2012 SUMMER CANDIDACY PROGRAM MATERIALS
THE CHICAGO-KENT LAW REVIEW

QUESTION

Generally, the modern tort of Publicity Placing Person in False Light prevents a person from knowingly or recklessly making public, false statements about another that would be highly offensive to a reasonable person. Historically, this tort was one of the principal causes of action comprising the proposed tort regime aimed at recognizing and protecting individual privacy rights that emerged in the late nineteenth century. Though vague at first, by the mid twentieth century, explicit efforts to protect individual privacy rights coalesced into the modern constellation of privacy torts and enjoyed relatively widespread adoption among the states. However, some states are now either abandoning or refusing to recognize the tort of False Light as a valid cause of action due to: (i) alleged redundancies with respect to protections offered by other privacy torts; or (ii) an absolute subordination of this tort to protections afforded by federal and state constitutional guarantees of the freedom of expression.

Please respond to the following questions:

1. Does the tort of False Light still have a useful place within the contemporary system of privacy torts? In other words, do the protections afforded by other privacy torts that have historically enjoyed a more sanguine acceptance render the tort of False Light unnecessary or even harmful to the public interest? What would be the benefits or detriments in continuing to recognize this tort?

2. Assuming that a state decides to recognize the tort of False Light, does that decision conflict with constitutional protections regarding free expression? Specifically, should the interests protected by the First Amendment and its state counterparts categorically defeat the interests protected by the tort of False Light or do states that view First Amendment protections as mere limitations follow the correct approach?

Using only the sources contained in this packet, write an academic article (15 pages, maximum) discussing these issues and take a stand as to what courts should do in this messy area of the law. Outside research is strictly forbidden. You can analyze the statements or propositions from other sources discussed in the SCP materials. However, you cannot obtain and read those sources; neither should you cite them directly. Keep in mind that not every word of every source relates to the issue. You must determine what is relevant. No knowledge of any outside legal subject is required to respond to these questions effectively.

Although many of the jurisdictions referenced in the sources below follow their own procedural rules, assume for this exercise that all such rules are substantially similar to any Federal Rules.

Read and follow the 2012 Summer Candidacy Program Instructions, available on the CHICAGO-KENT LAW REVIEW website (www.cklawreview.com).

GOOD LUCK!

2012 Summer Candidacy Program Table of Contents

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Restatement (Second) of Torts § 652C (1977)

Appropriation Of Name Or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

Comment:

a. The interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others. Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.

b. How invaded. The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.

Restatement (Second) of Torts § 652E (1977)

Publicity Placing Person In False Light

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

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

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

Comment:

a. Nature of Section. The form of invasion of privacy covered by the rule stated in this Section does not depend upon making public any facts concerning the private life of the individual. On the contrary, it is essential to the rule stated in this Section that the matter published concerning the plaintiff is not true. The rule stated here is, however, limited to the situation in which the plaintiff is given publicity. On what constitutes publicity and the publicity of application to a simple disclosure, see § 652D, Comment *a*, which is applicable to the rule stated here.

b. Relation to defamation. The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander under the rules stated in Chapter 24. In such a case the action for invasion of 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.

It is not, however, necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation.

Illustrations:

1. A is an actress. B, seeking to advertise a motion picture, sends out to 1,000 men letters on scented pink feminine stationery, signed with A's name, which invite each man to meet A on a particular evening in front of a designated theater. The language and tone of these letters suggest prior acquaintance and an assignation. B is subject to liability to A for both libel and invasion of privacy.

2. A is a taxi driver in the city of Washington. B Newspaper publishes an article on the practices of Washington taxi drivers in cheating the public on fares, and makes use of A's photograph to illustrate the article, with the implication that he is one of the drivers who engages in these practices. A never has done so. B is subject to liability to A for both libel and invasion of privacy.

3. A is a renowned poet. B publishes in his magazine a spurious inferior poem, signed with A's name. Regardless of whether the poem is so bad as to subject B to liability for libel, B is subject to liability to A for invasion of privacy.

4. A is a Democrat. B induces him to sign a petition nominating C for office. A discovers that C is a Republican and demands that B remove his name from the petition. B refuses to do so and continues public circulation of the petition, bearing A's name. B is subject to liability to A for invasion of privacy.

5. A is a war hero, distinguished for bravery in a famous battle. B makes and exhibits a motion picture concerning A's life, in which he inserts a detailed narrative of a fictitious private life attributed to A, including a non-existent romance with a girl. B knows this matter to be false. Although A is not defamed by the motion picture, B is subject to liability to him for invasion of privacy.

c. Highly offensive to a reasonable person. The rule stated in this Section applies only when the publicity given to the plaintiff has placed him in a false light before the public, of a kind that would be highly offensive to a reasonable person. In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. Complete and perfect accuracy in published reports concerning any individual is seldom attainable by any reasonable effort, and most minor errors, such as a wrong address for his home, or a mistake in the date when he entered his employment or similar unimportant details of his career, would not in the absence of special circumstances give any serious offense to a reasonable person. The plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.

Illustrations:

6. A is a noted musician. B writes and publishes a biography of A, which is in general a correct and favorable portrayal. Included in the book are a number of minor mistakes concerning details of A's career, together with accounts of a few fictitious but quite unimportant incidents in which A is reported to have been involved and conversations he is reported to have had with others. These are not defamatory and nothing in the book casts any adverse reflection upon A's character or reputation. B's attention is called to these errors, but he nevertheless publishes the book. B has not invaded A's privacy.

7. A and other police officers of a city maintain in the police department a "Rogues Gallery" of photographs, fingerprints and records of those convicted of crime. B is accused of robbery, arrested, fingerprinted and jailed. He is released when the accusation proves to be a matter of mistaken identity and another man is convicted of the crime. Although B never has been convicted of any crime, A insists, over B's objection, in including B's photograph and fingerprints in the Rogues Gallery. A has invaded the privacy of B.

8. A, a child ten years old, is knocked down and injured, without any negligence on her part, by a negligently driven automobile.After the accident, while she is lying in the street with her face showing so that she can be identified, her photograph is taken. Two years later B publishes in his magazine an article on the negligence of children and uses the picture of A, with the caption, "They Ask to Be Killed," to illustrate the article. This is an invasion of A's privacy.

9. A is the pilot of an airplane flying across the Pacific. The plane develops motor trouble, and A succeeds in landing it after harrowing hours in the air. B Company broadcasts over television a dramatization of the flight, which enacts it in most respects in an accurate manner. Included in the broadcast, however, are scenes, known to B to be false, in which an actor representing A is shown as praying, reassuring passengers, and otherwise conducting himself in a fictitious manner that does not defame him or in any way reflect upon him. Whether this is an invasion of A's privacy depends upon whether it is found by the jury that the scenes would be highly objectionable to a reasonable man in A's position.

d. Constitutional restrictions on action. The free-speech and free-press provisions of the First Amendment have been held to apply to the common law of defamation and to impose certain restrictions on the availability of defamation actions. In New York Times Co. v. Sullivan (1964) 376 U.S. 254, it was held that a public official could not recover for a false and defamatory publication unless he proved by clear and convincing evidence that the defendant had knowledge of the falsity of the statement or acted in reckless disregard of its truth or falsity. In the case of Time, Inc. v. Hill (1967) 385 U.S. 534, involving a magazine pictorial treatment of a play based upon a real episode, which implied that certain fictitious incidents in the play transpired with the real-life parties, the Supreme Court held that the rule of New York Times Co. v. Sullivan also applies to the false-light cases covered by this Section. It is on the basis of Time v. Hill that Clause (b) has been set forth. The full extent of the authority of this case, however, is presently in some doubt.
Although the Supreme Court had extended the rule of New York Times Co. v. Sullivan in defamation cases beyond public officials and public figures to all "matters of public or general interest," by a plurality opinion in Rosenbloom v. Metromedia, Inc., (1970) 403 U.S. 29, this position was subsequently repudiated in Gertz v. Robert Welch, Inc., (1974) 418 U.S. 323, which restricted the knowledge-or-reckless-disregard rule again to public officials and public

figures, but held that in other cases the plaintiff must show that the defendant was at fault, at least to the extent of being negligent, regarding the truth or falsity of the statement. The effect of the Gertz decision upon the holding in Time, Inc. v. Hill has thus been left in a state of uncertainty. In Cantrell v. Forest City Pub. Co. (1974) 419 U.S. 425, the court found that the defendant was shown to have acted in reckless disregard as to the truth or falsity of the statement, and it consciously abstained from indicating the present authority of Time v. Hill.

Pending further enlightenment from the Supreme Court, therefore, this Section provides that liability for invasion of privacy for placing the plaintiff in a false light may exist if the defendant acted with knowledge of the falsity of the statement or in reckless disregard as to truth or falsity. The Caveat leaves open the question of whether there may be liability based on a showing of negligence as to truth or falsity. If Time v. Hill is modified along the lines of Gertz v. Robert Welch, then the reckless-disregard rule would apparently apply if the plaintiff is a public official or public figure and the negligence rule will apply to other plaintiffs. If Time v. Hill remains in full force and effect because the injury is not so serious when the statement is not defamatory, the blackletter provision will be fully controlling.

e. Application of defamation restrictions in this Section. In addition to the constitutional questions discussed in Comment *e*, another important question is that of the extent to which common law and statutory restrictions and limitations that have grown up around the action for defamation are equally applicable when the action is one for invasion of privacy by publicity given to falsehoods concerning the plaintiff. These restrictions include, for example, the requirement that special damages be pleaded and proved by the plaintiff in any case in which the defamatory words are not actionable per se. They may include also the limitations imposed by retraction statutes, or statutes requiring the filing of a bond for costs in order to maintain a defamation action, as well as other possible restrictions. When the false publicity is also defamatory so that either action can be maintained by the plaintiff, 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 upon a different theory of later origin, in the development of which the attention of the courts has not been directed to the limitations.

As yet there is little authority on this issue. The answers obviously turn upon the nature of the particular restrictive rule, the language of a particular statute and the circumstances of the case, and no generalization can be made.

Restatement (Second) of Torts § 652B (1977)

Intrusion Upon Seclusion

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Comment:

a. The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

b. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.

Restatement of Torts (Second) § 652D (1977)

Publicity Given To Private Life

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

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

Special Note on Relation of § 652D to the First Amendment to the Constitution. This Section provides for tort liability involving a judgment for damages for publicity given to true statements of fact. It has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment. Since 1964, with the decision of New York Times Co. v. Sullivan, 376 U.S. 254, the Supreme Court has held that the First Amendment has placed a number of substantial restrictions on tort actions involving false and defamatory publications.

The Supreme Court has rendered several decisions on invasion of the right of privacy involving this Section and § 652E. The case of Cox Broadcasting Co. v. Cohn (1975) 420 U.S. 469, holds that under the First Amendment there can be no recovery for disclosure of and publicity to facts that are a matter of public record. The case leaves open the question of whether liability can constitutionally be imposed for other private facts that would be highly offensive to a reasonable person and that are not of legitimate concern.

Pending further elucidation by the Supreme Court, this Section has been drafted in accordance with the current state of the common law of privacy and the constitutional restrictions on that law that have been recognized as applying.

Comment:

a. Publicity. The form of invasion of the right of privacy covered in this Section depends upon publicity given to the private life of the individual. "Publicity," as it is used in this Section, differs from "publication," as that term is used in § 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication.

Restatement (Second) of Torts § 652H (1977)

Damages [that apply to § 652 torts]

One who has established a cause of action for invasion of his privacy is entitled to recover damages for

(a) the harm to his interest in privacy resulting from the invasion;

(b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and

(c) [actual] damage of which the invasion is a legal cause.

Restatement (Second) of Torts § 558 (1977)

Defamation

Elements Stated

To create liability for defamation there must be:

(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) [] the existence of [actual] harm caused by the publication.

Restatement (Second) of Torts § 568 (1977)

Libel And Slander Distinguished

(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.

(2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).

(3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

Comments

* * *

d. When publication libel, when slander. The publication of defamatory matter by written or printed words constitutes a libel. Common methods of publishing a libel are by newspapers, books, magazines, letters, circulars and petitions. The writing or printing may be made upon paper, parchment, metal, wood, stone or any other substance and may be accomplished by the use of pencil, pen, chalk or a mechanical device such as the printing press, typewriter, or mimeographing machine. Defamatory pictures, caricatures, statues and effigies are libels because the defamatory publication is embodied in physical form. There are, however, other methods of publishing a libel. The wide area of dissemination, the fact that a record of the publication is made with some substantial degree of permanence and the deliberation and premeditation of the defamer are important factors for the court to consider in determining whether a particular communication is to be treated as a libel rather than a slander. The publication of defamatory matter may be made by conduct which by reason of its persistence it may be more appropriate to treat as a libel than a slander. On the other hand, the use of a mere transitory gesture commonly understood as a substitute for spoken words such as a nod of the head, a wave of the hand or a sign of the fingers is a slander rather than a libel.

Restatement (Second) of Torts § 621

General Damages for Defamation

One who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed.

Restatement (Second) of Torts § 46 (1965)

Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress.

Comment:

* * *

b. As indicated in Chapter 47, emotional distress may be an element of damages in many cases where other interests have been invaded, and tort liability has arisen apart from the emotional distress. Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone. It is only within recent years that the rule stated in this Section has been fully recognized as a separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort, such as assault, battery, false imprisonment, trespass to land, or the like…

c. The law is still in a stage of development, and the ultimate limits of this tort are not yet determined. This Section states the extent of the liability thus far accepted generally by the courts. The Caveat is intended to leave fully open the possibility of further development of the law, and the recognition of other situations in which liability may be imposed.

d. Extreme and outrageous conduct. The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

* * *

e. The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. Thus an attempt to extort money by a threat of arrest may make the actor liable even where the arrest, or the threat alone, would not do so. In particular police officers, school authorities, landlords, and collecting creditors have been held liable for extreme abuse of their position. Even in such cases, however, the actor has not been held liable for mere insults, indignities, or annoyances that are not extreme or outrageous.

* * *

f. The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to **emotional distress**, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. It must be emphasized again, however, that major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.

* * *

g. The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause **emotional distress**. Apart from this, there may perhaps be situations in which the actor is privileged to resort to extreme and outrageous words, or even acts, in self-defense against the other, or under circumstances of extreme provocation which minimize or remove the element of outrage. Such cases have not arisen; but an analogy may be found in decisions under the actionable words statutes of Mississippi, Virginia, and West Virginia.

* * *

4 Harv. L. Rev. 193

The Right to Privacy

Harvard Law Review
December 15, 1890

***193** Samuel D. Warren
Louis D. Brandeis

"It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage."

WILLES, J., in Millar v. Taylor, 4 Burr. 2303, 2312.

THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in ***194** fear of such injury. From the action of battery grew that of assault. Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed. So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose. Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable. Occasionally the law halted, — as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium* amisit, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded. Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, ***195** as works of literature and art, goodwill, trade secrets, and trademarks.

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the, individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago, directly involved the consideration ***196** of the right of circulating

portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

***197** It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.

Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel, while a legal remedy for such injury seems to involve the treatment of mere wounded feelings, as a substantive cause of action. The principle on which the law of defamation rests, covers, however, a radically-different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellow-men, — the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity. On the other hand, our law recognizes no principle upon which compensation can be granted for mere injury to the feelings. However painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act itself is otherwise lawful, the suffering inflicted is *damnum absque injuria*. Injury of feelings may indeed be taken account of in ascertaining the amount of damages when attending what is recognized as a legal injury; ***198** but our system, unlike the Roman law, does not afford a remedy even for mental suffering which results from mere contumely and insult, from an intentional and unwarranted violation of the "honor" of another.

It is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them

expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular ***199** method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public, — in other words, ***200** publishes it. It is entirely independent of the copyright laws, and their extension into the domain of art. The aim of those statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all. The statutory right is of no value, unless there is a publication; the common-law right is lost as soon as there is a publication.

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property; and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic compositions. They certainly possess many of the attributes of ordinary property: they are transferable; they have a value; and publication or reproduction is a use by which that value is realized. But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation ***201** of that term. A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence. A man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written. If the letters or the contents of the diary were protected as literary compositions, the scope of the protection afforded should be the same secured to a published writing under the copyright law. But the copyright law would not prevent an enumeration of the letters, or the publication of some of the facts contained therein. The copyright of a series of paintings or etchings would prevent a reproduction of the paintings as pictures; but it would not prevent a publication of a list or even a description of them. Yet in the famous case of ***202** Prince Albert v. Strange, the court held that the common-law rule prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also "the publishing (at least by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise." Likewise, an unpublished collection of news possessing no element of a literary nature is protected from piracy.

That this protection cannot rest upon the right to literary or artistic property in any exact sense, appears the more clearly ***203** when the subject-matter for which protection is invoked is not even in the form of intellectual property, but has the attributes of ordinary tangible property. Suppose a man has a collection of gems or curiosities which he keeps private: it would hardly be contended that any person could publish a catalogue of them, and yet the articles enumerated are certainly not intellectual property in the legal sense, any more than a collection of stoves or of chairs.

The belief that the idea of property in its narrow sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters, on the ground that "letters not possessing the attributes of literary compositions are not property entitled to protection;" and that it was "evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot be considered of value to the author which he never would consent to have published." But ***204** these decisions have not been followed, and it may now be considered settled that the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits, or of any intention

to publish the same, and, of course, also, wholly independent of the material, if any, upon which, or the mode in which, the thought or sentiment was expressed.

Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine. Thus in the case of Prince Albert v. Strange, already referred to, the opinions both of the Vice-Chancellor and of the Lord Chancellor, on appeal, show a more or less clearly defined perception of a principle broader than those which were mainly discussed, and on which they both placed their chief reliance. Vice-Chancellor Knight Bruce referred to publishing of a man that he had "written to particular persons or on particular subjects" as an instance of possibly injurious disclosures as to private matters, that the courts would in a proper case prevent; yet it is difficult to perceive how, in such a case, any right of property, in the narrow sense, would be drawn in question, or why, if such a publication would be restrained when it threatened to expose the victim not merely to sarcasm, but to ruin, it should not equally be enjoined, if it threatened to embitter his life. To deprive a man of the potential profits to be realized by publishing a catalogue of his gems cannot per se be a wrong to him. The possibility of future profits is not a right of property which the law ordinarily recognizes; it must, therefore, be an infraction of other rights which constitutes the wrongful act, and that infraction is equally wrongful, whether its results are to forestall the profits that the individual himself might secure by giving the matter a publicity obnoxious to him, or to gain an advantage at the expense of his mental pain and suffering . . . [***205**]

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed — and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.

***206** If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds. For the protection afforded is not confined by the authorities to those cases where any particular medium or form of expression has been adopted, nor to products of the intellect. The same protection is afforded to emotions and sensations expressed in a musical composition or other work of art as to a literary composition; and words spoken, a pantomime acted, a sonata performed, is no less entitled to protection than if each had been reduced to writing. The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

It may be urged that a distinction should be taken between the ***207** deliberate expression of thoughts and emotions in literary or artistic compositions and the casual and often involuntary expression given to them in the ordinary conduct of life. In other words, it may be contended that the protection afforded is granted to the conscious products of labor, perhaps as an encouragement to effort. This contention, however plausible, has, in fact, little to recommend it. If the amount of labor involved be adopted as the test, we might well find that the effort to conduct one's self properly in business and in domestic relations had been far greater than that involved in painting a picture or writing a book; one would find that it was far easier to express lofty sentiments in a diary than in the conduct of a noble life. If the test of deliberateness of the act be adopted, much casual correspondence which is now accorded full protection would be excluded from the beneficent operation of existing rules. After the decisions denying the distinction attempted to be made between those literary productions which it was intended to publish and those which it was not, all considerations of the amount of labor involved, the degree of deliberation, the value of the product, and the intention of publishing must be abandoned, and no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person, — the right to one's personality.

