovery unavailable.[92] If the amorphousness of the disparagement results from its possible status as opinion or the difficulties in determining whether a disparaging meaning is implicit in the defendant's statement, there is no reason why a false light court should not accept the liability-limiting rules that a defamation court would apply. If, on the other hand, the disparagement, while both factual and explicit, is sufficiently serious to lead a jury to find that it is highly offensive, it would be a mistake for defamation law to regard that disparagement as being so mild as to fall below the defamation liability threshold.[93]

While my recommendation stresses a certain division of responsibility between defamation and false light, it does not call for any rigid dichotomy between the two. Rather, it acknowledges the

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invasion of privacy. *See* 38 Cal. 2d at 281, 239 P.2d at 635. Moreover, the plaintiffs *did* complain, in a defamation-like way, that the defendant's story subjected them to "scorn, ridicule, hatred, contempt and obloquy" by impliedly depicting them as "loose, dissolute, and immoral persons." *Id.* at 276, 281, 239 P.2d at 632, 635. Yet the court affirmed a privacy recovery and did not discuss defamation.

The Smolla treatise reports that a claim of a single act of negligence is not defamatory, because it does not diminish reputation. *See* R. SMOLLA, *supra* note 13, at 4-21. The cases cited by Smolla, however, relate to imperfect performance by public officials. They do not involve negligent conduct that creates a risk of serious physical injury or that produces such an injury in fact. On the reputation issue in defamation, see *infra* note 93.

92. R. SMOLLA, *supra* note 13, at 10-14.1.

93. Granted, under established doctrine a disparaging statement is defamatory only if it diminishes the plaintiff's "reputation." As Professor Post has shown, however, the concept of reputation has several quite different meanings, each of which can draw clear support from established defamation doctrines. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986). If the defendant's statement *is* distinctly disparaging, it could almost certainly be found to diminish reputation in at least one of that term's several meanings. The *Restatement*, for example, places emphasis on whether the defendant's statement "lower[s the plaintiff] in the estimation of the community . . . ." RESTATEMENT (SECOND) OF TORTS § 559 (1976). For an even broader appraisal, see W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 39, at 773 (a statement is defamatory if it "diminish[es] the esteem, respect, goodwill, or confidence in which the plaintiff is held . . . .").

inevitability of a fuzzy area in the middle. Consider, for example, a newspaper article full of false statements, some of them disparaging, others not. Plainly, the plaintiff, in bringing a defamation action in response to the former, should also be allowed to claim in false light with respect to the latter.[94] Moreover, in a number of cases the defendant's statement may be ambiguous in its disparaging quality or may be disparaging only in a somewhat technical or nominal manner; one can imagine the problems of characterization and strategic pleading that would ensue if courts insisted on a strict separation between defamation and false light. Consider, in addition, the story that falsely alleges that the plaintiff is indigent or is a homosexual. This plaintiff might primarily complain that the story has placed her in a false light,[95] given all the ways in which the story assigns to the plaintiff an identity that is not her own and implies that she faces key problems and choices that in fact are no part of her life. However, so long as a substantial and respectable minority regard poor people or homosexuals in a disparaging way, that plaintiff, if she so chooses, should be allowed to pursue a defamation claim as well.[96]

II. STANDARD OF LIABILITY

Section I has discussed those categories of false statements that comply with the *Restatement*'s requirement of "highly offensive." This section deals with the standard of liability in false light cases. Currently, all courts apply a requirement of intentional or reckless falsification when the plaintiff is a public figure. Courts are currently divided as to whether this requirement likewise applies in cases brought by other plaintiffs;[97] in such cases, many courts are willing to rely on a negligence standard. Yet a properly limited false light tort should recognize a common law requirement that the defendant's statement be intentionally false[98] or at

94. *See* Hazlitt v. Fawcett Publishing, Inc., 116 F. Supp. 538, 544-45 (D. Conn. 1953).

95. An exaggeration of the plaintiff's poverty was part of the false light portrayal in Cantrell v. Forest City Publishing Co., 419 U.S. 245, 248 (1974).

96. On homosexuality and defamation, see Matherson v. Marchello, 100 A.D.2d 233, 473 N.Y.S.2d 998 (1984) (affirming a defamation claim). On the ambivalences in defamation law's treatment of indigency, see Annotation, *Libel and Slander: Imputations of Poverty*, 137 A.L.R. 913 (1942).

97. *See* R. SMOLLA, *supra* note 13, at 10-11; *see also infra* text accompanying note 123.