It should be stated that, in some instances where protection has been afforded against wrongful publication, the jurisdiction has been asserted, not on the ground of property, or at least not wholly on that ground, but upon the ground of an alleged breach of an implied contract or of a trust or confidence . . . [***210**]

This process of implying a term in a contract, or of implying a trust (particularly where the contract is written, and where there is no established usage or custom), is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse. So long as these circumstances happen to present a contract upon which such a term can be engrafted by the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contract or of trust. But the court can hardly stop there. The narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special ***211** confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's picture could seldom be taken without his consciously "sitting" for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.

Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract; but it required little consideration to discern that this doctrine could not afford all the protection required, since it would not support the court in granting a remedy against a stranger; and so the theory of property in the contents of letters was adopted. Indeed, it is difficult to conceive on what theory of the law the casual recipient of a letter, who proceeds to publish it, is guilty of a breach of contract, express or implied, or of any breach of trust, in the ordinary acceptation of that term. Suppose a letter has been addressed to him without his solicitation. He opens it, and reads. Surely, he has not made any contract; he has not accepted any trust. He cannot, by opening and reading ***212** the letter, have come under any obligation save what the law declares; and, however expressed, that obligation is simply to observe the legal right of the sender, whatever it may be, and whether it be called his right of property in the contents of the letter, or his right to privacy . . .

***213** We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise.

If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.

The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension; the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more important and far-reaching one. If casual and unimportant statements ***214** in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity. If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.

The right to privacy, limited as such right must necessarily be, has already found expression in the law of France.

It remains to consider what are the limitations of this right to privacy, and what remedies may be granted for the enforcement of the right. To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task; but the more general rules are furnished by the legal analogies already developed in the law of slander and libel, and in the law of literary and artistic property.

1. The right to privacy does not prohibit any publication of matter which is of public or general interest.

In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest. There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law, — for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability. The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may ***215** properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. The distinction, however, noted in the above statement is obvious and fundamental. There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation. Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed per se. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.

The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn. Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case, — a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to ***216** a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.

In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity. The foregoing is not designed as a wholly accurate or exhaustive definition, since that which must ultimately in a vast number of cases become a question of individual judgment and opinion is incapable of such definition; but it is an attempt to indicate broadly the class of matters referred to. Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies, or the committees of those bodies; in municipal assemblies, or the committees of such assemblies, or practically by any communication made in any other public body, municipal or parochial, or in any body quasi

public, like the large voluntary associations formed ***217** for almost every purpose of benevolence, business, or other general interest; and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege. Nor would the rule prohibit any publication made by one in the discharge of some public or private duty, whether legal or moral, or in conduct of one's own affairs, in matters where his own interest is concerned.

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

The same reasons exist for distinguishing between oral and written publications of private matters, as is afforded in the law of defamation by the restricted liability for slander as compared with the liability for libel. The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether.

***218** 4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

This is but another application of the rule which has become familiar in the law of literary and artistic property. The cases there decided establish also what should be deemed a publication, — the important principle in this connection being that a private communication or circulation for a restricted purpose is not a publication within the meaning of the law.

5. The truth of the matter published does not afford a defence. Obviously this branch of the law should have no concern with the truth or falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.

6. The absence of "malice" in the publisher does not afford a defence.

Personal ill-will is not an ingredient of the offence, any more than in an ordinary case of trespass to person or to property. Such malice is never necessary to be shown in an action for libel or slander at common law, except in rebuttal of some defence, e.g., that the occasion rendered the communication privileged, or, under the statutes in this State and elsewhere, that the statement complained of was true. The invasion of the privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not; just as the damage to character, and to some extent the tendency to provoke a breach of the peace, is equally the result of defamation without regard to the motives leading to its publication. Viewed as a wrong to the individual, this rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent; and viewed as a wrong ***219** to society, it is the same principle adopted in a large category of statutory offences.

The remedies for an invasion of the right of privacy are also suggested by those administered in the law of defamation, and in the law of literary and artistic property, namely: —

1. An action of tort for damages in all cases. Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.

2. An injunction, in perhaps a very limited class of cases.

It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required. Perhaps it would be deemed proper to bring the criminal liability for such publication within narrower limits; but that the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted. Still, the protection of society must come mainly through a recognition of ***220** the rights of the individual. Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defence, he is responsible for the results. If he resists, public opinion will rally to his support. Has he then such a weapon? It is believed that the common law provides him with one, forged in the slow fire of the centuries, and to-day fitly tempered to his hand. The common law has always recognized a man's house as his castle, impregnable, often, even

to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

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False Light Invasion Of Privacy: The Light That Failed

Diane Leenheer Zimmerman

INTRODUCTION

The ?? 'a right of privacy' [sic] as used in law has almost as many meanings as Hydra had heads. In modern constitutional law, privacy may refer to freedom from illegal governmental searches as well as to preservation of individual choice in matters relating to family life ?? human sexuality. The common thread uniting these forms of the constitutional right to privacy is the claim that each citizen has a right of autonomy—a right to decide how to live and to associate with others, free from all but the most carefully limited impingements by governmental authority.

For the past century, the common law, too, has identified and attempted ***365** to protect interests in privacy. The common law right of privacy was conceived in the late nineteenth century by the fertile intellects of Samuel Warren and Louis Brandeis, and was born on the pages of the Harvard Law Review. Although schematic in form, their idea of privacy had not so much to do with citizen autonomy as it did with an interest in what might be called selective anonymity. Warren and Brandeis were convinced that individuals ought to have legal power to control dissemination of information about themselves when that information related to nonpublic aspects of their lives and, consequently, developed a tort theory to protect that selective anonymity. It is the common law version of the privacy right, rather than the constitutionally-based autonomy right, that serves as the focus of this Article. Warren and Brandeis's proposed tort took root and grew. But on its way to adulthood, the tort metamorphosed, evolving from one cause of action to four. As analyzed by Dean William Prosser in 1960, common law privacy had branched to protect several interests, inter-connected in only the loosest sense:[FN5] a right to prevent widespread publicity regarding personal information;[FN6] a right to be free from intrusions into one's solitude;[FN7] a right to control the use of one's name or portrait for commercial purposes;[FN8] and the right to ***366** be free of publicity which casts one in a false light.[FN9] The fourth of these—more the child of Prosser than of Warren and Brandeis—is in some ways the most perplexing. False light invasion of privacy has caused enough theoretical and practical problems to make a compelling case for a stricter standard of birth control in the evolution of the common law.

Twenty years ago, so uncharitable a view of the false light tort would have been surprising. At that time, conventional wisdom predicted not merely increasing prominence for false light, but also argued that it would effectively supplant the older, more cumbersome tort of defamation.[FN10] A belief that the future was bright for this developing body of law was reinforced in opinions of the United States Supreme Court in 1967[FN11] and 1974,[FN12] which approved its use subject to certain constitutional limitations.[FN13] Many state courts subsequently announced that the false light tort was henceforth to be considered a part of their common law, and actions relying on this form of invasion of privacy began to appear in significant numbers in the case reports. In practice, however, the tort has been less than a smashing success.[FN15] While its usefulness as a tool for discomfiting defendants cannot be doubted; the ***367** chances of a plaintiff ultimately prevailing on a false light claim are slim.[FN16]

Courts have long been reluctant to use the law of privacy to achieve its apparent aims in cases involving the publication of truthful, private information. Such serious questions exist as to the constitutionality of allowing a plaintiffs to recover for the dissemination of legally obtained, accurate information that courts most often laud the right of privacy in dicta, only to deny its application to virtually any case before them. A close examination of the case law reveals that while plaintiffs are more likely to receive damages for false light claims[FN19] than for publication of embarrassing truths,[FN20] many courts also clearly prefer to avoid the use of the false light doctrine,[FN21] or even to reject it altogether despite assurances ***368** from the Supreme Court that the false light tort is permissible under the first amendment.

Recent cases demonstrate the unease which false light often engenders in state and lower federal courts. Most notable are *Renwick v. News & Observer Publishing Co.*, decided by the North Carolina Supreme Court, and *Sullivan v. Pulitzer Broadcasting Co.*, decided by the Supreme Court of Missouri. Dicta in prior cases had indicated that both states were willing to allow recoveries for false light. However, when faced directly with the issue for the first time, North Carolina rejected the tort outright, relying on considerations both of 'judicial efficiency'[FN28] and of the first amendment rights of free speech and of free ***369** press.[FN29]

* * *

Hindsight, with its usual clarity, suggests important reasons why predictions that false light would become preeminent among the 'speech' torts turned out to be wrong. Both the early support for this cause of action and the two United States Supreme Court decisions approving its use[FN35] seem in retrospect insufficiently grounded in experience with the facts giving rise to such tort claims and in critical analysis. Courts did not probe deeply enough to reveal deficiencies in the tort from either a constitutional or a common law perspective.

This Article argues that false light is a conceptually empty tort, and suggests that, even if the Supreme Court never abjures its present acceptance of the tort, states with a commitment to freedom of speech may ultimately feel compelled to follow the example of North Carolina and Misouri by either severely restricting the doctrine of false light or rejecting it altogether. To justify this position, this Article begins by examining the current status of the false light tort. It then explores both the history of the tort's evolution at common law and the circumstances surrounding its acceptance by the United States Supreme Court. This will aid in understanding why such major questions continually arise as to the ***370** fit of the tort within the first amendment.

Two rationales can be given for treating false light as consistent with the protections of the speech and press clauses of the Constitution. From one point of view, use of the tort law to proscribe false speech protects the proper functioning of the marketplace of ideas; from another, regulation is justified in light of the injury inflicted upon individuals or society as a whole by untruths. Both rationales can be shown, upon examination, to be deeply flawed and unconvincing. This Article therefore argues that, at least where falsehoods do not damage reputation, a convincing reason for limiting their constitutional protection does not exist. Finally, the Article argues that even if the punishment of falsehoods through the mechanism of the false light tort were theoretically defensible in first amendment terms, the tort would remain unworkable nonetheless because it has such a severe chilling effect on the communication of accurate information. Although the Supreme Court has tried to ward off that chill by applying to false light the privileges developed for defamation, the two torts are so different that the attempt is doomed to fail. For these reasons, this Article concludes that the tort of false light invasion of privacy is unsalvageable as currently conceived and probably should be stricken from the common law as a cognizable cause of action.

I

FALSE LIGHT: ITS SOURCE AND WHY IT SEEMED SO BRIGHT

A. What Is the False Light Tort?

The tort of false light invasion of privacy arises either when something factually untrue has been communicated about an individual, or when the communication of true information carries a false implication. Generally, two minimum requirements exist for a false light claim. To be actionable, the falsehood must first be 'material and substantial.'[FN38] Then, communication of the misinformation must reach an ***371** audience sufficiently large to constitute widespread publicity. Thus, false light privacy is predominantly, although not exclusively, a restriction on the speech of the mass media.

Beyond these essential elements further delineation of the tort becomes difficult. This is due largely to a surprising vagueness about the interests this tort is intended to protect. In the broadest sense, the false light cause of action is intended to remedy the emotional distress caused by certain kinds of false depictions of the plaintiff.[FN42] But what kinds? ***372** The common law has yet to provide a coherent answer. Some commentators have argued that false light privacy is a modernized, less technical, version of defamation law and is intended to protect against reputational harm. In support of this view, courts in some jurisdictions have refused to find flattering or benign falsehoods actionable because they do not, at least in any generally accepted sense, injure the plaintiff's good name. But other jurisdictions have permitted suits for nondefamatory falsehoods, even when they are frankly

complimentary portrayals. Although state law is split on this issue, this division of opinion may be more apparent than real. Cases denying recovery for flattering falsehoods were decided between twenty and thirty years ago and are uncertain guides to current thinking in those jurisdictions. More modern cases seem indifferent to whether or not there is a reputational injury at stake.

Courts are also divided as to whether other types of subject matter limitations narrow the tort. Some of these disagreements seem to arise from the uncertainty about the relationship of false light to the concept of privacy as generally conceived. Usually, a person's privacy is thought to be invaded only when intimate areas of his or her life—sexuality, family relations, inner emotions, and actions normally carried out in seclusion—are involved. Some jurisdictions have therefore suggested that ***373** false light actions be limited to cases where the subject matter of the falsehood is considered intimate. Others, however, treat such distinctions as irrelevant. In these cases, the gravamen of the offense is the falsity of the information, not whether it touched on sensitive areas of the plaintiff's life.[FN50]

A third area of disagreement among courts is whether the newsworthiness of the subject matter or the plaintiff's status as a public or a private figure should affect the availability of the action. In the private facts branch of the tort of invasion of privacy, newsworthiness of the subject matter is ordinarily a complete defense. Less certainty attends its role in false light cases. The United States Supreme Court in *Time,* ***374** *Inc. v. Hill*, seemed to take account of the importance of newsworthiness by saying that no liability for false light invasions of privacy will exist where the subject matter is of public concern unless the error complained of is intentional or reckless.[FN55] But some subsequent federal and state cases have suggested that newsworthiness can be a complete defense. In some instances, courts treated matters of public interest as absolutely privileged prior to *Hill* and have not yet reexamined the issue.

Most jurisdictions are unwilling to limit false light by setting subject matter standards or requirements of reputations harm but are, nonetheless, worried about the practical and theoretical ramifications of offering tort recovery simply for any material falsehood. These states have compromised by holding that only especially egregious untruths are actionable. The most common formulation is one borrowed from the Restatement, which says that liability is reserved for untruths which are 'highly offensive to a reasonable person.'[FN60] The problem with this language is that the drafters of the Restatement beg the central question of what makes untruths legally 'offensive'; as a result the standard fails as an intelligible screening device. An examination of the cases used in the Restatement as examples of extreme offensiveness demonstrates the inherent vagueness of the concept. In one of them, an airline pilot sued because he was inaccurately portrayed in a film as a hero.[FN61] In the ***375** movie, the character based on him was shown exhibiting great calm as he comforted and reassured the passengers on his disabled plane. The Restatement drafters acknowledged that the portrayal in no way discredited the plaintiff, but nevertheless concluded: 'Whether this is an invasion of A's privacy depends upon whether it is found by the jury that the scenes would be highly objectionable to a reasonable man in A's position.' Thus, although courts commonly purport to apply the Restatement standard, that standard basically gives juries great discretion in these cases and is otherwise unclear.

B. The Origins of the False Light Tort

Much of the woolly quality of the false light tort standards can be attributed directly to the haphazard way this branch of privacy law emerged from its origins in the tort of invasion of privacy by appropriation. An examination of the origins of the false light tort also goes far in explaining why it is so difficult to find a compelling reason for the very existence of such a body of law today.[FN65] Courts did not develop the false light tort because they recognized a unique and unremedied personal harm arising from the publication of falsehoods; in fact, an examination of the early cases suggests that judges were responding to a quite different set of concerns. Little evidence exists that, prior to 1960, courts deciding seminal cases in this area would have identified falsity as an important issue, or even as an issue at all. If the problem was falsity, plaintiffs could sue for defamation. Courts evolving the infant law of privacy had staked out other ground.

To begin with, Warren and Brandeis, whose famous law review article inspired courts to create a protectable interest in privacy, did not identify the publication of false information as a wrong demanding some ***376** new remedy.[FN68] Their primary concern was press exposure of accurate but personal information.[FN69] They did, however, recognize a relationship between their version of privacy and the interest of individuals in controlling the unconsented commercial uses of heir identities.[FN70] Thus, not surprisingly, the bulk of early 'privacy' cases influenced by Warren and Brandeis addressed what was, to them, this more peripheral interest in

protection against commercial misuse.

Known today as the common law tort of appropriation, this branch of privacy law protects plaintiffs against the unconsented use of either their names or likenesses for purposes of trade or business—most commonly for advertising.[FN72] Appropriation was the most obvious and easiest place for the judiciary to test the legal waters with regard to the right of privacy because this area was a logical extension of other previously well-recognized legal interests. Since the use of a name or face in advertising had commercial value, its protection could readily be conceived simply as an extension of pre-existing protections for other rights in intangible personal property, in this instance to one's personal identity and physical ***377** attributes. Another factor which may have made courts more comfortable experimenting with this aspect of privacy was its kinship with the law protecting against commercial misrepresentation.

A stretch was required to connect the concept of 'privacy' embodied in the appropriation cases with the more traditional understanding of privacy as involving the intimate or personal. Recognizing a right of privacy in these cases did, however, enable the courts to pay homage to an attractive new idea without forcing them to confront the difficult implications of the conflict between the new privacy right and the interest in protecting accurate reportage. Restricting the use of a name of face in advertising did not raise the spectre of stifling journalism, and, by extension, the free discussion of important public issues.[FN75] In contrast, courts examining an invasion of privacy claim in the context of a truthful news report might acknowledge the possibility, in the abstract, of such a cause of action but would normally reject liability because the disputed communication was newsworthy and therefore privileged.

Over time, however, the concept of tortious appropriations broadened subtly. Certain representations were found to be invasions of privacy by commercial appropriation, not because they falsely suggested support or approval of the plaintiff for a commercial enterprise or product, but because they misrepresented the factual details of the plaintiff's life, and did so in a context the courts considered not to be 'newsworthy.' This occurred not because courts were particularly worried about the problem of inaccuracy as such, but because they were cautiously ***378** looking for ways to give individuals more legal control over public presentations of their lives . . .

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[***381**] The point of these observations is not to fault the courts for failing to articulate a coherent explanation for why they were developing a new body of common law to deal with dissemination of false information. Rather, it is to suggest that, in all likelihood, the courts did not intend to create such a body of law at all. They were instead really trying to grant redress to individuals suffering the uncomfortable personal consequences of the rapid expansion in mass communications that began in the second half of the nineteenth century. Although courts may have been influenced to some extent by a dislike for inaccuracies, they did not act primarily out of a conviction that falsity was per se a legal wrong, or that the plaintiffs in these cases had suffered some peculiarly serious injury attributable to any special characteristic of 'fictionalization.' They wanted to give people control over unwanted publicity.

This point is central to understanding why courts continue today to ***382** have difficulty deciding what the false light tort is supposed to accomplish. Modern notions of the proper scope of protection for privacy are narrower than those suggested either by Warren and Brandeis or by many of the older judicial opinions on the subject. Experience has shown that the interest in preventing unwanted publicity that the early false light decisions supported is an interest which is largely negated by the opposing values of free speech.[FN100] Today, privacy interests exist as narrow exceptions to the broad right to publish information about individuals, rather than the other way around.[FN101] Therefore, without a new set of justifications underpinning the false light cases, they might have withered away, never to have emerged as a distinct branch of tort law.

At this juncture, Dean Prosser's intervention becomes significant. His efforts at creative taxonomy, applied to the rather amorphous body of judicial opinion on privacy, in a real sense 'invented' the false light tort by singling out previously unacknowledged features common to most of the nonadvertising appropriation cases. He argued that these cases were designed to address falsity, distinguishing them from those cases directed toward the problems of inappropriate revelation of personal information, or the proprietary rights infringed by the commercial appropriation of one's identity . . .

This result is ironic, since Prosser himself was skeptical about the desirability of the false light privacy action. He explained it primarily as an analogue of defamation, acknowledging its potential usefulness in protecting reputation. Prosser noted that false light served some purpose by avoiding certain deficiencies in the coverage of traditional defamation law which resulted in worthy plaintiffs being barred from recovery. But he worried that it performed this function entirely free of the restraints that imposed at least some check on the tendency of defamation law to impede free speech and encourage trivial disputes.

Prosser's worries notwithstanding, false light had now been given a ***383** name and an apparent reason for being; the 1960s saw a marked increase in the frequency of this form of privacy action. Influential commentators picked up on Prosser's tort and wrote eloquently and enthusiastically of the role that false light privacy could play in advancing the protection of important personal interests. But clearly, the most important impetus to the acceptance of false light as a separate tort was its recognition in 1967 by the United States Supreme Court.[FN109]

C. False Light Goes to the Supreme Court

In the last twenty years, the United States Supreme Court has constitutionalized much of the tort law involving dignitary injuries. While most of this restructuring work has been devoted to defamation, in five instances the tort of invasion of privacy has claimed the Court's attention. Of those decisions, two involved the false light branch of the tort. The first, *Time Inc. v. Hill*, was difficult for the Court to untangle because it presented intricate problems of statutory interpretation as well as providing the Court with its first consideration of the common law false light privacy action.

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***385** At that point, the Supreme Court was able to turn its attention to the Hills' claim, a claim which the Court recognized as fitting both factually and logically into Prosser's newly identified false light branch of the privacy tort.FN123] The resulting analysis is disappointing, however, because it fails even to suggest the existence of the problems which have led later courts such as those of North Carolina and Missouri to regard this branch of privacy law with such serious skepticism. Ordinarily, when faced with a law restricting or punishing speech, the Supreme Court strictly scrutinizes the substantiality of the state's interest in its rule. The Court did not conduct such an examination in *Hill*. Instead, the Justices seemed to assume simply that the legitimacy of the purposes and scope of the false light action were well-established and turned immediately to a discussion of the Court's previous defamation decisions and their relevance to false light.

However, this part of the analysis was also too simple; a more thorough examination should have yielded a more cautious response. Despite the existence of significant differences between the false light and defamation torts, the Court treated them as roughly equivalent. It was ***386** able, therefore, to employ the same rationale used in earlier defamation cases to conclude that, in false light as in defamation, untruths could be actionable if uttered with actual malice. Quoting from *Garrison v. Louisiana*, a criminal libel case in which the appellant had been convicted for criticizing the conduct of eight Louisiana judges, the Court reiterated that 'calculated falsehood s ' were not 'speech' for constitutional purposes because they were 'at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.' Whatever the merits of allowing public officials and public figures to recover for defamation in the presence of actual malice, the frame of reference seems inappropriate for resolving the false light claim at issue in *Hill*.

In deciding to transfer the actual malice standard from defamation to false light, the Court took its cue from Prosser.[FN130] As has already been noted, Dean Prosser argued that this form of privacy protection was a close kin, indeed a second species, of defamation.[FN131] Certainly, a great deal of overlap does exist between the two torts. Because both involve false statements, and because many false statements are also defamatory, the fact patterns of many false light cases fit neatly into a defamation cause of action. Conversely, defamation actions, generally, can also be plead as false light invasions of privacy. The Court failed to consider, ***387** however, the significance of the fact that false light cases need have nothing to do with injured reputation in the sense in which that term has been traditionally understood.[FN133] While much can and has been said in defense of penalizing knowing falsehoods which damage someone's good name, the validity of penalizing falsehoods which do not injure reputation and which may make the 'victim' appear in a favorable light invited, although it did not receive, further examination by the Court.

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[*389] II

THE DISTORTING EFFECT OF FALSE LIGHT ON FIRST AMENDMENT LAW

A. The Defamation Model: A Misleading Analogy

The most important misunderstanding in our thinking about the false light privacy tort is the faulty analogy that has long been drawn between it and defamation. As has already been noted, superficial similarities do exist between false light and defamation. Unfortunately, those similarities have tended to obscure the deeper differences between the two torts, a fact which may largely explain the ease with which the Supreme Court slipped into thinking about false light as if, analytically, it were a subspecies of defamation. By drawing this inapt analogy, the Court failed to engage in the vigorous reanalysis from first premises that false light demanded. Such analysis might have revealed that false light was not merely traditional defamation law remodeled, but a novel form of action untested by history and unsupported by theory.

One difference from defamation is that false light invasion of privacy encompasses a broader class of speech than that reached by defamation. Defamation, by definition, applies only to a comparatively narrow class of falsehoods capable of injuring the reputations of its victims. In addition, a wide array of highly technical substantive and procedural requirements further limits the situations in which defamation victims can sue. By contrast, in most jurisdictions, a false light ***394** claim can be brought for virtually any untruth on the ground that it has caused injured feelings. Thus, a plaintiff upset by a flattering untruth is in as good a position to sue as someone who complains of a false allegation of criminal conduct. And unlike defamation, false light is relatively unencumbered by common law restrictions; the major limitations are the rather vague requirements of substantiality and offensiveness. Therefore, it represents a more serious challenge to traditional first amendment values.

To plaintiffs tangled in the technicalities of defamation, false light may seem a model for needed reform. But its very simplicity, once touted by some as the raison d'etre for the development of this sort of privacy action,[FN179] when viewed from a broader perspective, suggests why false light is in fact a legal misfortune rather than a salvation.

While defamation can be castigated for its complexity, the rules which make this area of the common law such a tangle are not without explanation. Long before *New York Times Co. v. Sullivan* expressed the danger in constitutional terms, courts recognized that defamation litigation created a serious risk of suppression of free speech. The veritable ***395** crazy quilt of rules that hedge defamation were invented to prevent the tort from running rampant over the public's interest in open debate. The Supreme Court has never had occasion to examine in detail the impact of most of the common law limits on defamation. Its approach in constitutionalizing defamation was to use the common law restrictions as a base and to overlay them with additional, constitutionally derived privileges.

When the Court initially transferred the defamation privileges to false light actions, it may not have understood the implications of building upon a common law foundation that was much less well-defined and restrictive than that supporting defamation. However, the state and lower federal courts have since accumulated additional experience with the false privacy tort, and its unique and problematic characteristics have become more apparent. The two decades since the *Hill* decision have left many courts concerned about the free speech implications of false light, even as tempered by the actual malice rule, and correspondingly reluctant to render the tort fully operational in their jurisdictions.

Although many aspects of the false light tort are troublesome, this Article focuses on two sets of issues which account for most of the discomfort generated by this body of law. The first and most central question is whether a tort action for false light invasion of privacy fits rationally into a constitutional scheme which is normally loath to deprive even the most irritating speech of protection. Only if an affirmative answer can be given to the first question, a second question arises: can constitutional privileges, designed with defamation in mind, continue to do an adequate job of protecting first amendment values when grafted onto false light actions? Courts considering the first issue have put forth two justifications for finding false light actions consistent with first amendment principles. One is that false light invasions of privacy, like defamation, cause significant injuries to the victims, creating a sufficiently strong state interest in preventing such harm to outweigh competing ***396** free speech claims.[FN187]

The other is that no first amendment interests are at stake at all, since factually false speech is not protected by the Constitution. Both justifications deserve reevaluation.

Certainly some false light cases do involve harm similar to that caused by libel because the falsehood at issue goes directly to reputation. But these are exactly the cases defamation law was designed to address. No compelling argument has been made that such harms require an alternative system of law to be adequately redressed. In fact, solid reasons support treating all cases sounding in injury to reputation according to the same rules so that success or failure in litigation does not become a game of artful pleading.[FN189] However, the cases that are uniquely reached by false light are those which involve nondefamatory falsehoods. These cases, it will be argued, turn almost entirely on falsity rather than harm; the actual and substantial injury element needed to maintain the case has become an easily satisfied formality which seems really to mean only that the plaintiff was irritated enough to sue. Thus, it must be asked whether false speech is per se so pernicious and unworthy of protection that states are entitled to broad latitude in regulating it.

The alternative justification that false speech is not protected by the first amendment is supported by language in several Supreme Court opinions over the past two decades. The implications of this dicta, however, have never been carefully considered by the Court, and close examination casts serious doubt on its validity. I will argue that speech should be protected even when it is not true. At the very least, the proper balance between constitutional protection of speech and personal interests requires that falsity not be actionable except when it is the direct cause of serious, concrete, and clearly defined injury. Under this view, the false light tort is a danger to free speech because it substitutes an ill-considered moral judgment about the value of truth for the more demanding ***397** standard of constitutionally significant injury.

If, however, one takes the view that false light privacy does fit rationally within the constitutional scheme, the question nevertheless arises whether application of the privileges designed to protect speech values in defamation are adequate to perform that function in privacy actions. The Supreme Court recognized immediately that false light, like defamation, had the potential to cast a serious chill over the willingness to engage in protected truthful speech.[FN192] In treating false light as an analogue of defamation, the Justices apparently assumed that the defamation privileges would work equally well for both torts. But because the two differ significantly, the transplant of privileges has not worked well for false light, creating a set of problems which need to be recognized. These are the issues to which this Article now turns.

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[*402] *C. Reconsidering the Protection of Falsehoods*

1. Cleansing the Free Marketplace of Ideas

To test the validity of the proposition that falsehoods are not protected speech, one must first attempt to understand what motivated the Court to choose the route charted by *Garrison* and *Gertz*, other than a desire for analytic simplicity. The apparent explanation is that the Court considered the protection of falsehoods to be inherently inconsistent with, and even destructive of, the intended role of the first amendment. Recalling the famous words of Justice Holmes in *Abrams v. United States*, the *Garrison* majority agreed that the first amendment was designed to promote the discovery of truth in the marketplace of ideas. Reasoning from this premise, the majority concluded that intentionally false statements of fact—and eventually in *Gertz*, all false statements of fact—did nothing to further this search for truth. Hence, they could not be the sort of 'speech' the Constitution was intended to protect.[FN228] This argument is not without force.

***403** The Holmesian notion of a free market of ideas helped to shape the development of the Court's first amendment jurisprudence. But when the Court decided *Garrison* and *Gertz*, it seemed to depart in significant respects from the vision of the marketplace of ideas articulated by Holmes. In Holmes's view, the free speech clause embodied a judgment by the Framers that government, except in the most unusual circumstances, should be disabled from restricting speech so that conflicting ideas could struggle, uninhibited, for public acceptance. To him, this unregulated struggle was the most likely vehicle through which truth would emerge. Justice Brandeis expanded upon this theme later when he wrote that the founders 'believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that . . . discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . ..' Over time, however, skepticism

has emerged as to the existence of any necessary connection between a free market of ideas and the discovery of truth. One prominent doubter has been philosopher Herbert Marcuse. Dubious about the efficacy in our society of unfettered freedom of political discussion, he pointed to the rise of the Nazis and fascism before World War II as examples of how the marketplace is ultimately dominated by the most powerful rather than the most accurate voices. If one were to adopt the position that the marketplace of ideas should encourage the emergence of truth, withholding protection from some, or perhaps all, falsehoods could be viewed as a logical, and perhaps necessary, precondition for the efficient achievement of the constitutional goal.

This revisionist view of the Holmesian formulation seems to be the one currently acceptable to the Supreme Court. It is not, of course, without its own difficulties, some of which the Court has recognized. Political ideas and social ideologies cannot readily be classified as 'true' or 'false,' and permitting the government to purge the marketplace of these by regulation was recognized by the Justices as fraught with the ***404** potential for anti-democratic repression. In contrast, falsified facts appeared to the Court to be a form of defective speech that could be identified and regulated in an objective, nondespotic way; as a result, this speech could 'safely' be exempted from the protections of a free marketplace of ideas.

This argument for excluding false speech from the first amendment is thought-provoking, but far from dispositive. Little scholarly support can be found for a position as broad as the one taken in *Gertz*, and much has been written that points to a quite different view. One set of arguments in defense of protecting falsehoods relies on a judgment that such speech actually has inherent value. Another would protect falsehoods because doing so is consistent with those values identified as the purpose served by the first amendment. Still other arguments, adhering to the Holmesian approach to the free market of ideas, are based on epistomological or pragmatic objections to government-backed culling of false speech. These objections stem either from a skepticism about the certainty with which truth can be known, or from a skepticism about the ability of government, including juries, to distinguish it reliably from falsity.

The argument that falsehoods have affirmative value as speech has been articulated most prominently by two figures who have had a profound impact on the development of our modern theories of freedom ***405** of speech: John Milton and John Stuart Mill. Milton and Mill each argued that false speech should be protected because it spurs the quest for truth, and because it also serves to sharpen our understanding of the difference between truth and falsity. According to Milton, anyone who is shielded from falsehood will be incapable of knowing truth.

Other theorists defend the protection of false speech on different grounds. They would argue, in contrast to Milton and Mill, that the first amendment protects individual autonomy, which includes a right to be inaccurate or even to lie. This approach holds that in protecting autonomy, the constitutional protections for freedom of religion, speech, and press form a barrier against random government interference with the process through which the individual develops his or her intellectual capacities and emotional life. Falsehoods are accordingly indistinguishable in value from other sorts of speech either because they all facilitate the development of critical thinking, or because their utterance represents an aspect of self-determination.

A somewhat related argument for broad protection of false speech relies on an extension of Locke's theories supporting religious freedom. A recent proponent of this approach has stated that suppression of false beliefs is inconsistent with the first amendment's purpose of promoting voluntary adherence to true beliefs, and, in addition, that it suppresses ***406** accurate information about the false beliefs that people hold.

a. Problems in distinguishing between truth and falsity. The existence of these theoretical arguments demonstrates that the Court's conclusion about the worthlessness of false speech is open to question. However, one need not agree that falsehoods are inherently worthy, or adhere to the Holmesian rather than the *Gertzian* view about the proper functioning of a free market of ideas, to conclude that falsehoods should be protected by the first amendment. What should also be considered are the powerful reasons to be skeptical about the adequacy with which truth can be distinguished from falsehoods. Doubt about the efficacy of systematic attempts by courts to cleanse speech of falsehoods through such actions as the false light privacy tort leads to a conclusion that the optimal functioning of the marketplace is more likely to be subverted than to be insured. Declarations by courts about what is and is not true are themselves subject to error. Thus, instead of furthering the emergence of truth, judicial determinations of the accuracy of speech may instead become one more route by which misinformation can be injected into the stream of communications.

Skepticism about any ability to know what is true is reflected as a dominant theme in multiple strands of Western intellectual endeavor. The history of philosophy demonstrates that for centuries scholars have wrestled with the problem of deciding whether and what we can 'know' about external reality—the world of 'facts' central to the Supreme Court's analysis of defamation and false light. There has been doubt at one time or another as to virtually all claims about factual knowledge. At the most extreme, the ability to know whether any reality exists outside the self has been questioned. And even when the reality of an ***407** external universe has been assumed or deemed proven, philosophers have continued to experience profound uncertainty about whether individuals can reliably apprehend it. One reason is that the dependability of sensory data as a source of knowledge has been questioned. But even those who conclude that direct apprehension of reality through the senses is possible are quick to point out the fallibility of human judgment in interpreting that data and the dubiousness of any specific claim to know what is true. The knotty problem of whether one can ever know what ***408** is 'true' has elicited a variety of responses over the centuries from figures as diverse as Plato, Sextus Empiricus, Montaigne, Descartes, Hume, and Kant. None has succeeded in laying the issue to rest.

But skepticism about the ability of the human mind to know accurately is not merely the province of abstract philosophy. Modern scientists accept the existence of external reality and base their work on the belief that such reality can be apprehended and understood. Much of scientific knowledge is gleaned from painstakingly meticulous observation of natural phenomena. But even careful scrutiny by sophisticated observers does not insure the accuracy of the information obtained. As a result, the scientific method presumes that what passes at any given time for 'knowledge' should really be considered only provisional. Certainly, scientific learning on many subjects may accurately reflect objective reality, but it is often hard to separate such cases from those where substantial revision will ultimately take place. The reasons are complex. First, scientific information does not consist merely of the simple accumulation of direct observations, but represents a set of conclusions which result from sifting observations through the filter of human reason. Second, to the extent that direct observations of natural phenomena are crucial to science, these may be affected by the limits of the human senses and current ***409** technology. Thus, scientific 'facts,' which to the layperson may seem examples of certain knowledge, may need revision or may be totally discredited, either because the reasoning about what was observed was invalid or because the data itself was faulty.

Although many examples of this phenomenon could be given, one of the best known remains the most interesting. Astronomy was revolutionized by the recognition that the Earth was not at the center of the universe, but was really a planet revolving around the sun. Any observer on the Earth's surface can 'see' the sun moving across the sky, rising in the East and setting in the West. As a result, people believed for millenia that they 'knew,' based on direct observation, that the sun circled the Earth. In fact, they were not relying solely on direct observation, but on an interpretation of experience that was, in that instance, wrong. So powerful, however, was the effect of this misleading sensory impression that discarding the geocentric view of the universe was not achieved without significant scientific and social upheaval.

Other, less dramatic, instances in our own century show that the process of revising incorrect scientific knowledge which seemed to rest on a firm experiential foundation continues unabated. Until the mid-1960s, school children were taught that one side of Mercury and Venus always faced the sun so that part of each planet enjoyed perpetual day, and part perpetual night. This understanding, accepted as fact, was gained from observations of those planets from the surface of the Earth. But the use of space probes has provided a new vantage point, and an understanding that both planets actually rotate.

In the social sciences, as in the natural sciences, our understanding of phenomena has also shifted dramatically from time to time, giving rise ***410** to quite contradictory views of what constitutes 'fact.' Consider, for example, the alterations in Western views that have occurred during the last few centuries about the nature of childhood. Until the end of the Middle Ages, children were understood to be miniature adults with needs that differed little from those of grown-ups. Even into modern times, certainly throughout the nineteenth century, children worked like adults, but often for little or no pay and at tasks and under conditions that were harsh and sometimes dangerous. Today, however, we believe that children are a class of persons needing a prolonged period of special care and protection, for whom many adult experiences and occupations are harmful and inappropriate.

Another illustration of shifting conceptions of 'fact' is drawn from experiences in the United States during the first decades of the twentieth century. During this period, large numbers of immigrants, speaking little or no English, poured into the country. These immigrants did poorly on standard intelligence tests. We would now

understand that they were hampered in their performances by many factors unrelated to intelligence, such as language difficulties, cultural differences, and adaptational stresses. But in the 1920s, perhaps because of prejudice against these ***411** newcomers, the widely accepted explanation for their poor test scores was genetically based feeble-mindedness.