98. Intentional falsification is not uncommon in false light claims. It was allegedly at

least close enough to intentional to comply with the *Time, Inc. v. Hill* idea of "reckless disregard for the truth."[99]

In assessing the standard of liability for a tort whose very existence is somewhat uncertain, one should take into account how alternative liability standards would affect both the arguments favoring the tort's recognition and those arguments casting the tort in doubt. Here the relevant point is that the assumption of knowing or reckless falsification both strengthens several considerations that support the false light tort and dispenses with or sharply reduces the significance of many of the burdens or problems that the tort would otherwise entail.

Those considerations favoring the tort of course include the emotional distress that false light statements can occasion. If the falsity of a statement is intentional or reckless, that adds to the distress that the plaintiff experiences.[100] It is one thing if a journalist innocently or negligently publishes a story that inaccurately depicts one's romantic life; it is something else when such a story is published with knowledge of its falsity.

A second and related point is that a story that is deliberately false involves an attack on one's identity within society in a way that an inadvertently false story does not. Professor Post refers to the privacy tort as providing remedies for the violation of those norms that render us coherent as a society.[101] Statements by defendants that are deliberately false far more clearly violate those norms than statements whose falsity is merely inadvertent.

A third point is that the assumption of intentional or reckless falsification makes possible a meaningful analogy between the false light tort and the appropriation branch of privacy. The law is well settled that no appropriation occurs if magazine editors merely highlight a story that will predictably be successful in selling many copies of the magazine itself.[102] If, however, a tabloid,

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the core of the defendant's reporting in the *Eastwood* and *Spahn* cases. In *Spahn* the author's research was essentially limited to reading newspaper stories and magazine articles; she made no effort to conduct interviews. Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 128, 233 N.E.2d 840, 843, 286 N.Y.S.2d 832, 835-36 (1967). In Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), one senses that the reporter, knowing that his story was somewhat thin, decided to fill it out with certain embellishing falsifications.

99. 385 U.S. 374, 387 (1967).

100. *See* Post, *supra* note 70, at 971(pointing out that the intentionality of the defendant's intrusion is often necessary to make his conduct highly offensive and hence actionable under the intrusion branch of the privacy tort).

101. *See id.* at 964-68.

102. *See, e.g.*, Jenkins v. Dell Publishing Co., 251 F.2d 447, 450-51 (3d Cir.), *cert.*

knowing that the story is false, places in headlines the story of Clint Eastwood's romance, it becomes plausible to argue that Eastwood's celebrity has been exploited in a way that can be regarded as an appropriation. Indeed this is precisely the argument that the court of appeal accepted.[103] Yet while the posture of the case led the court to concern itself only with appropriation, Eastwood had also alleged false light.[104] On balance, it seems best to conceptualize his claim in false light terms and to allow appropriation values to reinforce the false light doctrine.[105]

If the requirement of intentional or reckless falsification enables false light to draw on the logic of appropriation, that requirement likewise solves a constitutional problem that false light could raise. A standard of liability less than recklessness might be unconstitutional, depending on the interaction between *Time v. Hill* and *Gertz v. Robert Welch, Inc.*[106] By accepting intentional or reckless falsehood as a test for liability, the prospect of unconstitutionality is all but eliminated. To be sure, even if a legal rule is technically constitutional, it would be disturbing to find that the rule stands in a tense relationship with basic ideas associated with the Constitution. In this regard, Professor Zimmerman[107] expresses concern with the reasoning in *Gertz* to the effect that false statements of fact are not "speech" in the sense of the first amendment.[108] Zimmerman is correct in suggesting that this formulation is jarring and unsatisfactory.[109] However, an alternative idea, advanced in *Garrison v. Louisiana*, is that deliberate and

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denied, 357 U.S. 921 (1958).

103. "The deliberate fictionalization of Eastwood's personality constitutes commercial appropriation." Eastwood v. Superior Court, 149 Cal. App. 3d 409, 426, 198 Cal. Rptr. 342, 352 (1983). In the *Spahn* case, New York's highest court ruled in favor of the plaintiff on grounds that the defendant's biography "constitutes an unauthorized exploitation of [Spahn's] personality for purposes of trade . . . ." Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 330, 221 N.E.2d 543, 546, 274 N.Y.S.2d 877, 881 (1966). Given, however, the limits of the New York privacy statute, that court was under a special obligation to interpret the plaintiff's claim in "exploitation" terms.

104. *See supra* note 50.

105. These values do confirm that it is quite appropriate for a false light plaintiff to sense that he has been unjustly excluded from the defendant's profits. *See Spahn*, 23 A.D.2d 216, 221, 260 N.Y.S.2d 451, 455-56 (1966). Yet since the falsehood in the defendant's publication is the key to the plaintiff's grievance, false light is the relevant doctrine.