One might argue that most factual propositions, including those likely to be at issue in a typical false light action, are simpler to sort out than those given in the examples above. Whatever problems are faced by physical, biological and social scientists in dealing with the complexities of their fields, the argument goes, ordinary people armed with normal powers of observation are usually capable of reaching reliable conclusions about truth or falsity as it relates to commonplace occurences. This argument is simplistic in that it draws too sharp a line between the problems of knowing 'complex' and 'simple' facts. Seldom do laypersons know even ordinary things as a result of direct, unfiltered perception; rather we, too, use our perceptions as data from which we draw conclusions. Perhaps most damaging to the claim that simpler facts are more reliably knowable than complex facts is the vast number of studies which support the doubts of the philosophers that human observers can process and interpret even uncomplicated sensory data 'accurately.' While our common-sense intuition that we 'know' what is happening in our immediate environment may be correct in many instances, it is not in others, and distinguishing between the two will often be very difficult for the 'perceiver.'

***412** To begin with, inherent limitations in our sensory organs may lead us to experience external reality in a form different from that in which it actually occurs. Humans, for example, do not see light as wavelengths and amplitudes but as brightness and color. When we go to a movie, we 'see' motion when what is really presented to us is a rapid succession of still photographs. Furthermore, our ability to perceive accurately is affected by numerous other factors of which we are rarely conscious. An example which was used by John Locke to demonstrate the unreliability of the senses was that of an individual who chills one hand and warms the other. If both hands are then plunged into a bowl of tepid water, the water will feel cold to the hot hand and warm to the cold. Adaptation can also affect the accuracy of our perceptions, so that we may not hear noises or smell odors acutely because we have become habituated to them.

The problem of 'knowing' through our sensory powers is further complicated by the extent to which perceptions must be organized by learned patterns to be meaningful. Studies of persons blind from birth who later gain vision through surgery have shown that such persons 'see,' but find visual data to be meaningless; a lengthy process of learning must occur before what is seen can be organized and interpreted. To at least some extent, these learned organizational patterns which allow us to understand sensory data seem to differ from culture to culture. ***413** For example, a person unused to seeing three-dimensional objects represented by two-dimensional pictures may be unable, without help, to recognize even a close relative in a photogrph. In addition to the powerful influence of learned patterns of perceiving, what we see, hear, or smell also seems to be influenced by what others lead us to expect, as well as by our own biases and unexamined assumptions about ***414** the world. As a result, different individuals experiencing the same sensory stimulus could readily reach different conclusions about what they have seen, heard, smelled, or felt.

In addition to these reasons for caution about the certainty with which we are able to distinguish truth from error, an additional layer of complexity attends the determination of truth and falsity of speech. To decide if speech is or is not accurate, the trier of fact must not merely contend with competing versions of reality, but must also attend to the possible ambiguities of meanings in the words or images used to convey the information at issue. A single word often will have multiple literal meanings, and may be capable of still further coloration, depending upon the context within which the communication occurs, as well as on the intent and tone of the speaker. Thus, a statement may be 'true' or 'false' depending not merely upon its correlation with external reality, but also upon the multiple factors that affect linguistic interpretation. ***415** Ambiguity can be a powerful source of richness in language and literature, but it can also obfuscate our understanding of what is or is not 'true.'

Several examples illustrate how the ambiguities in words and in images give rise to problematic false light claims. Since communication by its nature is subject to diverse interpretations, plaintiffs in false light actions are invited to scan the entire surface of the speech for inaccuracies by innuendo—and are likely to find them. Some recoveries that have resulted may strike the reader as surprising. One notable case in which liability was based on inference was *Varnish v. Best Medium Publishing Company*. In *Varnish*, the plaintiff complained that a newspaper article which presented his late wife as 'happy' prior to her suicide and which did not report those aspects of her suicide note that were unflattering to him created an inference that he was unperceptive and insensitive to her

unhappiness. Perhaps the most troubling false-light-by-implication ***416** case to be decided in recent years was *Braun v. Flynt*, where the plaintiff argued at trial that the fact that her picture was published in a 'girlie magazine' reflected negatively on her morals. The jury agreed that the plaintiff was placed in a false light and the Fifth Circuit affirmed. The appellate court held that the context had to be considered; thus, even if the picture itself did not portray plaintiff in any way falsely, when it was viewed in the context of the magazine as a whole, it resulted in the creation of an incorrect impression about plaintiff's moral character. At present, no firm decisional principles have emerged that restrain courts from permitting recoveries for false light claims based on a series of dubious inferences.

***417** *b. Government-mediated determinations of truth and falsity.* Finally, particularly as to speech, serious pragmatic objections must be raised by the spectre of government-mediated determinations of truth and falsity. This, too, is an expression of skepticism, although it does not rest on epistemological or semantic doubts about our ultimate ability to distinguish truth reliably. Rather, it proceeds from a belief that government is an inherently undesirable repository for control over a process in which the accuracy of communications is determined. This point of view may reflect both political theory about the proper limits on civil government with respect to the individual, and a distrust of the bases on which government, including government acting through the mechanism of juries, might rest its determinations of truth. If one believes that a liberal democratic form of government should maximize the individual and the personal development of its citizenry, then, absent the need to prevent some truly serious and immediate harm, such a government ***418** should be obliged to leave decisions about what to believe, as well as about what to say, to each citizen's individual judgment. Furthermore, government power in this area is susceptible to abuse. Government declarations as to the truth or falsity of information may be affected by fluctuating and divergent views of what best serves the public's interests or even what best serves the interests of public officials. Furthermore, both public officials and juries may reflect the current predilections and prejudices of the general public. Therefore, they often represent a conservative force with regard to new ideas and controversial speakers, a force most comfortably aligned with the preservation of the social status quo. These tendencies can powerfully affect which competing claims will be legally determined to be true.

But even if courts were able to rise above all social and political biases, there are strong reasons to believe juries nevertheless ought not to be asked to judge truth or falsity in false light privacy cases. No reason exists to believe that these are cases which present 'simpler' issues of factual verity than exist in other areas of human experience. Certainly, some are cases that involve obvious error, often conceded on both sides. But in a substantial number of instances, the facts are hotly contested and the difficulty in choosing among competing versions of reality is amply demonstrated. *Time, Inc. v. Hill* provides one interesting example. In *Hill*, the central dispute seems not to have been over the details which distinguished the action in the play from the Hill family's actual experience as hostages; rather, it was over the accuracy of characterizing the plot of *The Desperate Hours* as a 're-enactment' of the plaintiffs' experience. The episode involving the Hills, at the very least, played a role in inspiring and shaping both the play and the novel on which it was based. On the other hand, additional material was drawn from other hostage cases as well as from the author's imagination. If the Hills' experience, however, was central to the shaping of the play, a semantically respectable argument can be made that *Life* was justified in terming the play a 're-enactment' despite the fact that, in the process of dramatization, some of the incidents differed from those of the actual event. Unfortunately, the importance of the Hill family's episode to the play is not a question as to which 'truth' could be neatly and surgically ***419** separated from falsehood; the substantial accuracy of *Life*'s terminology is a messy question of judgment and semantics.

A more recent case rested upon a string of inferences which the plaintiff argued would lead a television audience to form the unfair impression that he was an 'intemperate and evasive' person.[FN297] The plaintiff did not dispute that he was angry at the time the interview was filmed, but argued that editing had removed the footage that would have explained his anger. Implicit in the case were such imponderables as whether 'correct' characterization of personality is possible, however much footage of the plaintiff was shown, and the extent to which a television audience's impressions of personality can be assessed. In any event, a jury awarded the plaintiff $1.25 million for the falsehood; an appellate court reversed on the ground that no inaccuracy was involved.

Even in false light cases that seem to be more clearly assertions of fact, for example about the biographical details of someone's life, sorting out the truth is often a difficult and uncertain task. In the well-known case of *Spahn v. Julian Messner, Inc.*, baseball star Warren Spahn successfully recovered from the publisher of a biography for children because his testimony convinced the court that the book substantially misrepresented his life through the 'all-pervasive' use of imaginary incidents, dialogue, thoughts, and feelings. However, the author did not simply

invent much of the alleged misinformation. It was drawn from other published sources, and in some instances from articles co-authored by Spahn himself, making factual accuracy at least a substantial question. Also, much of the material complained of described the quality of relationships between Spahn and members of his family and profession, an area where conflicting interpretations can be, and often ***420** are, made. As to events long past, memory, too, can be a source of disagreement. Ultimately, the court weighed the conflicting evidence and made a judgment. However, this is not the same thing as arriving at the ultimate truth of the matter. Despite the laundry list of patent errors ascribed to the defendant by the court, the judge was not omniscient, nor was he a witness to the events at issue; he could not know with certainty in which instances Spahn was correct, in which the author was correct and in which neither was correct.

The purpose of this discussion is not to argue that, because they are fallible, judgments about truth and falsity should never be made. As a practical matter, we could not deal with the events of daily life without a willingness to decide, based on experience and learning, what is and is not so, what can and cannot be believed. Similarly, in order to function, our legal system must be credited with the capacity for reasonably reliable fact finding. Nevertheless, we should be clear that when we say courts find facts, we do not claim that they uncover truth but rather that they assess probabilities, finding one version of the facts more likely than another in the case before them. Thus, any such decision contains within it the possibility of error. The legal system attempts to compensate for the tendency toward erroneous factfinding by manipulating the burden of proof, but it cannot entirely eliminate mistakes. The risk that a defendant may unjustly pay damages or suffer imprisonment is deemed tolerable only because the alternative would be a society in which the legal system could neither compensate the injured nor protect its members against criminal acts.

Generalities about the proper balancing of the risk of error between victims and defendants may need to be rethought, however, when the issue is not who committed a crime, but rather is the veracity of a verbal description of that incident in the local newspaper. It is not clear that ***421** plaintiffs in legal disputes over the truth or falsity of speech present as compelling a claim for protection and compensation as do those whose property or person are physically damaged by crime or by negligence. In addition, the semantic problems alluded to earlier make determinations of truth in these cases a peculiarly murky and difficult enterprise.

A further layer of complexity is added by the constitutionally-driven need to protect accurate speech. Consider a defendant who, after a fair trial, is incorrectly found to have disseminated false information about the plaintiff. First, she will suffer the injustice of paying damages for something she did not do. But she also suffers a second wrong in being penalized for engaging in conduct—accurate speech—which is protected by the first amendment. She is thus also improperly deprived of a constitutional right. Compare this case with that of a defendant who, after a fair trial, is incorrectly found liable for negligent operation of her automobile. She, too, is penalized for conduct in which she did not actually engage. But, because driving a car is not a constitutional right, she at least does not suffer the same sort of double loss.

When all of the foregoing considerations—the difficulty in determining the truth, the need to protect accurate speech, and the damage to constitutional rights that results from an incorrect decision—are added together, the doubtfulness of regulating speech solely on some abstract notion of purifying the marketplace of ideas becomes apparent. To prevent incurring the risks of false light adjudication, including the real risk that adjudication itself will add to the sum total of erroneous information, an alternate approach must be explored. Some compelling additional interest or interests must be demonstrated to be at stake.

2. 'Harm' as an Alternative Rationale for the Constitutionality of the False Light Tort.

Where else might one look for an alternative first amendment rationale? One other approach the Supreme Court has used to resolve first amendment disputes is to engage in a balancing of interests. Under this mode of analysis, one might argue that falsehoods are protectable speech, but that they cause such severe harm that the state's interest in redressing or preventing that harm outweighs the speech interest protected by the Constitution. This analysis requires not simply that the ***422** speech be distasteful or have some vague potential for evil, but rather that it cause a well-defined and particularized injury of considerable magnitude.

[***423**] The precise nature of a harmful effect which might have persuaded the Court to broaden the sweep of permissible regulation in the way that it did from only certain kinds to all kinds of falsehoods cannot readily be teased out of its opinions. Some hints can be found in the defamation cases that falsehoods are inherently pernicious;

but thus far the Court has not given the concrete and particularized account of the evil to be redressed that would provide a credible explanation for why nondefamatory falsehoods are punishable in the face of protections for freedom of speech. Absent a convincing demonstration of specific and significant harm, broad regulation of false speech, including much of the law of false light, is probably impossible to justify. This conclusion finds eloquent support in a dissent by Justice Harlan in *Rosenbloom v. Metromedia, Inc.* Justice Harlan, who clearly did not regard all falsehood as injurious, argued that a finding of 'tangible danger' was a prerequisite for regulation and he criticized a rule of law that would allow the government to punish publication of any inaccurate information about individuals, stating that it was antithetical to the first amendment.

***424** Since the Court's opinions do not make it clear that a harm rationale is indeed at the bottom of its approach to falsehoods, much less what the harm is, an inquiry into the possible nature of the 'tangible danger' is, inevitably, speculation. But the explanatory potential of this alternative analysis makes the speculation worthwhile. The first place one might turn to find a substantial harm was alluded to in the previous section of this Article. The possible injury identified in that discussion was the disruption of the marketplace of ideas: false statements mislead the public, encourage wrong beliefs, and thereby subvert the purposes of the first amendment. This form of injury is inflicted not on any individual but rather on the body politic. The reasons for skepticism about it have already been addressed at some length. Two slightly different versions of the harm-to-the-body-politic thesis, however, have not previously been identified and should also be discussed. The first rests not so much on political philosophy, but on what might be called a consumer protection rationale. Some writers, addressing false light in particular, have argued that falsehoods about individuals are injurious to society in a fashion analogous to the way misrepresentation or fraud is injurious to individuals; that is, they mislead that portion of the public which relies on the misinformation. But the similarities between false light and misrepresentation evaporate as soon as the analogy is probed. As noted earlier, misrepresentation is not deemed tortious at common law simply because it is false; the law also requires that the recipient of the information be justified in relying on it and that he suffer financial or other concrete injury as a result. By contrast, detrimental reliance is not an element of false light, and the audience to which the falsehoods are directed does not emerge in the case law as an independent focus of concern; in large part, I suspect, this is because receipt of this false information has no discernible effect on the audience's life or behavior. The subject of the falsehood, not the hearer to whom it is communicated, is deemed to be the party who has been injured. For these reasons, this form of claimed harm to society's interest in an effective free marketplace of ideas is also ***425** unconvincing.

The final sort of social harm which could be said to inhere in falsehoods is that they pollute the moral fibre of the community. At least a whiff of the notion that moral pollution is the relevant harm can be discerned in *Keeton v. Hustler Magazine, Inc.*, where the Court said that a state has a significant interest in offering a forum for redress of falsehoods even when they received only the most minimal circulation within its borders. This is so, according to the Court, because of the high value to the state of 'discourag ing the deception of its citizens.' Certainly, injury to public morals has been viewed as sufficient harm to justify regulation of obscene or indecent speech. The Supreme Court has excluded obscenity from first amendment protection, and more recently has lowered the degree of protection for sexually explicit or scatalogical speech. Because truthfulness is a deeply imbedded moral value in our society, one might make a parallel claim that falsehoods should be excluded from the mantle of constitutional protection to preserve the moral tone of the society and to promote its value structure.

The argument that falsehoods can be censored or punished because of the harm they inflict on the moral fiber of society is at best an uncomfortable one. Despite precedent permitting morals-based restrictions on obscenity and indecent speech, the proposition that the coverage of the speech and press clauses can properly be tailored to fit governmental judgments about the social acceptability of speech has seemed to many first amendment scholars to be inconsistent with the basic tenets of the Constitution. Such qualms notwithstanding, there exists a further problem with this justification. For falsehoods to be excluded from protection on moral grounds, it must first be assumed that the promulgation of any falsehood, whether intentional or negligent, constitutes seriously culpable behavior. This assumption is simplistic because it fails to reflect ***426** the complexity of widely shared attitudes toward falsehoods. Some erroneous statements, such as those resulting from negligence, appear to implicate ethical values only marginally, if at all. Although carelessness with regard to facts may be undesirable behavior for many reasons, it is not normally morally culpable in the sense that the speaker has disregarded standards of social decency or exhibited wanton disregard for the interests of others.

The falsehoods more often associated with flawed morality are knowing or intentional lies. But even here,

claims of harm to community standards of decency are open to question. Many would argue that intentional falsehoods are often at worst innocuous—and even capable on occasion of rising to the level of socially valued behavior. Although ethical or religious objections can be found to the telling of 'white lies,' experience suggests that most people would find this practice preferable to the infliction of unnecessary pain. The wheels of society undoubtedly run more smoothly because the wearers of hideous ties and youngsters in dance recitals are generally assured by others that their taste or performances are impeccable. We tend also to be tolerant of many psychologically-based bendings of the truth. Human beings regularly recall experiences and relationships in forms that make them more exciting, less painful, or in other ways more satisfying to their deep-seated needs. Even though, on occasion, this reshaping may alter our stories in ways that are not entirely fair to others who have been involved, we do not ordinarily consider this to be seriously immoral behavior. Finally, without freedom to 'lie,' some forms of valued communications would be substantially foreclosed. Dramatic presentations of biographical or historical events often require authors to invent dialogue or scenes because no way remains to document exactly what was said and done. Taking into account all of these factors, it becomes difficult to argue that the exclusion from protected speech of all falsehoods, even knowing or intentional ones, is justified because of the clear threat to the moral values of society.

* * *

[***431]** The remaining question, therefore, is whether some unusual characteristic of nondefamatory falsehoods can be identified that renders them so uniquely harmful to the psyche of the plaintiff that a special case can be made for regulation. The attempt to make such a case has engaged many scholars, but their explanations of the special harm caused by false light are themselves so abstract and intangible that they do little to sweep away the quality of nebulousness that surrounds the tort.

One approach has been to claim that false light addresses the same sort of reputational harm that supports claims of recovery in defamation. The Supreme Court seems to have accepted this explanation without, however, explaining how the falsehood in either *Hill* or *Cantrell* were injurious to reputation as that phrase is normally understood. It is true, of course, that many false light cases do involve exactly the same injury to reputation as libel and slander. The reason is simple: because the elements of the privacy tort are less technically demanding ***432** than those of defamation, libel plaintiffs are encouraged to plead their cases either solely or alternatively as false light actions. But reputational harm is not a requisite of false light claims. Of course, it may be asserted that this is a definitional quibble. One might argue that the meaning of reputational harm applied in defamation is unreasonably restrictive and that a better understanding of reputational injury would acknowledge the infliction of harm whenever an individual knows that others have formed an incorrect impression of him or her. Reputational harm so defined seems, however, highly attenuated; it lacks the specificity and severity of the concept of 'injury' that was traditional to defamation or other torts resting on speech, such as assault. Again, it carries us no further than would a simple assertion that false-hoods are bad.

Other efforts to particularize the injury caused by the false light tort fall victim to a similar vagueness. One suggestion has been that the tort causes damage to the integrity of the plaintiff's personality, or, as another commentator expressed it, that it distorts the individual's self-image. This may explain why inaccurate portrayals in the press upset some people enough to induce a suit, but it does not help us understand why their reaction should be compensable. Furthermore, a claim that false portrayals always injure the integrity of personality cannot be ***433** proven; and if less than all persons so portrayed experience the harm, it is difficult to be sure who has and who has not been afflicted.

A further consideration should be mentioned. The first amendment is also frequently described as a provision which protects autonomy—if you will, the integrity of the speaker's personality. Viewed this way, the false light tort pits one claim of personal autonomy—the right to be presented correctly to the public—against another—the right to speak freely. Since the claim to free speech is based on an affirmative constitutional provision and the other is not, a strong argument can be made that, absent some additional powerful claim on the potentially injured party's side of the equation, the speaker's interest should prevail.

One attempt to argue that such a powerful additional claim can be made rests on the argument that false light damages a plaintiff's interest in protecting her private life against involuntary exposures to the glare of publicity. The difficulty with this tack is two-fold. First, because privacy claims clash with a contrary interests in freedom of communication, any claim of a right to avoid public exposure must by necessity be narrow. As the

majority itself said in the *Hill* opinion: 'Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.' Therefore, if the real problem in false light is that the plaintiff prefers not to be written about in the press, the injury from having those wishes ignored is probably not constitutionally cognizable.

Second, as a conceptual matter, the interest in privacy does not run to every incident of one's life but rather to those details of personality and relationships which involve issues of a highly personal nature. Several commentators have argued persuasively that a tort which punishes falsity without regard to whether it bears on any intimate aspect of the plaintiff's life can in no intelligible sense be said to redress damage to one's interest in privacy.

***434** In the absence of a clear understanding of the injury for which false light plaintiffs are to be compensated, a verbal formula, allowing recovery for falsehoods of 'extreme offensiveness' is usually substituted. Unfortunately, a standard of 'extreme offensiveness' is subjective to the point of uselessness. The problem is not unlike that inherent in the 'outrageousness' standard rejected by the Court in the context of intentional infliction of emotional distress in *Hustler Magazine, Inc. v. Falwell*. This potential has been well demonstrated in false light cases where judges and juries have seen fit to compensate complainants for the egregious offensiveness of falsehoods which could equally reasonably be characterized as flattering or neutral in effect. Both *Hill* and *Cantrell* are excellent examples of the extraordinary flexibility of the offensiveness test.

The subjectivity problem is not a surprising one, given the paucity of shared assumptions about what kind of nondefamatory falsehoods could reasonably be expected to cause severe distress. For many, the experience of being publicized by the media, even accurately, is unpleasant, and the experience of being misrepresented is, almost by definition, worse. Without more to guide them, juries, which are likely to sympathize ***435** more with an aggrieved plaintiff than with a mass media defendant, can hardly be expected to resist the conclusion that the plaintiff has been legally harmed once convincing evidence of falsity—particularly knowing falsity—is put forth.

The foregoing analysis indicates that exclusion of the nondefamatory falsehood from the protection of the first amendment has not been adequately supported on theoretical grounds; nor has a compelling case been made that such falsehoods are a source of concrete, serious injury either to individuals or to society collectively. Thus, any unease that a judge might feel about allowing recovery for false light invasions of privacy seems amply warranted. But the inquiry ought not to end here. Even if there were a coherent justification for the existence of the false light tort which conformed with a convincing theory of the first amendment, problems would still exist. As long as the law looks to defamation for the rules by which to apply the false light tort, a serious risk of chilling protected speech will continue unabated.

III

COMING DOWN WITH A CHILL: THE DEFAMATION RULES IN THE CONTEXT OF FALSE LIGHT

Let us now assume that the theoretical objections to the Supreme Court's position that false statements of fact are unprotected speech can be met. This assumption still does not dispel all objections, on free speech grounds, to the current shape of the false light tort. A potential concern remains that the speech-protective privileges developed by the Supreme Court for defamation are inadequate to address the different problems posed by the false light tort.

In evolving its approach to defamation, the Supreme Court imposed rules limiting the rights of plaintiffs to recover. The Court did so not to protect defendants' ability to publish falsehoods, but to ensure that speakers did not suppress accurate speech because of doubts that they could prove its truth in a court of law. *Sullivan* and subsequent cases held that public officials and public personages could recover only if they could prove actual malice; that is, either that the offending statement was false and the defendnat knew it was false or that the defendant was reckless with regard to the truth in publishing it. This approach gave the defendant the benefit of the doubt except under unusual circumstances. This balance was modified in *Gertz* by allowing private persons to recover ***436** upon proof of negligent falsity, but the Court's motive for creating the *Gertz* privilege—to prevent a chill on the communication of speech which might actually turn out to be true—remained the same.

When *Hill* came before the Court a few years after *Sullivan*, the Justices applied the actual malice standard to false light on the theory that it would protect accurate speech against the risk of being penalized. Subsequently, the majority opinion in *Cantrell* suggested that private persons with false light claims might be allowed to recover for negligent, rather than solely for intentional or reckless falsity. No matter whether the Court adopts that view in a future case, there is ample reason to believe that even the *Sullivan* standard is too weak a shield to prevent undue infringement upon protected speech in the privacy context.

A. Sullivan, *an Uncertain Shield*

The sheer breadth of the privacy tort exposes a much wider range of errors to liability than does defamation. The inevitable result is a sharp increase in the potential chilling effect of false light. Under *Hill*, a plaintiff can pursue any reckless or intentional falsehood about him- or herself because the purpose of the tort is to punish and prevent inaccurate portrayals. *Sullivan* and its successors, by contrast, had a more modest goal: the prevention and punishment of that relatively narrow class of reckless or knowing falsehoods that inflicted injury on the plaintiff's good name and standing in the community.

Sullivan, it should be acknowledged, did not meet the Court's criteria for creating a sufficiently impregnable protective barrier around first amendment speech even in defamation. To begin with, the Court ***437** seemed to anticipate that the *Sullivan* standards would sharply decrease the use of litigation as a means by which public officials and public figures could avenge themselves against the press for unflattering portrayals and unintentional defamation. The Justices recognized that, even if a defendant in a libel case were ultimately exonerated, the experience of being sued, or the fear that it could happen, would greatly inhibit a speaker's willingness to publish critical or controversial materials. The actual malice rule, coupled with the requirement of a defamatory meaning, should in theory have limited libel suits by public persons to a narrow range of particularly egregious fact patterns. That did not happen. *Sullivan* has not in the long run either significantly limited the risk of suit or made it more predictable. Public officials and public figures continue to sue frequently, and often over less than compelling claims. Even though their chances of ultimate success are slim, their willingness to bring these actions imposes a sufficiently high cost in money, time, and exposure of internal operations through extensive pretrial discovery to encourage defendants to settle dubious actions and to avoid similarly dangerous ground in the future.

***438** Applied to false light privacy cases, the *Sullivan* actual malice rule is even less effective in stemming the litigation-as-censorship problem. Unlike defamation, no subject matter limitations constrain false light. Although courts often attempt to limit the subject matter by requiring extreme offensiveness or material falsity, these categories are too indistinct to narrow the ambit of tort liability in any cogent and predictable way. As a result, it is easier technically to state a cause of action in false light than in defamation. All that seems necessary is publicity and a colorable claim of any knowing error. As a practical matter therefore, the constitutional ratification of the tort by *Hill* and *Cantrell* effectively invites rather than discourages litigation over alleged errors, even where ultimate success on the merits may be unlikely, increasing the potential use of the courts as vehicles for discouraging or avenging unwanted or distasteful publicity.

Furthermore, the enunciation of a knowing or reckless falsity standard offers no automatic assurance that only intentional misinformation will be punished or deterred. The Supreme Court has tried to compensate ***439** for the problem of such errors by requiring the plaintiff to prove elements of actual malice by clear and convincing evidence, a higher burden of proof than is normally applied in a civil action. Manipulation of the burden of proof increases the chance but does not ensure that protected speech will not erroneously be suppressed. A basic premise of the Court's first amendment analysis is that protected, accurate speech should not be penalized except on rare occasions where an extremely weighty countervailing social interest can be articulated. As a result, ***440** the substantiality of the plaintiff's claim for redress is a crucial element in deciding when, if at all, to tolerate even a small risk that speech protected by the first amendment may be infringed. One might agree that the interest of public persons in protecting their reputations against destruction by propaganda campaigns is weighty enough to justify occasional erroneous punishments of protected speech, without conceding that the interests asserted by plaintiffs in a case like *Hill* make an equivalently powerful claim.

In the end, however, even if the *Sullivan* standard were a perfect rule, eliminating excessive litigation and unerringly dividing the true from the false, the wisdom of its application to the false light tort would remain in question. As this Article indicated earlier, knowing falsehoods are not all the same. It may be possible that some

kinds of false speech currently threatened by a blunderbuss application of the actual malice standard ought even to be encouraged. At first glance, it might seem that only blackguards or the irredeemably irresponsible could find it burdensome to eschew knowing or reckless falsehoods. In truth, even lavish care cannot help some classes of speakers comply with this requirement.

The limitations of the *Sullivan* privilege in defamation cases involving fiction, where characters and situations are modeled after actual persons and events, have been widely discussed. Defendants sued by persons who claim to be recognizably portrayed in novels, films, and plays find that *Sullivan* can be a highly phemeral protection. Since fictional works, by their nature, are technically 'false,' and their authors 'knew' that when they created them, at least some courts have been ***441** ready to find the actual malice test fully satisfied. This hole in the actual malice privilege is potentially even wider in false light cases. Because the plaintiff need not show that the falsehood was defamatory, he or she could sue based merely on the existence of a recognizable portrayal.

At least one state, Illinois, has recognized the negative implications of allowing false light to be used in this way, and has declared the tort, and the actual malice standard itself, inapposite as applied to fiction. But cases like this continue to be litigated in other states, and plaintiffs sometimes win. A New York attorney, for instance, was awarded $10,000 for invasion of privacy because he satisfied the court that he was ***442** the model for a character in a novel about army officers who organized the assassination of a World War II general.

An even broader potential for litigation exists with regard to a class of speech which occupies an uneasy border between fact and fiction. These are works intended primarily to be factual, but which are fleshed out with conjectured scenes or dialogue. Various reasons for 'making up' parts of otherwise factual works exist: manufactured scenes and dialogue may be needed to hold the interest of the audience, to enhance the artistic effect of the piece, or to enable the author to present the information in the desired medium. A playwright or a filmmaker, for example, may be unable to dramatize a real person's life without at least some reliance on imagined speech and occurrences. The presence of this element of fictionalization has been the foundation for a number of famous false light actions.

The best known example of this type is the suit, discussed earlier, by baseball player Warren Spahn. Part of Spahn's objection to the biography rested on the book's use of 'invented dialogue' and imagined scenes. The defendants conceded that these aspects of the book were contrived, but they argued that a reasonable amount of literary license was required in order to write any biography addressed to an audience of children. Thus, the book followed the general outlines of Spahn's life ***443** but dramatized it somewhat and added dialogue to hold the interest of young readers. Spahn also alleged that the book contained factual errors. The extent of the inaccuracy is unclear, as is the degree to which such errors were knowing or reckless, but much of the misinformation complained of was so flattering that its presence may have reflected a belief on the part of the writer and editors that a bit of romanticizing about Spahn's life would enhance his suitability as a role model for the young. Use of these literary conventions, standard to the juvenile book genre, resulted in a legal victory for Spahn. At least one of the courts that considered the case during its tortuous litigative course was frank about the implications of Spahn's victory. It meant, said the court, that publishers would either have to pay for the subject's consent, change the nature of children's books, or limit themselves to publishing ***444** biographies of 'deceased historic persons.'

Although material produced for children may place particularly heavy reliance on fictionalization as a literary device, works for adults frequently must rely on it as well. Even the best efforts to produce an accurate unauthorized biography or dramatization of historical events may require conjecture about what the participants said or how they felt or acted at a particular moment because there are no participants or eyewitnesses willing or able to describe what actually transpired. If the author or director is precluded from relying on known facts, enhanced by imagination to supply the missing details, the characterization may fail, the narrative lose its point, or the barebones information prove too drary to hold an audience. Despite these problems, several jurisdictions, most notably New York, are firmly of the view that the use of such devices can, consistent with the *Sullivan* privilege, constitute actionable falsehood.

The full impact on authors and producers of their potential liability for such works on a false light theory cannot easily be quantified, but there is reason to suspect that they are encouraged by this odd body of law to approach portrayals of living persons cautiously or not all. One ***445** recent episode suggesting possible self-censorship involved a plan by the American Broadcasting Company to televise a dramatization of Elizabeth Taylor's life. The actress sued, arguing in part that the script could not be written unless aspects of the portrait were made up.

The project was subsequently dropped. One can only guess that many projects of a similar sort are eliminated simply because a false light law suit is a possibility.

A considerable number of suits have been filed, however, after a program was aired or a book published; an examination of these decisions reveals a variety of grievances. Some plaintiffs, like Mr. Spahn, seem distressed primarily because they were not paid for the use of their personas in the works at issue. Not surprisingly, other suits are brought by individuals who, while not defamed, disagree with the work's point of view or consider themselves to have been portrayed with insufficient sympathy. For example, Roy Cohn sued the National Broadcasting Company following the presentation of *Tail Gunner Joe*, a dramatization which was critical of the late Senator Joseph McCarthy. Mr. Cohn, who had been Chief Counsel to the Senate Government Operations Committee during McCarthy's chairmanship, figured prominently in the program. *Spahn* and *Hill* suggest, however, that even publishers who frankly flatter their subjects cannot be sure they will not be sued.

Nor can a speaker be certain to avoid liability by focusing on events long past. A program about the Russian monk, Rasputin, generated false light litigation some 50 years after his death, brought by one of the participants in his assassination who turned out still to be alive. Similarly, the National Broadcasting Company was sued in 1977 for broadcasting ***446** a portrayal of a trial that occurred some 40 years earlier. The plaintiff was the victim in the 1933 rape trial of nine black men in Scottsboro, Alabama. She was incorrectly believed to be dead by those involved with the production. The inevitable conclusion one draws from examining these cases is that a prospective publisher of dramatically enhanced documentary material receives so little protection from the actual malice rule as applied in *Hill* that he can operate in safety only as to the far-distant past or with the permission of all living subjects.

One must ask, after reviewing these cases, whether the application of the *Sullivan* actual malice rule to false light claims based on fictionalization of the subject matter strikes a balance between private rights and protection of speech, or simply abandons speech interests entirely. This is not to say that subjects of dramatizations have no claim to protection. If the fictionalization in a documentary work seriously damages the subject's reputation, the plaintiff can look to the law of defamation to provide a remedy. False light, because it compensates mental distress arising from all types of inaccuracies, invites plaintiffs to search for untruths to support a lawsuit which is really about grievances which the Constitution or legal proscriptions against trivial suits would prevent them from pursuing directly. Plaintiffs need not make a careful showing that what is offensive about their portrayal is closely tied to the knowing falsehoods of which they complain; they are free, therefore, to sue merely upon the showing that substantial fictionalization has occurred. Litigants may use the presence of fictionalization as a device to effectuate otherwise unenforceable preferences for anonymity. Alternatively, ***447** false light can provide a vehicle for plaintiffs who are not averse to publicity at all to demand payment for the right to use their life stories, or to exact concessions in the manner of presentation. It is valid to question whether the existence of this sort of problem suggests that, even with the actual malice privilege in place, the structure of the false light tort is seriously flawed.

*** * ***

[*451] CONCLUSION

Weaknesses in the theoretical justifications for the false light tort, questions about the reality of the injuries suffered, and intimations that the constitutional privileges for defamation work poorly in false light may well account for the hesitancy of many courts to embrace this branch of common law privacy protections with enthusiasm. Indeed, reluctance to embrace a tort with such serious free speech-impairing over-tones and such hazy philosophical underpinnings seems both an appropriately conservative jurisprudential approach, and, from a civil liberties perspective, a highly reassuring one.

What conclusions, then, should be drawn about the place of false light invasions of privacy in the law? Should it be read out of our jurisprudence altogether, or could it be reshaped to avoid its worst failings while at the same time serving legitimate interests of those whose lives have been misrepresented? The answer to that question largely requires a reference to defamation and to other situations where liability for false ***452** speech appears to be accepted by the courts. In such cases two basic conditions seem to hold: (1) a clear and reasonably concrete understanding seems to exist about the harm to be avoided by regulating the false speech at issue, and (2) the speaker can reasonably anticipate the sorts of false utterances that would be the proximate cause of such harm.

Using this framework, a much-reduced but acceptable scope for the false light tort could be retained. False speech, even when intentional, would generally be protected. The exception would exist for cases where the plaintiff can prove not merely mental distress but some other concrete form of injury such as pecuniary loss, significant damage to personal relationships, or other harms capable of objective proof. Because such false speech cannot easily be identified by its general subject matter, some requirement would have to be built in to avoid the chill that would occur if the speaker could not reasonably predict in advance the particular speech that might be a source of liability. The approach most likely to generate reliable results would be to limit the tort to instances of intentional or reckless untruths which, because of circumstances known by the speaker, could reasonably be predicted to cause the harm that indeed ensues. This would be somewhat comparable to the situation in misrepresentation, where the defendant makes incorrect statements on which he or she reasonably expects the listener to rely, reliance occurs, and the predictable injury ensues.

Even at this reduced level of operation, questions about false light may remain. Arguments can be made that the models of such speech torts as misrepresentation or defamation are insufficiently respectful of free speech values. Furthermore, it may be difficult to articulate a firm standard for proving harm or to determine what speakers reasonably should foresee as the probable consequence of their false speech. Finally, the mere availability of the tort may encourage plaintiffs to use the threat of litigation as a weapon, even if they would be found not to have stated a case on the ultimate merits.

Given these considerations, the wiser course may be for states to eliminate false light altogether. The evidence gleaned from the case law suggests that fact patterns of the sort described above will occur very rarely. Most injuries from untruths will, and should, be handled as defamation actions; of those that cannot be, many will either be too trivial to remedy or will not be actionable because the 'falsity' complained of will be constitutionally-protected opinion or ideas. In other cases, the harm will prove not to have been foreseeable.

The risks inherent in preserving a separate false light action for the few cases that will be left seem hard to justify. This is, however, a matter on which reasonable minds could differ. What is clear is that the current conception of false light invasions of privacy should be approached with ***453** the skepticism and caution shown by the Supreme Courts of North Carolina and Missouri. Its splendid pedigree notwithstanding, false light has proved in practice to illuminate nothing. From the viewpoint of coherent first amendment theory, it has served instead to deepen the darkness.

[FN5] Prosser, Privacy, 48 Calif. L. Rev. 383, 389 (1960). Dean Prosser's reformulation is reflected in the structure of the sections of the Second Restatement of Torts concerning the right to privacy. Restatement (Second) of Torts §§ 652A-E (1977). It has also provided the framework within which most states recognizing a right of privacy conduct their analyses.

[FN6] Restatement (Second) of Torts § 652D (1977); see, e.g., Virgil v. Time, Inc., 527 F.2d 1122, 1125-26 (9th Cir. 1975) (plaintiff entitled to trial on claim of invasion of privacy where article detailed bizarre instances of behavior exhibited in his personal life), cert. denied, 425 U.S. 998 (1976).

[FN7] Restatement (Second) of Torts § 652B (1977); see, e.g., Dietemann v. Time, Inc., 449 F.2d 245, 247-50 (9th Cir. 1971) (taking secret pictures and recordings in plaintiff's home is invasion of privacy).

[FN8] Restatement (Second) of Torts § 652C. This branch of the tort, commonly known as appropriation, is itself slowly transforming into a broader protection of economic interests, although it remains under the general rubric of privacy rights. In its newer form, it is referred to as a right of publicity.

[FN9] Restatement (Second) of Torts § 652E (1977); see, e.g., Time, Inc. v. Hill, 385 U.S. 374, 384-88 (1967) (publication of material falsehoods about plaintiff gives rise to cause of action for invasion of privacy if falsehoods are knowing or uttered with reckless disregard of their accuracy). See text accompanying notes 36-63 infra.