106. 418 U.S. 323 (1974); *see infra* text accompanying notes 138-41.

107. Zimmerman, *supra* note 12, at 402.

108. 418 U.S. at 339, 341. Whatever protection false statements receive, *Gertz* suggests, is no more than strategic or prophylactic.

109. Professor Greenawalt refers to *Gertz* as taking an "extreme" position. K. GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 314 (1989).

reckless falsifications are not protected speech.[110] This much narrower formulation seems far more acceptable, and it suggests that a false light tort that focuses on intentional and reckless falsifications is satisfactory from the perspective of basic constitutional ideas.

What the first amendment insists on is a minimal state with respect to matters of free speech. A minimal state is advocated in a more general way by efficiency-minded economists and ethical libertarians. Even these advocates, however, make explicit their position that such a state can—and should—place sanctions on deliberate falsehoods that result in harm. According to Posner, for example, "The liar makes a positive investment in misinformation. This investment is completely wasted from a social standpoint . . . ."[111] And Epstein, while relying on the rationale of "misrepresentation" to criticize the tort of disclosure (which, in his view, enables the plaintiff to falsely present himself to his neighbors), invokes the same rationale as providing a promising justification for the false light branch of privacy.[112]

That justification can be expanded on in the following way. Consider a journal that runs a headline story that it knows to be false. In buying the journal and reading the story, a consumer is essentially wasting time and losing money. Moreover, this waste and loss result from conduct by the journal that essentially involves fraud or at least misrepresentation. In theory, then, these readers may well have their own valid claims against the journal. In practice, however, these claims are unlikely to be filed, both because the readers will not timely acquire adequate information about the story's falsity and because their stake is not large enough to justify bringing suit. In these circumstances, the privacy action brought by the subject of the journal's false story can be justified as a useful device for indirectly vindicating the readers' own tort rights against the journal.[113]

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110. 379 U.S. 64, 75 (1964).

111. R. POSNER, ECONOMIC ANALYSIS OF LAW 97 (3d ed. 1986).

112. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 466, 469-71 (1978). Epstein, however, wavers between identifying the reader and the subject as the victim of the misrepresentation. I here sketch a misrepresentation rationale for false light that emphasizes the legal interests of readers.

113. To be sure, this rationale extends beyond false light. It provides some support for defamation actions as well. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) ("False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire can rightly employ its libel laws to discourage the deception of its citizens." (emphasis in the original)) Indeed, the rationale might suggest that the

Affirming an intentional/reckless liability standard for false light makes it appropriate to probe the relationship between the false light tort and the tort of intentional infliction of emotional distress, as supported by the *Restatement*. The latter tort imposes liability on defendants whose "extreme and outrageous conduct" subjects plaintiffs to "severe" emotional distress.[114] Can false light be explained as no more than a subcategory or application of intentional infliction?[115] Instructive in this regard is the 1955 second edition of the Prosser treatise, which predicts that as the torts of invasion of privacy and intentional infliction develop, the former is likely to be "absorbed" into the latter.[116]

To say that a plaintiff is "highly offended" by the defendant's false-light publication is not necessarily to say that she has suffered severe distress. As Dean Givelber has shown, however, "severe" emotional distress is not that much of an independent requirement in intentional infliction cases; if juries find defendants' conduct extreme and outrageous, they are likely to infer that the emotional distress experienced by plaintiffs is "severe" enough to meet the doctrine's standard.[117] Hence, the harm incurred by plaintiffs may not readily distinguish intentional infliction cases from false light cases. How, then, does "extreme and outrageous" in the intentional infliction sense compare to the intentional or reckless falsity requirement in false light? Intentional falsification can plausibly be seen as one form of extreme and outrageous conduct.[118] But whether a showing of reckless falsification suffices to

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subject of a false story should be allowed to sue even when the false statement is not itself highly offensive. Yet even though the rationale is somewhat overbroad, it can still be relied on to provide significant support for the false light doctrine.

114. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

115. Warren and Brandeis were well aware that tort law did not then recognize any general doctrine of intentional infliction of emotional harm. Warren & Brandeis, *supra* note 1, at 197. The North Carolina Supreme Court, in abolishing the disclosure tort, has argued that many disclosure cases can justify recoveries under the intentional infliction doctrine. Hall v. Post, 323 N.C. 259, 269, 372 S.E.2d 710, 716-17 (1988). For consideration of the relationship between intrusion and intentional infliction, see Post, *supra* note 70, at 970-71.