[FN10] See, e.g., Prosser, supra note 5, at 401 (suggesting that the tort may 'engulf' defamation); Wade, Defamation and the Right of Privacy, 15 Vand. L. Rev. 1093, 1120-22 (1962) (advocating false light privacy as way to avoid those 'absurdities' of defamation law resistant to direct reform).

[FN11] Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

[FN12] Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 249 (1974).

[FN13] The Supreme Court has thus far required plaintiffs in false light cases to prove knowing or reckless falsity in order to recover. See id.; Hill, 385 U.S. 374 (1967); notes 167-73 and accompanying text infra. A distinct possibility exists that the Court, if faced with the question, would now approve a less stringent standard for cases brought by private persons. See note 173 and text accompanying notes 445-74 infra.

[FN14] See, e.g., McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882, 887-89 (Ky. 1981), cert. denied, 456 U.S. 975 (1982); McCormack v. Oklahoma Publ'g Co., 613 P.2d 737, 739-41 (Okla. 1980); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 86-90 (W. Va. 1984).

[FN15] As one commentator put it:

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

R. Sack, Libel, Slander, and Related Problems 401 (1980).

[FN16] Because the torts of defamation and false light invasion of privacy overlap, plaintiffs usually sue for both rather than solely for invasion of privacy. To the extent that they prevail, they usually do so on their defamation claims. Where the plaintiff sues only for false light, courts frequently treat the claim as if it were one for defamation. See note 21 infra. Some 'pure' false light claims, however, involve falsehoods that are not defamatory and the results in such cases are unpredictable. Compare Spahn v. Julian Messner, Inc., 18 N.Y.S.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966) (plaintiff recovered for nondefamatory falsehoods) with Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E.2d 496 (1966) (plaintiff's suit for nondefamatory falsehood failed).

[FN19] Invasion of privacy by placing an individual in false light occurs when something materially false about the plaintiff—whether or not defamatory—is given broad publicity. For a discussion of the elements of the tort, see text accompanying notes 36-63 infra.

[FN20] This form of invasion of privacy, in contrast to false light, occurs when broad publicity is given to information which is accurate but, because of its nature, is material the plaintiff would prefer not to have widely known.

[FN21] The most common way of avoiding the application of false light, and by extension, of avoiding its troubling doctrinal implications, is to treat the claim as one sounding in defamation and then to rule for or against the plaintiff based on the law governing the older tort of defamation. See, e.g., Smith v. Esquire, Inc., 494 F. Supp. 967, 970 (D. Md. 1980) (false light complaint dismissed on grounds that policies underlying short statute of limitations for defamation would be subverted if plaintiff were allowed greater time to bring false light claim on identical facts); Moloney v. Tribune Publ'g Co., 26 Wash. App. 357, 362-63, 613 P.2d 1179, 1183 (constitutional privileges and statute of limitations applicable to defamation also apply to false light case based on similarity of two causes of action), review denied, 94 Wash. 2d 1014 (1980). See also Kapellas v. Kofman, 1 Cal. 3d 20, 35 n.16, 459 P.2d 912, 921 n.16, 81 Cal. Rptr. 360, 369 n.16 (1969) (where false light action equivalent to action for defamation, applicable rules should be those of defamation); Holbrook v. Chase, 12 Media L. Rep. (BNA) 1732, 1736 (Dist. Ct. Idaho 1985) (false light claim resting on same facts as libel claim subject to same defenses).

[FN28] Renwick, 310 N.C. at 323, 312 S.E.2d at 412. The plaintiff in Renwick claimed that the same facts gave rise to both a defamation and a false light cause of action which is typical of most false light suits. Id. The North Carolina Supreme Court believed it more 'efficient' to limit plaintiffs to a single tort action for defamation rather than allowing both a defamation and a false light claim. Id.

[FN29] Id.

[FN35] See Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974); Time, Inc. v. Hill, 385 U.S. 374 (1967).

[FN38] See Time, Inc. v. Hill, 385 U.S. 374, 386 (1967) (stating the New York rule requiring 'material and substantial error'); Rinsley v. Brandt, 700 F.2d 1304, 1308 (10th Cir. 1983) (court found inaccuracies 'too minor to be actionable,' although no specific standard articulated); Winegard v. Larsen, 260 N.W.id 816, 823 (Iowa 1977) (relying on comments to the Restatement (Second) of Torts, in adopting a 'material and substantial' rule). The Restatement says that even deliberate untruths are not actionable if 'unimportant:' It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy. Restatement (Second) of Torts § 652E comment c (1977). Notably, the case law does not establish a clear standard by which a trivial error can be distinguished from a substantial one. Compare, e.g., Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974) (implying that plaintiff was present when reporters visited her house sufficient to support privacy claim) with Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929) (attributing to plaintiff fictional quotation regarding her feelings about husband's murderers insufficient to support claim for invasion of privacy).

[FN42] Mental distress is the articulated basis for recovery in false light privacy cases. See, e.g., Time, Inc. v. Hill, 385 U.S. 374, 385 n.9 (1967); Brink v. Griffith, 396 P.2d 793, 796 (Wash. 1964).

[FN50] According to the Restatement:

The form of invasion of privacy covered by the rule stated in this Section does not depend upon making public any facts concerning the private life of the individual. On the contrary, it is essential to the rule stated in this Section that the matter published concerning the plaintiff is not true.

Restatement (Second) of Torts § 652E comment a (1977).

[FN55] 385 U.S. at 390.

[FN60] Restatement (Second) of Torts § 652E comment c (1977).

[FN61] Id., illustration 9.

[FN68] Id. at 218. The article suggests that Warren and Brandeis assumed that the law of defamation provided all the protection that was needed against 'inaccurate portrayal of private life.' Id.

[FN69] Id. at 195-96, 216.

[FN70] Id. at 195 & n.7, 208-10.

[FN72] See note 8 supra; Restatement (Second) of Torts § 652C comment b (1977).

[FN75] Courts clearly saw the potential risks to freedom of speech through recognition of a broad right to privacy, and often expressed hesitancy about expanding privacy law beyond the appropriation area because to do so might infringe too deeply on that other significant interest. See, e.g., Pavesich v. New England Life Ins. Co., 122 Ga. 190, 202-03, 50 S.E. 68, 73 (1905) (acknowledging that required protections for freedom of speech and press will limit development of right of action for invasion of pricacy); cf. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 545, 64 N.E. 442, 443 (1902) (concern with effect of right of privacy on freedom of speech as one reason for refusal to recognize even tort of appropriation).

[FN100] See, e.g., Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (first amendment values require tolerance of considerable exposure to publicity). See also notes 379-82 and accompanying text infra.

[FN101] See, e.g., Hill, 385 U.S. at 388 (acknowledging that freedom of speech requires that citizens give up much of their interest in privacy).

[FN109] See Time, Inc. v. Hill, 385 U.S. 374 (1967).

[FN123] The Court does not use the term 'false light;' instead, it refers to '[t]he doctrine of 'fictionalization'.' Hill, 385 U.S. at 385 n. 9. The Court distinguished between classic appropriation and other applications of the New York statute. Id. at 381-82. The Court implied that classic appropriation might be free of first amendment problems

because of its relationship to commercial speech—a category of communication which, at the time Hill was decided, fell outside the protection of the constitution. Id. at 381 (citing Valentine v. Chrestensen, 316 U.S. 52 (1942)). Since Hill, the Court has extended first amendment protection to commercial speech. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[FN130] Hill, 385 U.S. at 384-85 n.9 (citing Prosser, supra note 5, at 398-401).

[FN131] Prosser, supra note 5, at 400-01. The Court relied heavily on the principles of its defamation cases as a source of decisional principles in Hill. See Hill, 385 U.S. at 386-91. It also noted that injury to reputation may be an element bearing upon mental distress in false light cases. Id. at 384-85 n.9. A more explicit statement of the Court's understanding of false light can be found, however, in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). In this 'right of publicity' case, the Court, distinguishing among the four branches of the common law right of privacy, see text accompanying notes 5-9 supra, defined the interest at stake in false light as "clearly that of reputation, with the same overtones of mental distress as indefamation." Id. at 573 (quoting Prosser, supra note 5, at 400). Also notable is the language used in the Court's other false light decision, Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974), to describe the plaintiff's injury. 'Outrage, mental distress, shame, and humiliation,' id. at 248, are also words frequently used to describe the injury resulting from defamation. The core injury in defamation, however, is being disgraced in the eyes of the community. See W. Keeton, supra note 36, at 773-74. In Cantrell, the sense of disgrace seemed to inhere in the Cantrells' subjective response to the publicity at issue.

[FN133] Although definitions of defamation abound, for the purposes of this Article the definition used by the Restatement (Second) of Torts § 559 (1977) suffices: defamation includes any speech which tends to 'lower [the plaintiff] in the estimation of the community or to deter third persons from associating or dealing with him.' Although plaintiffs in false light actions may believe that having their actions or characters misrepresented to the public results in an injury to their reputation, such injury is distinct from the sort of damage to community standing that defamation has traditionally addressed. See notes 350-58 and accompanying text infra.

[FN187] While courts are rarely explicit about their balancing of competing interests, they commonly, in false light cases, engage in a discussion both of the harm to individual plaintiffs and of the fact that free speech considerations exist. By agreeing that liability can exist for false light despite the existence of the first amendment, they are implicitly adopting the view that the state has a sufficiently weighty interest in providing this tort remedy. See, e.g., Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 129-32, 448 A.2d 1317, 1329-31 (1982) (plaintiffs have interest in not being misrepresented to others); McCall v. Courier- Journal and Louisville Times Co., 623 S.W.2d 882, 887-88 (Ky. 1981) (right to be let alone includes right not to be portrayed in offensively false manner), cert. denied, 456 U.S. 975 (1982). See text accompanying notes 310-94 infra.

[FN189] Many courts faced with defamation claims garbed as false light have refused to give plaintiffs the benefits of more generous legal rules, but have instead insisted on treating the suits under the same rules that pertain to defamation. See cases in note 21 supra.

[FN192] Time, Inc. v. Hill, 385 U.S. 374, 387-89 (1967).

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In Defense of False Light: Why False Light Must Remain a Viable Cause of Action

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[***149**] Bryan R. Lasswell

I. Introduction

Among the numerous members of the tort family, it is arguable that there is no greater "black sheep" than the form of invasion of privacy known as "false light." [FN1] Probably more so than any other tort, false light must continually justify its existence. Perhaps the biggest bully on the block is the law of defamation. [FN2] Almost anywhere that false light dares ***150** to stand up and be counted, its older cousin defamation has arrived first demanding undivided attention. Unfortunately, in some states defamation has bullied false light out of town.

Since its inception, critics have questioned and greatly criticized the existence of the false light form of invasion of privacy. Because it is similar to the more respected tort of defamation, it is attacked as a method of avoiding the constitutional protections of free speech and press that have developed in defamation. Additionally, because it provides a remedy for a false publication, it is criticized as having a chilling effect on free speech. Because of the similarity to defamation and the possible restrictions on free speech, the question boils down to: Is false light really necessary?

* * *

[***156** A]n actionable statement under false light need not be defamatory, and could in fact be laudatory. Another distinction is that the primary harm compensated in an invasion of privacy action is the mental distress caused by exposure to public view, as opposed to damage to reputation. However, a successful plaintiff under either theory must prove the material falsity of the publication, as well as the publisher's knowledge of the falsity or reckless disregard for the truth . . . The actual malice standard was borrowed from the defamation standard established [] in New York Times Co. v. Sullivan. [FN62]

* * *

[***161**] If the plaintiff is a public figure, the defendant enjoys certain ***162** constitutional protections in that the plaintiff must establish the actual malice of the defendant in order to win damages. [FN132] The actual malice standard has been defined as knowing falsity or reckless disregard as to the truth of the published statement. [FN133] If the plaintiff is a private individual, the plaintiff must establish that the defendant was negligent as to the falsity of the published statement. [FN134] If the private plaintiff seeks punitive damages, the higher threshold of the actual malice standard must be met. [FN135]

* * *

[***163**] The false light tort is designed to protect the plaintiff's right to be left alone. [FN142] False light redresses the embarrassment or humiliation felt by the plaintiff because an intimate part of his life was portrayed to the public at large.

The constitutional protections that have grown up around the law of defamation are also applicable to false light. [FN143] The majority of jurisdictions recognizing false light require actual malice as the standard of culpability. The negligence standard, as applied to defamation of a private person, has been accepted in at least two jurisdictions. [FN145]

Traditional restrictions on defamation, such as the requirement that special damages be pleaded and proved, are apparently required in false light actions as well. [FN146] . . .

The Restatement (Second) suggests that all of the absolute and conditional privileges that apply to defamation also apply to false light actions. [FN148] Truth is considered an absolute defense to this tort. [FN149]

Damages recoverable under false light include compensatory damages for injury to reputation, emotional distress, and humiliation. [FN150] Presumably, even under the Gertz [FN151] analysis, punitive damages are not

recoverable by a private plaintiff unless the plaintiff can prove actual malice ***164** on the part of the defendant. [FN152] It is probable that any special damages[, or damages for actual harm,] that are pleaded and proved can also be recovered. [FN153]

The right of privacy is personal in nature. [FN154] With the exception of the appropriation form of the tort, recovery is limited to the plaintiff who has been harmed. [FN155] The action is not survivable or assignable. [FN156]

* * *

[***169**] Under false light, a plaintiff is allowed to recover nominal or minimal damages, but special damages must be pleaded and proved. [FN219] The damages can be based upon humiliation or mental distress caused by the invasion of privacy. [FN220] Like defamation, damages can also be awarded for injury to the plaintiff's reputation. [FN221] Special damages are available to the extent that the plaintiff can establish that the invasion of privacy was the legal cause of damages. [FN222] To recover punitive damages, the private plaintiff must prove the defendant's actual malice. [FN223]

When a plaintiff brings suit in both defamation and false light, an election must be made. [FN224] A double recovery will not be allowed under both torts.

The right to privacy is personal rather than relational. [FN225] Under a false light action, only the person who has been presented in a false light can actually recover. [FN226] . . .

B. Distinguishing Characteristics

One of the characteristics distinguishing false light from defamation is the type of interest protected. Defamation is a tort designed to compensate for damages to the victim's reputation. In contrast, the interest protected by false light is the plaintiff's right to be left alone. Texas courts have explained the interests protected as including injuries to the plaintiff's sensibilities, mental anguish, and mental suffering and injury. As one commentator has stated, "[w]hat is involved in a privacy case is not damage to reputation but primarily emotional disturbance." In summary, an action in defamation is based on the damage felt by the plaintiff externally while the damages protected by false light are those suffered internally.

* * *

[***171**] V. The Future of the False Light Invasion of Privacy

What is the future of false light in general, and what is its future in Texas? The answers to these questions will inevitably be affected by three issues: the similarity of false light to defamation, freedom of speech and press, and the applicable standard of care.

Prosser notes that false light has the potential to swallow up the entire law of defamation. However, in reality, defamation has turned false light from the hunter into the hunted. Some states have never recognized false light as a cause of action . . . Yet, a reading of the case law indicates that false light is recognized in more jurisdictions than have expressly rejected it.

A. The Advantages Offered by Pursuing a Claim Under False Light

When Warren and Brandeis first considered invasion of privacy, they intended it as a remedy against the threat of "yellow journalism." They envisioned it as a tool to strike back against the outrageous stories that were otherwise invulnerable through defamation. Because of the evolution of invasion of privacy from one tort to four, false light became a desirable alternative to defamation. False light's greatest advantages derive from its function as an alternative to defamation.

However, false light cannot be replaced by defamation any more ***172** than defamation can be replaced by false light. Each cause of action has unique interests to be served. Plaintiffs can seek protection in one tort or the other, but not both. Because false light serves a special need, it must remain a viable cause of action.

The greatest advantage presented by a false light cause of action is that an action or publication need not be defamatory before it is actionable. [FN250] It is possible for a plaintiff to recover for a so-called "laudatory" false

light. [FN251] Laudatory false light recognizes that the mere publication of a false impression can be damaging to a plaintiff whether or not it is technically defamatory. In order to recover in defamation, a plaintiff must prove that the communication "lower[ed] him in the estimation of the community or ... [would] deter third persons from associating or dealing with him." [FN252] By contrast, in a false light cause of action, the plaintiff must prove that the statement is false, and that the plaintiff was portrayed in a manner that "would be highly offensive to a reasonable person." [FN253] While the highly offensive standard is more readily accessible to a plaintiff than proving defamation, it is a standard that provides a satisfactory threshold to limit recovery to legitimately harmed plaintiffs.

* * *

[***173**] B. The Disadvantages of Pursuing a False Light Claim

One disadvantage of false light as compared to defamation is the more stringent requirement of widespread publicity. Defamation only requires publication to a third person who is capable of understanding the defamatory nature of the communication. False light requires publication to a widespread audience. While this may not be difficult if the defendant is a member of the media, this requirement will bar many claims involving non-media defendants. Realistically, this requirement limits the availability of false light actions largely to actions against media defendants.

The biggest disadvantage of a false light cause of action is its similarity to defamation. Those who are hostile to perceived threats to freedom ***174** of speech and press feel that false light is simply another method of limiting or chilling free speech. This is the predominant reason that false light has faced hostility in the state courts and the legal commentaries. The critics argue that the tort of defamation is already available to aggrieved plaintiffs who have been falsely portrayed. Since defamation has a longer and more recognized pedigree, critics argue that it should be used to the exclusion of any similar action. Critics maintain that false light could be swallowed up by the law of defamation and the First Amendment would be the better for it.

* * *

[T]he constitutional protections made applicable to defamation in New York Times, [FN191] and subsequently to false light in Time, [FN192] require that the defendant must publish the falsity with actual malice. [FN193] Whether the plaintiff is a public or private person, this standard applies for determining liability in the majority of jurisdictions. [FN194] The actual malice standard requires actual knowledge or reckless disregard as to the falsity of the matter published. [FN195]

* * *

B. The "Chilling Effect" Fallacy

Can false light be done away with? Critics suggest that it can with good riddance. The most common criticism is that the action is a restriction on both freedom of speech and the press. [FN273] These critics suggest that false light will be able to avoid the constitutional protections in defamation and impose self-censorship on the press. One look at the chilling effect on free speech being suffered today by tabloids makes one ponder what types of stories the readers are being denied by the writers' fear of a false light suit. [FN274]

These criticisms are not valid in view of the decision in Time, Inc. v. Hill, [FN275] which expressly made the same constitutional protections in defamation applicable to false light. The same privileges [FN276] and defenses [FN277] ***175** to defamation are also applicable to false light. Indeed, some of the restrictions on false light are more burdensome than those applicable to defamation. The requirement of widespread publicity [FN278] is a more onerous burden than the publication rules applicable to defamation. [FN279] The "highly offensive to a reasonable man" [FN280] standard may or may not be easier to attain than the standard required to find a statement defamatory. [FN281] Regardless, the plaintiff must pass a judicial threshold of whether the statement is capable of conveying a false meaning before he ever presents his case to the trier of fact. By seeking damages for a false light portrayal, a plaintiff simply cannot avoid the constitutional protections of free speech that have developed in the law of defamation.

To the staunchest advocates of free speech, the interests protected by false light simply do not justify the

restrictions imposed by the threat of litigation. There is a strong belief that any restriction on speech is a greater evil than the publication of information that places a plaintiff in a false light. Surely the right of the ordinary person in not having his life put to public scrutiny, especially in a false manner, is at least as important as the right that the actor has in free speech. After all, who is harmed more by the denial of this right. To simply view this issue in terms of censorship is to ignore the rights that each person has in maintaining personal dignity.

D. The Special Needs Served by a Cause of Action in False Light

Considering the similarities of the constitutional protections of false light and defamation, why is there a need for two different forms of the same cause of action? The answer is that the two torts protect different interests. [FN284] Defamation compensates and protects the damage to reputation caused by inaccurate speech. False light protects and compensates the mental anguish caused by the widespread publication of false speech. Yet, to be actionable under false light, speech must be much more than merely false, it must rise to the level of being highly offensive to a reasonable ***176** person. "The false light tort, to the extent distinct from the tort of defamation ... rests on an awareness that people who are made to seem pathetic or ridiculous may be shunned, and not just people who are thought to be dishonest or incompetent or immoral." [FN285]

* * *

[***178**] VI. Conclusion

False light is both damned and acclaimed because of its similarity to defamation. It is damned because it is perceived to be a method of avoiding the constitutional and common law protections that have grown into the law of defamation. But as discussed above, this argument may ***179** have no validity. The decisions in Time, Inc. v. Hill and Cantrell v. Forest City Publishing Co., [FN317] insured that the constitutional protections to free speech and freedom of the press would become a part of the law of false light.

The tort is acclaimed because it offers a remedy that is not offered by the similar tort of defamation. The interests protected by false light are those of dignity and self-respect. False light provides a method for the plaintiff who has been falsely portrayed in a highly offensive manner to seek the damages caused by the humiliation of such acts. There is no need for the plaintiff to carry the added burden of proving special damages to reputation.

* * *

Because the personal interest protected by false light is as important as the reputation interest protected by defamation, false light should be recognized and adopted as the only adequate remedy for the harms done to human dignity by the public disclosure of highly offensive personal information.

[FN1] Restatement (Second) of Torts § 652E (1977).

[FN62] 376 U.S. 254, 279-80 (1964).

[FN2] Id. § 577.

[FN132] Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967).

[FN133] Id. at 387.

[FN134] Diamond Shamrock Ref'g. & Mktg. Co. v. Mendez, 809 S.W.2d 514, 520 (Tex.App.—San Antonio 1991, writ granted). See also, Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1092 (5th Cir.1984) (requiring proof of negligence as to falsity), cert. denied, 469 U.S. 1107 (1985).

[FN135] Braun v. Flynt, 726 F.2d 245, 256 (5th Cir.), cert. denied, 469 U.S. 883 (1984).

[FN142] W. Page Keeton et al., Prosser and Keeton On The Law of Torts § 117 at 864 (5th ed. 1984).

[FN143] Restatement (Second) of Torts § 652E cmt. d (1977).

[FN143]. Restatement (Second) of Torts § 652E cmt. d (1977).

[FN145]. Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1092 (5th Cir.1984), cert. denied, 469 U.S. 1107 (1985); Boyles v. Kerr, 806 S.W.2d 255, 259 (Tex.App.—Texarkana 1991, writ granted); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 89 (W.Va.1984).

[FN148]. Id. § 652F-G.

[FN149]. Id. § 652E cmt. a.

[FN150]. Id. § 652H cmt. a-b.

[FN151]. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[FN152]. Braun v. Flynt, 726 F.2d 245, 256 (5th Cir.), cert. denied, 469 U.S. 883 (1984).

[FN153]. Restatement (Second) of Torts § 652H cmt. d (1977).

[FN154]. Id. § 652I.

[FN155]. Id.

[FN156]. Id. § 652I cmt. a.

[FN191]. 376 U.S. 254, 279 (1964).

[FN192]. 385 U.S. 374, 387-88 (1967).

[FN193]. Id.

[FN194]. Only West Virginia, Texas, and the Fifth Circuit have recognized a negligent invasion of privacy. See supra note 145.

[FN195]. Time, 385 U.S. at 398.

[FN219]. Clarke v. Denton Publishing Co., 793 S.W.2d 329, 331 (Tex.App.—Fort Worth 1990, writ denied). See Restatement (Second) of Torts § 652E cmt. e (1977).

[FN220]. Braun v. Flynt, 726 F.2d 245, 250 (5th Cir.1984), cert. denied, 469 U.S. 883 (1984); see also Kramer v. Downey, 680 S.W.2d 524 (Tex.App.—Dallas 1984, writ ref'd n.r.e.).

> [T]he rule in Texas is that damages are recoverable for mental suffering (even if unaccompanied by physical suffering) when the wrong complained of is a willful one intended by the wrongdoer to produce mental anguish or from which such result should be reasonably anticipated as a natural consequence ... Invasion of one's right to privacy is such a wrong.

Id. at 525.

[FN221]. Restatement (Second) of Torts § 652H cmt. a (1977).

[FN222]. Id. § 652H (1977).

[FN223]. Braun, 726 F.2d at 256.

[FN224]. Id. at 250.

[FN225]. Restatement (Second) of Torts § 652I (1977).

[FN226]. Id. at cmt. a.

[FN250]. Restatement (Second) of Torts § 652E cmt. b (1977).

[FN251]. Id. § 652E cmt. b illus. 5; id. at cmt. c, illus. 9.

[FN252]. Id. § 559.

[FN253]. Id. § 652E.

[FN273]. Renwick v. News and Observer Publishing Co., 312 S.E.2d 405, 413 (N.C.1984).

> Given the First Amendment limitations placed upon defamation actions by Sullivan and upon false light by Hill, we think that such additional remedies as we might be required to make available to plaintiffs should we recognize false light invasion of privacy claims are not sufficient to justify the recognition in this jurisdiction of such inherently constitutionally suspect claims for relief.

[FN274]. "As a general rule journalists simply are more responsible and professional today than history tells us they were [in the era of Warren and Brandeis]." Id.

[FN275]. 385 U.S. 374 (1967).

[FN276]. Restatement (Second) of Torts § 652F-G (1977).

[FN277]. Id. § 652E cmt. a (1977).

[FN278]. Moore v. Big Picture Co., 828 F.2d 270, 274 (5th Cir.1987).

[FN279]. Restatement (Second) of Torts § 563 (1977) (stating that in order for a statement to be defamatory it must be communicated to a third party capable of understanding the communication).

[FN280]. Id. § 652E cmt. c.

[FN281]. Id. § 559.

[FN284]. "In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual." Warren & Brandeis, supra note 5, at 197.

[FN285]. Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1134 (7th Cir.1985).

[FN317]. 419 U.S. 245 (1974).

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Let There Be False Light: Resisting The Growing Trend Against An Important Tort

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Nathan E. Ray

According to the traditional conception of the privacy torts, as described by Professor William L. Prosser, [FN1] there are four forms of invasion of privacy: intrusion upon seclusion or solitude, publication of embarrassing private facts, appropriation of name or likeness, and publicity placing an individual in a false light before the public eye. Minnesota has cautiously waited one hundred and eight years to recognize any of these torts, approving the first three in Lake v. Wal-Mart Stores, Inc. [FN6] ***714** Yet Minnesota is in the vanguard when it comes to rejecting "false light," boldly joining only two other states.

Whereas the first three forms of invasion of privacy protect easily recognized interests such as solitude, confidentiality, and control over how one's name or image is used, [FN8] the false light tort makes an easy target for criticism. This is due in large part to its "hazy philosophical underpinnings" and a poorly-understood protected interest. Many critics also believe the tort conflicts with First Amendment free speech guarantees and overlaps with the established tort of defamation. False light is nevertheless distinct from the other privacy torts and from defamation. Repudiating it would be a harsh example for other states if a cogent account of its protected interest shows it to be vital and worth preserving.

***715** False light invasion of privacy involves exposing an otherwise private individual to unwanted and false publicity. By contrast, defamation, with which false light is often compared, involves damage to reputation from a false communication, not necessarily publicized, that exposes an individual to hatred, contempt, or ridicule. Many misrepresentations are both defamatory and an invasion of privacy, but in the absence of injury to reputation, Minnesota has eliminated any protection for a sense of privacy, peace of mind, or the right to decide how we present ourselves to the public. Without a cause of action for invasion of privacy by false, highly offensive publicity, deserving plaintiffs without viable defamation claims have no available remedy . . .

Moreover, false light publicity, unlike defamation, might even improve reputation. It can nevertheless be deeply offensive, as when it presents an individual as more virtuous or heroic than he really is. Undeserved praise might cause the same discomfort and embarrassment to a person with integrity as ***716** does an unmerited attack and could create an impression that such a person invited the unearned honors. In a well-known case, a professional baseball player won a verdict for invasion of privacy when a fictionalized children's biography depicted him as having earned military honors for heroic deeds during World War II that he did not actually receive. [FN15] In Minnesota, these plaintiffs and others would have been without recourse.

* * *

I. BIRTH OF A MISUNDERSTOOD TORT

Professor Prosser has told the story that the famous 1890 Warren and Brandeis article advocating a common-law tort of invasion of privacy was inspired by Boston journalists crashing the society wedding of Warren's daughter. [FN18] . . . One commentator, ***717** however, points out that Warren's daughter, "the face that launched a thousand lawsuits," [FN20] was only six at the time, and the newspaper Prosser credits with provoking Warren only mentioned him twice in the previous seven years, in connection with unimportant matters. [FN21] Despite uncertainty surrounding the exact origins of the seminal Warren and Brandeis article, scholars often consider it the most influential law review article ever written. It was the source of a new area of law, becoming the basis for statutory or common-law causes of action in forty-eight states, now including Minnesota. [FN23]

Warren and Brandeis argued that an implicit right to privacy had evolved at common law, and the time had come for American courts to recognize it explicitly. [FN24] Apart from passing mention in an 1888 treatise on torts of the right "to be let alone," no coherent notion of privacy existed in American ***718** law. Yet, they argued, courts

had provided relief on other grounds in the absence of causes of action for invasion of privacy. Few courts elected to recognize invasion of privacy in the beginning, but the tort slowly gained momentum. With its appearance in the Restatement of Torts in 1939, the trend in favor of recognition spread quickly to the majority of American jurisdictions. In the terse formulation of the first Restatement, "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

By 1960, privacy cases had proliferated to a point where conceptual refinement was needed. It was provided by Prosser in a law review article second only to Warren and Brandeis's in influence. Prosser concluded from a survey of over three hundred cases that invasion of privacy was actually a complex of four kinds of invasion of separate interests. "False light" ***719** originated in this article. Prosser's classification ultimately was adopted by nearly every state recognizing invasion of privacy at common law, and became the formulation for the Restatement (Second) of Torts.

* * *

[***720**] A. First Amendment Implications of the False Light Tort

When states punish a defendant for making false statements about another person, whether using privacy law or defamation law, the First Amendment guarantee of freedom of expression is often invoked. As Justice Brennan said, "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive." ' [FN42] Whether defamation or false light is at issue, states must balance the demands of the Constitution with the rights of citizens harmed by misrepresentations made about them.

In dealing with First Amendment concerns raised by these two torts, the Supreme Court has treated them similarly, but imposed a higher standard of fault on false light plaintiffs. When tort law is used to redress injuries caused by speech, First Amendment values may be undermined because the threat of litigation and damage awards can lead to over zealous self-censorship by individuals or the press. This issue first became a constitutional matter in the 1964 defamation case New ***721** York Times Co. v. Sullivan. [FN43] Concerned that giving states unlimited discretion to punish certain kinds of expression would chill otherwise constitutionally-protected speech, the Court required public officials suing for defamation to prove that a critic of their official conduct acted with knowledge of falsity or reckless disregard for the truth. [FN44] This "actual malice" rule was soon extended to public figures.

In 1967, Time, Inc. v. Hill [FN46] examined the question of First Amendment limitations on liability in invasion of privacy cases. [FN47] Hill expanded the actual malice rule again to protect freedom of speech in invasion of privacy cases, but did not distinguish between invasion of privacy and defamation. [FN48] The result of Hill is a heightened standard of fault in false light cases. Defamation permits recovery for merely negligent harm as long as the plaintiff is not a public figure. False light plaintiffs, however, must prove knowing misrepresentation or reckless disregard for the truth.

Because the Court certainly could have declared the false light tort unconstitutional had it found any insuperable conflict with the First Amendment, some commentators have declared ***722** that the Supreme Court recognized the tort. Subsequent to Hill, however, the Court has expressly declined to consider whether the actual malice standard applies to all false light cases. It is generally assumed that plaintiffs wishing to state a false light claim must prove the defendant acted with knowledge of falsity or reckless disregard for the truth. This assumption found its way into the Restatement (Second) of Torts, which adopts Prosser's fourfold division of invasion of privacy. According to the Restatement:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. [FN52] These elements have been adopted more or less verbatim in virtually every state recognizing this cause of action at common ***723** law. [FN53] An increasing number of states recognized false light invasion of privacy after the second Restatement was published, and the future of the tort seemed secure.

* * *

[***725**] C. Attempts To Define the Interests Protected by the False Light Tort

Legal scholars have yet to provide a satisfactory rationale for the false light tort. As the above cases and others suggest, the current state of law on false light invasion of privacy is a "haystack in a hurricane," to use Judge Biggs's oft-quoted reference to privacy tort law in 1956. The false light tort should protect interests sufficiently compelling to outweigh the widespread suspicion that it is redundant and inconsistent with freedom of speech. Even the majority of states recognizing ***726** false light, however, have had difficulty justifying the tort by the interests it serves to protect. Proposed interests have included freedom from scorn and ridicule, freedom from embarrassment, humiliation and harassment, freedom from personal outrage, freedom from injury to feelings, freedom from mental anguish, freedom from contempt and disgrace, and the right to be let alone.

. . . Of false light, Prosser wrote: "The interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation. . . . There has been a good deal of overlapping of defamation in the false light cases, and apparently either action, or both, will very often lie." [FN75] If all that false light accomplished was an increase in the number of situations where defendants could be liable for harming reputation, however, critics concerned about First Amendment guarantees might have good grounds for suspicion. Commentators have found reputation to be an insufficient interest for false light, because this interest is already protected by defamation law. As one critic notes, reputation is by definition not a privacy interest, so suggesting this interest as a justification for the false light tort inevitable raises the question of why placing someone in a false light before the public is an invasion of privacy at all. [FN77] Moreover, because false light publicity can technically be favorable to the subject of the publicity, it is ***727** doubtful whether reputation could be the interest protected by the tort.

By acknowledging a substantial overlap between the new false light tort and the established defamation tort and claiming that both protect the same personal interest, Prosser probably contributed to the skepticism with which courts and scholars view false light. [FN79] The Supreme Court may bear some responsibility for the confusion as well. In applying constitutional restrictions for defamation to false light without analyzing the interests at stake for each tort, it created a presumption that defamation and false light are intimately connected and protect the same personal interest.

In addition, despite recognition that an analysis of the interests at stake is vital for the continued existence of the tort, [FN82] there is no general agreement among scholars about the interests protected by the right to privacy, let alone by the false light tort in particular. [FN83] One commentator has identified four major interests proposed to account for the necessity of a right to privacy: the expression of one's personality or essence as a human being, autonomy or moral freedom, the ability to regulate information about oneself and thereby control one's relationships with others, and a cluster of interests including secrecy, anonymity, solitude, repose, sanctuary and intimate decision. These interests may be vague and abstract, but few people dispute the desirability of privacy protections in our society.***728** [FN85] The lack of a clearly identifiable interest has become an acute problem with false light, however. The tort has been sharply attacked for not protecting any definable or important interest, and for being apparently justified only by virtue of its inclusion in the Restatement. [FN86]

Few legal theorists have attempted to define the interest protected by the false light tort even though the lack of a clearly-defined interest may jeopardize its existence. No discussion deals at length, if at all, with the specific interest protected by the tort of false light. Moreover, none has led to a consensus, and some attempts have been sharply criticized. ***729** Under these circumstances, it would be difficult to expect a court deciding whether or not false light should be recognized to positively accept the tort without qualification. Invasion of privacy as a cause of action originated in a law review article, and was identified as encompassing false light in a law review article--and the need for the tort in the first place is still being debated in law review articles. With so little consensus in the legal community, not to mention among lay citizens, there is wide latitude for judicial rejection of false light. The latest repudiation of the tort by Minnesota may signal a growing trend.

II. DEFENDING A MALIGNED CREATION

The false light tort has zealous detractors. [FN89] Lake v. Wal-Mart Stores, Inc. may portend a slow and needless death for this new tort if more states decide to follow Minnesota's example and reject it. [FN90] That would be an unfortunate development because the usual arguments dealing with First Amendment infringement and overlap with defamation are not unassailable. With a careful examination of the privacy interest protected by the tort, courts could conclude that eliminating the remedy for false light publicity is a harsh response to these two concerns.

A. First Amendment Considerations

Despite a threat of liability for certain false or misleading statements, First Amendment guarantees of free expression and freedom of the press are not threatened by the existence of the false light tort.

***730** 1. Free Speech Is Adequately Protected by Restrictions on the False Light Tort

Although there are restrictions on the false light tort meant to safeguard free speech interests, even Prosser, sometimes credited with creating this tort, [FN91] acknowledged the "extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored [in false light cases]." [FN92] Courts, however, have developed and implemented various limitations on false light actions since the publication of Prosser's article in 1960. Plaintiffs must now prove falsity, actual malice on the part of defendants, and disclosure to the public at large. In addition, some courts hold that the shorter statute of limitations for defamation applies to false light actions.

Minnesota's outright rejection of false light remains a minority position. Most jurisdictions disagree with the conclusion that false light should be abandoned, despite prevalent defamation-type***731** restrictions that prevent the tort from "unacceptably derogat[ing] constitutional free speech." So far, free speech has not been noticeably derogated in jurisdictions recognizing the limited false light tort. Indeed, to judge from today's popular media, the restraint one might expect from editors and broadcasters afraid of false light litigation is barely detectable. [FN98]

Even with restrictions, media defendants still may fear that they are not adequately protected against litigation costs imposed by flimsy false light claims. It is undoubtedly true that misrepresentations putting plaintiffs in a false light but not amounting to libel or slander are more difficult for an editor to notice and prevent. The false light actual malice requirement, however, is meant to address this concern. Negligent reporters and editors who merely fail to observe an error or to use reasonable care in averting misrepresentations will be protected. There can only be liability if a plaintiff can show that the publication knew of the falsity or acted with reckless disregard for the truth.

* * *

[***732**] 2. False Light Claims Do Not Threaten the Press and Can Promote First Amendment Values

Even if imposing liability for intentional or reckless but non-defamatory misrepresentations had a chilling effect on free speech, this burden would primarily affect the press--a very powerful entity. The widespread publicity requirement of the false light tort targets the mass media because non-media defendants rarely disseminate information "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Indeed, the privacy tort was expressly created to curb abuses by the press. "Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service . . . they must pay the freight . . ." Given the media's vast resources and influence, it is unlikely to "catch a chill" from privacy protections. Because only misrepresentations made with actual malice are likely to be silenced, there is little chance that false light will ***733** curtail the willingness or ability of the press to make information available to the public, even with a rise in litigation.