116. W. PROSSER, LAW OF TORTS 639 (2d ed. 1955).

117. Givelber, *Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 48-49 (1982).

118. In Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1262, 1274 (3d Cir. 1979), the court found it easy to affirm a jury's finding that a football team physician had behaved in an extreme and outrageous way when he released to the press a knowingly false statement that the plaintiff was suffering from a potentially fatal disease.

establish extreme and outrageous would probably depend on the facts of the individual case. To this extent, the false light tort does have a partial life of its own; it has a reach that extends somewhat beyond intentional infliction.

For the time being, however, it can be assumed that the two torts do entail a substantial measure of overlap. Even so, this overlap supports rather than opposes the recognition of false light as a distinct tort. Critics of false light sometimes contend that, insofar as false light protects interests that are separate from reputation, the tort is doctrinally a curiosity. The law's firm recognition of the intentional infliction tort refutes this contention by confirming that tort law affords significant general protection to emotional interests as such. One problem, however, with the intentional infliction tort is that it is unduly unformed and elusive, capable of intruding after the fact into a variety of situations in which the parties in advance might not have anticipated its applicability.[119] Even if false light can be partially understood as an application of intentional infliction, this understanding identifies one apparent advantage of false light: it gives parties a clearer idea as to what the intentional infliction tort signifies in the context of journalism that knowingly makes false yet nondisparaging statements about the plaintiff.

In all, then, recognition of a liability standard that requires intentional or reckless falsification enables the false light tort to draw on the values expressed by the torts of appropriation, misrepresentation, and intentional infliction of emotional distress. That liability standard also functions to minimize certain objections to false light brought forward by Professors Zimmerman and Zuckman. Zimmerman, for example, disparages the meaningfulness of the distinction between truth and falsity and the ability of government in a private lawsuit to draw that line.[120] Her argument is no doubt rendered problematic by the central role that the concept of factual truth plays both in our legal system and in our ordinary modes of everyday thought. Be that as it may, so long as the false light tort requires that the defendant's statement be de-

119. The Supreme Court's opinion in Hustler Magazine v. Falwell, 485 U.S. 46 (1988), highlights the special difficulties encountered in imposing liability on the media under a standard as imprecise as "extreme and outrageous." *Falwell* can of course be distinguished from false light situations, since the *Hustler* parody, as interpreted by the Court, did not make any genuine representation of fact that might be regarded as deliberately false. *Id.* at 55.

120. Zimmerman, *supra* note 12, at 402-21.

liberately or recklessly false, this requirement goes a long way towards eliminating those nice questions as to the meaning of truth that preoccupy Zimmerman. The objection to false light that Professor Zuckman advances is that an editor might be led to allow an instance of false light to slip by, since a nondisparaging false statement does not raise a red warning flag in the same way as a statement that clearly criticizes the plaintiff.[121] If, however, the story that the conscientious editor is reviewing has been recklessly prepared by a freelance journalist or an op-ed author, there would be no problem: given the writer's independent status, any false light claim against the magazine would need to establish the editor's own recklessness. Assume now, however, that the writer who recklessly prepares the story is the journal's own employee, and assume further that ordinary principles of vicarious liability are acceptable in the context of defamation and false light.[122] Given these assumptions, the employee's extreme fault belongs to the corporate defendant in a way that allays concerns about subjecting that defendant to excessive or unjustified liability.

A final area of analysis concerns the relationship between the liability standard in false light and the standard relied on in defamation. For the law to require at least reckless falsification in false light actions would harmonize false light and defamation whenever the plaintiff is a public figure. However, when the plaintiff lacks this status, to insist on at least recklessness in false light would establish a disparity between false light and defamation, since negligence suffices for the latter under *Gertz*.[123] This disparity, however, seems sensible rather than anomalous. Even though nondisparaging false statements can sometimes be offensive, the resulting harm is generally much less than the harm inflicted by a statement that is disparagingly false. Recognizing negligence as an acceptable standard of liability in defamation cases while insisting on recklessness in false light is one way to acknowledge this significant difference in the relevant harm. Admittedly, a properly

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121. Zuckman, *supra* note 13, at 257.

122. For a discussion of vicarious liability in defamation under *New York Times*, see R. SMOLLA, *supra* note 13, at 3-83 to -86. Vicarious liability was approved by the Supreme Court for false light in Cantrell v. Forest City Publishing Co., 419 U.S. 245, 253-54 (1974).

123. Those cases in which defamation and false light might overlap generally involve stories in the media that deal with issues of some public concern. Therefore, this section ignores whatever the strict liability implications might be of Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

refined negligence standard might be capable of acknowledging this difference: the lesser the harm that a defendant's statement threatens, the fewer the burdens that a refined negligence standard requires the defendant to bear. There is a clear chance, however, that refinements of this sort might be lost on the ordinary juries that would administer a negligence standard in false light cases. Given this risk, it is prudent to support recklessness as the minimum standard of liability for false light.

A variety of arguments relating to false light policy have been developed above that support an intentional/reckless liability standard in false light cases. Granted, such a standard could be regarded as problematic if it involved a major curtailment of the false light tort in its original common law form. In fact, however, that requirement seems in happy harmony with common law tradition. In this regard, *Time v. Hill* can be usefully compared to *New York Times Co. v. Sullivan.*[124] The common law of defamation had frequently held defendants liable under a strict liability version of the defense of truth. Given this background, the *New York Times* insistence on intentional or reckless falsification in cases brought by public officials effected a revolution within defamation law.[125]

By contrast under the common law, invasion of privacy is a tort that has always been primarily intentional; to this extent, *Time v. Hill* did no more than reinforce the common law's own requirement. In their 1890 article that originated the privacy tort, Warren and Brandeis made clear their understanding that while a showing of malice is not required in a privacy action, that action does depend on the defendant's intent;[126] and their reference to privacy-invading defendants whose conduct entails "flagrant breaches of decency and propriety"[127] confirms that they were in earnest in conceptualizing privacy in terms of intentionality. Prosser's treatise, in its 1941 first edition[128] and its 1984 co-authored

124. 376 U.S. 254 (1964).

125. Granted, in public official or public figure defamation actions prior to *New York Times*, courts might well have recognized a common law privilege of fair comment. Even so, the *New York Times* privilege is far more extensive.

126. Warren & Brandeis, *supra* note 1, at 197.

127. *Id.* at 216.

128. Privacy law protects against interferences that are "serious and outrageous, or beyond the limits of common ideas of decent conduct." W. PROSSER, LAW OF TORTS 1050 (1941). For identical language, see W. PROSSER, *supra* note 116, at 635.

fifth edition,[129] expresses the view that privacy actions are properly brought against defendants whose conduct is not only intentional but outrageous.[130] As for the modern privacy torts of disclosure and appropriation, they seem almost inherently intentional: it is difficult to imagine a disclosure or appropriation in which the defendant does not have an adequate idea of the basic nature and meaning of the statement that it is publishing.[131] As for intrusion, the *Restatement* explicitly defines it as an intentional tort.[132] Thus the landlord who negligently maintains the building's ducts or wiring in a way that allows others to eavesdrop on the plaintiff's conversations in his own apartment would not be liable to the plaintiff under an intrusion theory.

In order specifically to consider the common law's standard of liability in false light, it makes sense to look at two of the leading state court false light cases prior to the Supreme Court's decision in *Time v Hill*: the *Spahn* case, and *Time v. Hill* itself as it was originally considered by the New York courts. When *Spahn* went to trial in 1964, the trial judge, ruling in favor of liability, entered findings to the effect that the defendant was guilty of intentional falsification.[133] Accordingly, once the Supreme Court of the United States remanded *Spahn* for reconsideration in light of *Time v. Hill*, the New York Court of Appeals was able to reaffirm

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129. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 39, at 864-65. This edition precedes this point with passive voice language that results in some equivocation.

130. The issue is not addressed, however, in Prosser's 1960 article. *See* Prosser, *supra* note 2. And the language from the first and second editions of the Prosser treatise does not appear in the third and fourth editions. The standard of liability in invasion of privacy was regarded as uncertain in Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326, 333-35 (1966).

131. Granted, there can be cases in which the defendant sincerely but wrongly believes that the plaintiff had consented to the publication in question. (For example, in Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984), the defendant, relying on a forged consent form, published nude photographs of the plaintiff.) These cases raise the issue not of the prima facie standard of disclosure liability but rather the leniency of disclosure affirmative defenses. (As it happens, *Wood* was pleaded in false light rather than disclosure).

The privacy section in the first *Restatement of Torts* limited itself to disclosure and appropriation. That section talked about "unreasonable" interferences with privacy that are "beyond the limits of decency." RESTATEMENT OF TORTS § 867 & comment d (1939). It is unclear whether these labels were intended to relate to the conduct of the defendant or instead to the impact on the plaintiff.

132. RESTATEMENT (SECOND) OF TORTS § 652B (1976). The *Restatement* provides no illustrations; I offer one here in the text.

133. Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 227, 230, 232, 250 N.Y.S.2d 529, 538, 541, 542-43 (Sup. Ct. 1964).

the plaintiff's original verdict.[134] In *Time v. Hill* itself, Justice Fortas's dissent accepted the reckless disregard standard of liability that Justice Brennan had set forth; the dissent limited itself to contending that the trial judge's instruction to the jury had adequately embodied the reckless disregard idea.[135] In assessing the trial court's proceedings in *Time v. Hill*, one can agree with Justice Brennan that there was enough uncertainty on this point to render a new trial appropriate.[136] One can also agree, however, with Justice Fortas that the trial judge, in calling for liability if the defendant had "fictionalized" or "altered" the true Hill family story, was probably intending to convey the idea that intentional falsification is a prerequisite for liability.[137]

Of course, the precedent of *Time v. Hill* has now been rendered uncertain by the intervention of *Gertz v. Robert Welch, Inc.*[138] In that case, the Supreme Court held that in defamation actions not brought by public officials or public figures, negligence rather than actual malice is the constitutional prerequisite for liability. *Gertz* can be read as implying that the Constitution requires no more than negligence in a false light action that a private party might bring.[139] Subsequent to *Gertz*, a number of courts have supported this reading of the Constitution and have

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134. *Spahn*, 21 N.Y.2d 124, 126, 233 N.E.2d 840, 843, 286 N.Y.S.2d 832, 835 (1967).

135. 385 U.S. 374, 415-20 (1967). Justice Fortas had begun as the author of the majority opinion in *Time v. Hill*, an opinion that would have affirmed the jury's verdict in favor of the plaintiff. After reargument, the Fortas opinion (in a much revised form) turned out to be the dissent. *See* B. SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 240-303 (1985).

136. 385 U.S. at 387, 394-97.

137. 385 U.S. at 418-19. Moreover, given the underlying facts in the case, I agree with Justice Fortas that in any new trial, the Hill family would have stood a solid chance of recovering. 385 U.S. at 411. Leonard Garment was lead counsel for the Hill family; his article's discussion of the Supreme Court's eventual ruling in *Time v. Hill* seems to treat that ruling as though it were a final blow to the family's opportunity to recover. Garment, *supra* note 76, at 106-07, 109-10. Puzzled by this impression, I have asked Garment what happened following the Supreme Court's decision. It turns out that after the Court's decision came down, Garment was confident that the family could prevail at a retrial; nevertheless, he was concerned about the psychological burden that any retrial would impose on the family. He was therefore willing (and able) to settle the case for a substantial amount—an amount close to the sums provided by the jury's original verdicts in the case. Telephone interview with Leonard Garment (Aug. 22, 1990). These verdicts added up to $175,000. 385 U.S. at 379 & n.2. At the least, this information makes clear that cases like *Time v. Hill* are quite winnable under the intentional/reckless liability standard.

138. 418 U.S. 323 (1974).

139. Justice Powell spotted this issue in a concurring opinion one year after *Gertz*. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 498 n.2 (1975).

therefore ruled that a private party plaintiff can recover in false light merely by showing negligence.[140] Such reasoning, however, contains something of a non sequitur. Even if the Constitution requires no more than negligence in false light cases, the underlying common law tort might continue to require something like intentional falsification. False light may be one sector of the law that has suffered from an excessive constitutionalization, one that has tempted some judges to forget that a tort action's compliance with the Constitution does not establish that it satisfies the common law's own prerequisites. In a recent opinion, the Illinois Supreme Court has resisted this temptation; relying on common law considerations, it has ruled that a false light action requires a showing of at least reckless falsification.[141]

III. FURTHER CONSIDERATIONS

This section brings together additional points that bear on the appropriateness of the false light tort. Some consideration has been given above to the economics of false light.[142] It is time now to devote further attention to the economic implications of the limited tort that this article supports. Consider a journal that is thinking of publishing a story that it knows to be false. Readers presumably buy that journal because they place value on the stories that it publishes; those stories would lose most of their value if readers came to believe that stories in the journal are typically false.[143] The market therefore provides the journal with a significant incentive to publish stories that are substantially correct; the market is capable of punishing the journal that develops a reputation for falsehood.[144]

To note, however, that journals have a substantial incentive to publish accurate stories is not to say that this incentive is com-

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140. Recent cases are collected in Zimmerman, *supra* note 12, at 374 n.59.

141. Lovegren v. Citizens First Nat'l Bank, 126 Ill. 2d 411, 534 N.E.2d 987 (1989) (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 39, at 864-66).

142. *See supra* text accompanying notes 111-13. For another economic analysis of false light, see R. POSNER, *supra* note 24, at 264-66.

143. One hears the suggestion that buyers of tabloids know that their stories are false, and that they read the tabloids for the same pleasure they might derive from science fiction. This suggestion seems false. While tabloid readers may well have some doubts about complete accuracy, they almost certainly believe that there is a good chance that the tabloids' stories are substantially true. Absent that belief, they would presumably devote their reading time to works that are overtly fictitious.

144. A recent biography of Greta Garbo suffered a reduction in sales after serious questions were raised about its authenticity, A. GRONOWICZ, GARBO, HER STORY (1990).

pletely effective. As long as readers have imperfect information about the accuracy of stories and as long as many readers assume that articles in journals are accurate unless they have learned to the contrary, the narrowly rational publisher may find it well within its interest to blend in a limited number of articles that it understands to be probably false with a majority of articles that it believes to be true. Acknowledging imperfect information, a market analysis can affirm that a journal could reach an equilibrium—a stable situation—in which it would publish some substantial minority of articles that it knows to be false. Hence that analysis, while pointing out that tort is not the only technique for influencing publishers' behavior, confirms that tort can play a significant role in achieving this result. Indeed, since the effectiveness of the market depends on information available to consumers, tort and the market can function as collaborators rather than alternatives. False light privacy lawsuits might be a useful way to get the message out to readers that there is reason to doubt the accuracy of a particular story or of a pattern of stories in a particular journal.

One further objection to false light brought forward by Professor Zimmerman can now be identified and answered. She complains that the tort unduly discourages the production of unauthorized biographies for movies or television.[145] She cites, as an example, a proposed made-for-television movie of the life of Elizabeth Taylor that a major studio decided to drop, possibly because of false light liability implications.[146] Zimmerman's discussion encourages a review of the liability exposure of the author of an unauthorized biography. If that biography takes the form of a book or article, the author faces no problems: as long as he avoids making reckless misstatements of fact, he incurs no liability under false light, or defamation. It is the author of a screenplay for a film or television biography who uniquely encounters false light problems, since the screenplay evidently requires the fabrication of events and dialogue relating to the subject's private life. Given the implications of the *Spahn* case,[147] such a screenplay would be difficult to produce without having secured the subject's consent. The subject might withhold that consent, either to enable her to

145. Zimmerman, *supra* note 12, at 442-47.

146. *Id.* at 445.

147. Spahn v. Julian Messner, Inc., 21 N.Y. 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967).

produce her own autobiography without competition or at least to make sure that the screenplay portrays her in ways that she finds acceptable.

In assessing the magnitude of this false light problem, one should not forget the defamation tort that would remain in place even if false light were abolished. In inventing scenes and dialogue for a dramatized biography, the author of the screenplay will feel required to steer clear of anything that portrays the subject in an unflattering or unfavorable way: for the knowing falsification of such scenes and dialogue would create a substantial exposure to defamation liability.[148] To avoid that liability risk, the screenplay's authors will evidently feel obliged to fabricate events and dialogue that depict the subject in a favorable or at least neutral way. In other words, the resulting screenplay is likely to be full of scenes that are either falsely favorable to the subject or both falsely and rather blandly neutral. Yet if these are the dramatized biographies whose production might be inhibited by a meaningful doctrine of false light, it is difficult to see why society should especially regret their loss.

One other possible objection to false light can here be anticipated and addressed. Like a number of other torts, false light protects against the infliction of essentially emotional harm. One problem with these torts is that a damage award functions imperfectly by way of "compensating" the plaintiff. The plaintiff has not suffered out-of-pocket losses that can be reimbursed by such an award; and the process of quantifying the plaintiff's emotional distress can be unduly influenced by the vagaries of how effective the plaintiff is as a witness. For that matter, with false light, as with other areas of privacy, there may be a poor correlation between those persons who in fact experience serious distress and those who decide to bring lawsuits seeking damages.[149]

The clumsiness of damage awards as remedies in many emotional tort cases is a considerable problem. Often, however, these

148. Consider the scriptwriter who has been told—in a reliable but quite conclusory way—that the plaintiff frequently treats his family cruelly; the writer then invents scenes (and also dialogue) that profess to illustrate or elaborate on that cruelty. These inventions extend beyond the underlying truth in a way that would entail a major risk of defamation liability. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 39, at 841. The Supreme Court has recently discussed the doctrine of substantial truth in its application to invented dialogue in docudramas. *See* Masson v. New Yorker Magazine, Inc., 39 U.S.L.W. 4726, 4731 (U.S. June 20, 1991).

149. *See* Kalven, *supra* note 130, at 338.

cases are brought against institutions that are engaged in recurring courses of conduct: for example, retail stores may falsely imprison suspected shoplifters and debt collection agencies may employ tactics amounting to privacy intrusions or intentional infliction of emotional distress. In such cases tort law is well structured to play a regulatory role; it can deter instances of institutional behavior that otherwise would result in the infliction of emotional distress. The very awkwardness of the after-the-fact award of damages to actual victims thus may highlight the benefit that tort law can provide to the class of potential victims by discouraging conduct that would otherwise result in their being subjected to distress.

A deterrence rationale, which renders torts such as false imprisonment especially attractive, may apply to false light as well. False light actions are essentially addressed to editors and journalists who are in a good position to respond to the threat of liability by avoiding intentional and reckless falsehoods. There is reason to expect, then, that a well-defined false light tort can be effective in discouraging the commission of false light violations.[150] The extent of this effectiveness is, of course, a question of real world observations. This question prompts a reconsideration of the *Spahn* case. Why have there been almost no cases after *Spahn* dealing with the problem of substantially fictionalized biographies?[151] A likely explanation is that authors and publishers, roughly aware of *Spahn*, are no longer developing the kind of unauthorized biographical fictions that the *Spahn* holding properly condemns. This explanation, if correct, supports the idea of the effectiveness of the false light tort. That idea likewise receives support from one episode that I am aware of concerning the procedures relied on by a leading tabloid.[152] Further support comes from my recent conver-

150. As far as modern defamation law is concerned, whatever burdens it may entail, almost all would agree that it is at least moderately successful in reducing the number of defamatory statements that end up getting published.

151. The intermediate New York court seemingly accepted the defendant's claim that it was then a common practice for biographies aimed at younger readers to include major portions of fictionalized material. Spahn v. Julian Messner, Inc., 23 A.D.2d 216, 221, 260 N.Y.S.2d 451, 452-53 (1965).

152. In 1974, my colleague John Wiley was rescued out of the North Atlantic after being swept off an English cliff while rock climbing. This episode received some coverage in English newspapers. *The National Enquirer* then contacted Wiley and offered him $500 in exchange for his consent to the publication by the *Enquirer* of a story that would profess to divulge what Wiley's thoughts were on the brink of death. Its article appeared in its issue of June 2, 1974. Wiley was willing to give his consent because, as a college student, he

sations with Los Angeles lawyers who specialize in providing clearance for the screenplays of television docudramas.[153] These lawyers indicate that they would worry about a script that invents an otherwise nonexistent romance in the life of the subject of the docudrama. One lawyer adds that he has insisted on documentation for portrayals in scripts of supposedly intense relationships between child and parent, even though nothing in those relationships seems disparaging.

The evidence relating to the effectiveness of false light is, however, by no means free of ambiguity.[154] For now, it seems best to say that a false light tort whose elements are clearly set forth in judicial opinions has the capacity to exert an appropriate influence on the conduct that the tort addresses.

CONCLUSION

In its current form the false light tort is sloppy and overgrown, and hence vulnerable to challenge. In response to that challenge, the false light tort should withdraw from those cases in which it essentially overlaps with defamation.[155] Appropriately reconfigured, the false light tort can then focus on defendant's statements that are highly offensive on account of their falsity even though they are not disparaging. To provide further structure

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regarded $500 as a very large sum of money. Of course, the tabloid's consent procedure also enabled Wiley to maintain control over the flow of inaccurate information concerning his private life. (On this theme of control, see *Spahn*, 23 A.D.2d at 221, 260 N.Y.S.2d at 456.)

By making a payment in order to secure Wiley's consent, the tabloid's procedure implies its awareness that, absent his consent, its story might have comprised a false light violation. Nothing in the story was disparaging of Wiley. By securing his consent the tabloid was even able to present its story as a first person account.

153. Telephone interviews with Ted Gerdes (December 21, 1990) and Lionel Sobel (January 14, 1991).

154. Indeed, I consulted Gerdes after reading an article of his, dealing with the clearance function, that describes what lawyers are said to "affectionately" call the "no harm, no foul rule." Gerdes, *The Special Problems of Docudramas*, L.A. LAW., Apr. 1990, at 32, 36. Clearance lawyers, the article suggests, pay close attention to factual representations that are "negative"; but "if the story portrays a real individual in a positive, or at least a neutral light, defamation and privacy concerns are minimized." *Id.*

Standing alone, this account seems insensitive to the demands that the false light tort might place on nondisparaging inaccuracies. Gerdes tells me, however, that at least to some extent his language should be interpreted with false light "harms" in mind.

155. At the same time, in order to clarify the realignment between defamation and false light, courts should confirm a broad definition of the concept of "defamatory" so that the defamation tort can provide general coverage for false statements that are significantly disparaging.

to false light, courts should require a showing of the defendant's intentional or reckless falsification. This requirement makes it more likely that the defendant's false statement is highly offensive; also, it enables false light to draw sustenance from the rationales underlying the torts of appropriation, misrepresentation, and intentional infliction. This article has begun the project of discussing why and under what circumstances nondisparaging false statements can be highly offensive; this project can now be carried forward by courts and other scholars.