It may be difficult to compare and balance the competing interests in free speech and privacy because the measure of harm from an invasion of privacy differs qualitatively with the measure of harm from a restraint on the media. In trying to balance these interests, courts should consider that both the right to privacy and the right to a free flow of information are ultimately for the sake of the public. Courts therefore ought to bear in mind that

"allowing the media to engage in tortious behavior imposes costs upon the public whose interests the media is claimed to serve. Forcing the public, ostensibly in its own interest, to subsidize newsgathering behavior is not a decision to be undertaken lightly."

The false light tort may even promote freedom of speech. One scholar argues that the press, far from being silenced by tort liability for invasion of privacy, actually itself inhibits public debate by exposing speakers or their families to public scrutiny that is often uncomfortable and embarrassing. Under this view, a cause of action for false light would actually promote***734** freedom of speech by encouraging the expression of ideas and participation in public affairs, with less fear of media distortion and public embarrassment.

In addition, the many legal scholars who champion freedom of the press generally focus on the indispensable nature of a free press in a democratic society, but do not consider how public confidence in the press is diminished by irresponsible, unfair, or sensational reporting. Because media credibility is impaired when journalists violate respected private interests without facing legal consequences, journalists are less able to serve important social or political roles. Subscriptions and ratings manifestly do not decline in such situations, but the media might be taken less seriously as an ally of the public. The tort of false light should be preserved, if for no other reason than to stand as an example of what our society considers unacceptable conduct by the media.

B. Distinctions Between False Light, Defamation and the Other Privacy Torts

False light is a distinct cause of action. Defamation and false light, though frequently compared, have different elements and protect different interests . . .

***735** Several points of difference between the two torts must be emphasized. First, the disclosure requirements are distinct. False light requires "publicity," meaning communication to the public at large. [FN117] On the other hand, defamation requires only "publication," meaning the defamatory statement must be communicated to at least one person other than the plaintiff. False light plaintiffs thus bear a heavier burden when proving disclosure. Second, a libelous or slanderous statement must be "defamatory," lowering the community's opinion of the plaintiff and deterring others from associating with him. False light, by contrast, requires the statement to be "highly offensive," a subjective standard that in practice may be more or less difficult to establish. This is a crucial difference. Because false light requires no damage to reputation, a plaintiff can be cast in a false light that reflects positively or even improves reputation. For example, a veteran might be depicted as a "war hero" and given praise or recognition for deeds he did not perform. Such a misrepresentation might be just as offensive as one that disparages, but false light is the only tort that provides a remedy. Finally, the standard of fault differs for defamation and false light. Defamation generally requires at least a showing of negligence by plaintiffs, whereas false light carries the more demanding requirement of actual malice.

***736** In addition to differing elements, truth is a common-law defense to defamation but not to false light, though most courts require a false light plaintiff to show the defendant's statement was false. Again, false light plaintiffs therefore bear the heavier burden because they must make an affirmative showing of falsity rather than leaving it to defendants to justify the offensive statement.

. . . . Intrusion upon seclusion generally involves some kind of physical intrusion, such as prying eyes. Publication of private facts involves the publicizing of true information, such as personal medical records. Appropriation of name or likeness usually involves exploiting the name or image of a well-known person for profit without permission. Although situations may arise in which false light and another privacy violation occur (such as a false report of observations obtained by spying on another person in a private place), this is not overlap but rather a multiple offense . . .

False light is meant to protect a distinct interest as well. Defamation protects a plaintiff's interest in reputation and a good name, whereas false light protects inward interests that have been characterized in a variety of ways. Even the competing ***737** interests opposed to defamation and false light differ. The right of public discussion conflicts with the reputation interest protected by defamation, whereas it is the public's right to information, which conflicts with the right to privacy. The scope of free expression tends to be narrowed more by restrictions on defaming others, whereas the availability of information is limited more by excluding certain private matters from the realm of public knowledge.

* * *

C. Interests Protected by the False Light Tort

The right of individuals not to be subjected to public scrutiny resulting from inaccurate and offensive publicity is a valuable interest worth protecting. Despite good reasons for the confusion surrounding false light, the lack of consensus about the purpose of the tort is puzzling. After all, most people would agree that it is bad to be unwillingly exposed to the public in an inaccurate and offensive way. We should therefore also be able to agree about why this is bad, what interest it would violate, and about the social value of providing legal protection to that interest. Courts and scholars, however, have failed to arrive at a satisfactory account of exactly what false light protects. In the discussion that follows, this Note will examine why attempts by legal scholars to analyze the privacy right at stake under false light have failed and will propose that the tort protects an individual's interest in self-determination.

* * *

[***742**] 2. The False Light Tort Serves Public Interests and Protects Self-Determination

This Note proposes that the interest protected by the false light tort is self-determination, a privacy interest. This Note will make no attempt to define "privacy," however, because many aspects of human life contribute to the meaning of this concept, including social, psychological, philosophical, linguistic and legal. Indeed, "privacy" may be the name of numerous concepts without a central, reducible meaning. The idea of privacy is evolving as well. Shifting societal values and changing contexts in which we use the idea may render today's accurate definition obsolete in the future. In the next one ***743** hundred years, we will want privacy law to protect us from harms different than those that concern us today. Self-determination might be one of many possible "privacy" concepts or it might underlie them all, but no attempt will be made to "prove" this one way or the other. Instead of philosophizing about the ultimate meaning of privacy, this Note will simply argue that the false light tort serves the public interest in several ways and then justify the proposed interest protected by the tort on its own terms.

a. Policy Considerations Support the Existence of a False Light Tort

The false light tort serves important public interests. To start with the most general point, our political system places a premium on the individual. Any dignitary harm that a publicity mechanism inflicts on an individual has consequences for a system requiring social interaction and public debate. The democratic exchange of ideas suffers when people fail to participate in public discussion due to fears of embarrassing or offensive publicity. This is especially true when the harm affects how the individual views himself in the community, as with unwanted publicity placing him in a false light. Technology and urbanization had begun to introduce this threat in Warren and Brandeis's time, and privacy came into being, as one author puts it, "to keep American democracy in step with its own inventiveness." Technology has continued to produce means of obtaining and broadcasting information about individuals that Warren and Brandeis could not have imagined. "It seems fair to say that if [they] had not invented a right of privacy***744** [in 1890], somebody else would have had to invent a similar legal concept, by whatever name, in short order."

On a more subjective level, privacy promotes the independent and critical thinking needed to make informed decisions regarding elections and government policies. When an individual is placed in a false light before the public, the ability to make informed choices is diminished because unwanted publicity forces the individual into seclusion and thwarts the free exchange of ideas. "[W]hen a person's privacy is invaded, he is discouraged from making free choices. . . . [He is] more reluctant to take part in self-governing, decision-making processes and the purpose of the first amendment has been frustrated." Empirical studies have been interpreted to support this. The availability of a false light tort can prevent ridicule and pressure to conform, indirectly serving the needs of public debate.

Enforcing the false light tort will also enhance society's ability to attract gifted individuals to public service. One often hears complaints about undistinguished presidential candidates, but it is hard to blame talented people for considering ***745** the media "spotlight" so disagreeable as to outweigh even a desire for the highest office

in the land. Although false light cannot solve this problem, judicial recognition of the tort will at least articulate society's commitment to respecting the privacy of individuals who wish to serve the public.

b. The False Light Tort Protects an Individual's Interest in Self-Determination

No doubt each of the interests claimed to be protected by the right to privacy, and the false light tort in particular, is to some extent valid. There is, however, a more basic personal interest common to all of these interests which is jeopardized when individuals are subjected to unwanted publicity placing them in a false light. This interest is self-determination, a concrete principle that is more clear and accessible than others proposed, and which underlies each of the other interests in the context of false light privacy.

Self-determination simply means allowing individuals to regulate their own affairs, a kind of privacy. Placing someone in a highly offensive false light before the public eye interferes with self-determination because the misrepresentation defines that person for the public and limits his ability to choose how to interact with others. Whereas a defamatory falsehood harms reputation and may change the way others treat the individual, the false light misrepresentation changes the way the individual deals with others. As courts repeatedly emphasize, the injury from an invasion of privacy is to the victim's feelings. ***746** An individual who is forced to confront an offensive and misleading image of himself broadcast to the world is put in a role that carries different and inferior options for interacting with others. The reason is not damage to reputation, but self-imposed withdrawal or defensiveness arising from feelings of humiliation, indignity, helplessness, resentment, nakedness, and the like. The false light tort does not protect against mere hurt feelings, however, but against the natural consequences of these inner reactions in the specific setting of the public arena. The natural response to offensive false light publicity is withdrawal or defensiveness, and when someone impairs an individual's involvement with public life and freedom of decision-making, the law should provide a remedy.

The interest in self-determination can be seen as a common component in other interests proposed for justifying false light. For example, "human dignity" is in large measure an expression of what is unique about a human being among other creatures and relates to our capacity for voluntary, conscious action. "Control over accessibility to others" is only one very specific form of self-determination. The various interests in mental tranquility likewise are connected to self-determination because an offensive disruption to mental tranquility, imposed from without, diminishes the ability to make reasoned, reflective choices. By recognizing this common element in all the interests purporting to underlie the false light tort, courts can protect a legitimate need, maintain consistency with established rationales, and avoid the insecurity of having to defend an ill-defined or insubstantial interest. Moreover, self-determination is not merely another "real" interest supposedly underlying the interest in privacy. Self-determination itself is by definition a kind of privacy.

Of course, other dignitary or physical violations besides false light can interfere with the interest in self-determination. A particular tort theory need not be the exclusive protection for a personal interest to be justified, however. It must simply ***747** protect a clearly identifiable interest in a situation where there is no other protection. As already noted, there are numerous potential situations in which a false light invasion of privacy is not deterred or remedied by defamation or other torts. Conversely, every interference with self-determination need not be protected for self-determination to warrant protection from false light publicity. Sometimes the law provides no recourse for an offensive act. The special situation in which offensive publicity misrepresents an individual to the public is, however, an important situation needing redress in the courts because public policy implications exist.

Self-determination is not a new, undiscovered interest, but rather one that has already been acknowledged by scholars and courts. Unlike other proposals, it is less encumbered by philosophical baggage and more calculated to achieve a consensus. While related to respected but indistinct concepts like "autonomy," "integrity," or "dignity," self-determination is a familiar concept with a narrow, literal meaning, and can be readily acknowledged as a vital interest. It is an interest already recognized implicitly in other areas of the law, such as First Amendment jurisprudence and fundamental-decision cases under the Fourteenth Amendment. Because self determination ***748** relates to many of the themes found throughout the American legal and political systems, we have a legitimate expectation that the law will respect this interest. It deserves protection from offensive false light publicity no less than from other intrusions on privacy.

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[***749**] Moreover, undeserved positive or neutral portrayals might inflict a reputational injury not addressed by defamation in addition to violating the interest in self-determination.

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***751** CONCLUSION

Privacy is an increasingly scarce commodity in a crowded and technologically advancing world. With the means of intrusion and publicity becoming ever more accessible, any privacy protection available from the law should be secured to the fullest possible extent. In Lake v. Wal-Mart Stores, Inc., however, the Minnesota Supreme Court created a harsh precedent, paying scant attention to protecting the interests of individuals whose privacy might be violated by false light publicity. Minnesota has signaled that it will not protect its private citizens from false and offensive publicity unless they are defamed.

Threat of liability for false light invasion of privacy could be an effective tool to help curb media abuses and would underscore Minnesota's commitment to promoting respect among its citizens by allowing them to determine for themselves how--and whether--they are presented to the public. Recognizing the other three forms of invasion of privacy is a step in the right direction, but Minnesota has created a gap by not permitting false light claims. The false light tort does not menace First Amendment rights because it is heavily restricted and supports few actionable grievances. Nor does it overlap with torts such as defamation, which cannot remedy every harm from false or misleading publicity. Defamation requires proof of different elements and protects different interests. If tortious conduct satisfies the elements of both torts, this should be no more a problem than other situations in which multiple causes of action are available to plaintiffs. The false light tort serves a unique need and protects a distinct interest--self-determination. Other states should not follow Minnesota's lead in rejecting this important tort.

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When Even The Truth Isn't Good Enough: Judicial Inconsistency In False Light Cases Threatens Free Speech

Sandra F. Chance | Christina M. Locke

In 1988, an Oklahoma jury found Ronald Williamson and Dennis Fritz guilty of rape and murder, a conviction that was later overturned.[FN1] More than 20 years later, their story was the subject of a lawsuit alleging, among other claims, false light invasion of privacy.[FN2] The prosecutor and law enforcement officials involved in the initial ***547** conviction sued author John Grisham, alleging that his novel The Innocent Man: Murder and Injustice in a Small Town[FN3] defamed them and portrayed them in a false light. False light invasion of privacy is a relatively new common law tort in many states that allows individuals aggrieved of their "right to be let alone" to sue. Oklahoma recognizes false light, but in 2010, a court held that Grisham could not be sued for false light because there was not a sufficient nexus between the plaintiff's allegations of harm and Grisham's assessment of the criminal justice system as one riddled with "bad police work, junk science, faulty eyewitness identifications, bad defense lawyers, lazy prosecutors, [and] arrogant prosecutors."[FN5]

While Oklahoma follows the *Restatement (Second) of Torts* and its definition of false light, several states have outright rejected the tort on grounds that it violates the First Amendment. Since its inception, the tort has drawn criticism by Dean William Prosser in 1960[FN7] and subsequent analysis by various state supreme courts. On one hand, the law provides a separate redress for injuries to one's right of privacy, which is theoretically distinct from reputational harm. But on the other hand, false light can be duplicative of defamation and unnecessarily chill speech. For example, what if a newspaper truthfully reports a story about a man accidentally shooting his wife, but he alleges the ***548** arrangement of sentences falsely portrayed him as a murderer?[FN11] In a later-overturned Florida jury verdict, a businessman was awarded $18.28 million for a newspaper's truthful coverage of his wife's death. Had Florida not rejected false light as a cause of action, that verdict could still stand today. It is this type of false light scenario that illustrates how dangerous the tort can be for the press.

A brief comparison of false light and defamation is helpful in understanding the controversy surrounding the adoption of false light. According to the *Restatement (Second) of Torts*, the type of statement communicated in a successful false light action is "highly offensive to a reasonable person."[FN13 In a defamation action, the statement must be "false and defamatory."[FN14] False light is said to protect individual privacy and mental distress while defamation protects reputation.

Defamation allows for variable standards of fault on the part of the publisher depending upon the status of the plaintiff. For example, in *New York Times Co. v. Sullivan*, the Supreme Court held that public official plaintiffs must prove "actual malice" on the part of the defendant in order to protect the First Amendment rights of the media.[FN15] The Court expounded on this concept in *Gertz v. Welch*, deciding that a variable ***549** fault standard--such as only requiring proof of negligence where the subject of the alleged defamatory statement is a private figure--was within the confines of the First Amendment.[FN16]

While the *Restatement* definition of false light includes an actual malice standard (requiring proof that the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed"),[FN17] the Supreme Court in *Cantrell v. Forest City Publishing* specifically declined to address whether a variable fault standard in false light cases would pass constitutional muster.[FN18] Prior to Cantrell, the Supreme Court had already considered its first false light case in *Time, Inc. v.*

Hill, where it recognized false light but required an actual malice fault requirement for matters of public interest.[FN19]

Cantrell and Hill have been the only discussions of false light invasion of privacy by the U.S. Supreme Court. However, as consistent court attention to defamation has resulted in an erosion of that tort, litigants have increasingly turned to false light. For example, false light has appeared in published opinions 60 times more often from 2000-2010 ***550** than in the 1960s. The 2000-2010 decade saw nearly twice as many false light-related opinions as the 1990s (1,025 versus 1,982). And within the most recent decade, the number of opinions mentioning false light doubled with 123 in 2000 and 312 in 2010.

In light of the significant increase in false light issues faced by the courts (and the press), this Article addresses the past, present, and future of the false light invasion of privacy tort, looking at its inception in a law review article, current adoption by a majority of states, and the potential for a widespread, negative effect if truthful reporting continues to be subject to false light lawsuits. Part I examines the evolution of false light from the recognition of a right of privacy in a law review article[FN24] through state court adoptions of the four privacy torts--appropriation, intrusion, public disclosure of private facts, and false light--following their inclusion in the *Restatement (Second) of Torts*.[FN25] Part II assesses the current state of false light law by presenting the landscape of the law across the nation with a focus on three recent appellate decisions that present both sides of the controversy. The danger for truthful reporting and the existence of other appropriate remedies are discussed in further detail in Part III. Finally, Part IV concludes that although the majority of states have adopted false light, the story does not end there--recent cases illustrate the danger of recognizing false light for truthful ***551** reportage. Those states still undecided about adopting the tort, as well as those who have already given their blessing to the false light cause of action, must take into account the hazards posed by false light or else protected speech will be needlessly silenced.

I. Prosser's Privacy Postulate: False Light is Born

The common law invasion of privacy torts stem from the seminal work by Samuel Warren and Louis Brandeis, *The Right to Privacy*.[FN26] The article, published in an 1890 issue of *Harvard Law Review*, was a reaction to the "yellow journalism" of the time and the extreme tactics journalists used to write sensational stories.[FN27] In particular, the press had a "field day" with the wedding of Warren's daughter. In their article, published shortly after the wedding, Warren and Brandeis proposed a new principle upon which aggrieved individuals could seek relief: the right to privacy. The authors contended this "right to be let alone" offers individuals protection against mental distress caused by the excessive prying of the press. For several decades after the article was first published, legal scholars continued to debate whether a right of privacy even existed. However, since the 1930s and the publication of the first *Restatement of Torts*, the majority of American courts have recognized a right of privacy in some form.

***552** This trend toward the recognition of privacy rights was well-established in 1960, when William Prosser, Dean of the University of California at Berkeley Law School, wrote a law review article that examined case law since Warren and Brandeis first articulated a right to privacy. Prosser set forth four distinct invasion of privacy torts based on his interpretation of cases since 1890:

Intrusion

Public disclosure of private facts

False light in the public eye

Appropriation

This classification of invasion of privacy torts was adopted in the Restatement (Second) of Torts, for which Prosser was a reporter.[FN33] As one court aptly stated:

The law relating to a protectable "right to privacy" is an American invention, developing over a period of approximately the last one hundred years. The law in its present form was conceived almost entirely by Professor William Prosser, who, in a 1960 law review article in the California Law Review, expounded that the right of

privacy gave rise not to one but to four different tort actions, sometimes called "Prosser's Four Torts of Privacy."

These four torts found their way into the Restatement--perhaps because Prosser was the American Law Institute Reporter who drafted the language--and have been adopted, often verbatim, by the vast majority of American jurisdictions.

False light, Prosser admitted, was not an invasion of privacy tort envisioned by Warren and Brandeis.[FN35] Prosser recognized the overlap ***553** between defamation and false light, noting that both claims will often lie in one case.[FN36] He described false light as "a needed remedy" that goes beyond the narrow confines of defamation.[FN37 Prosser concluded his discussion of false light with a series of questions rather than answers: Would false light engulf the law of defamation? If so, how valuable are the restrictions imposed on defamation claims in the name of a free press?[FN38]

It has been argued that courts accepted Prosser's articulation of false light and its subsequent inclusion in the Restatement (Second) of Torts with few attempts to rationalize or justify the existence of the tort. Legal commentators have, however, scrutinized the rationale behind false light, and many have concluded courts should not recognize the tort. The major arguments levied against recognition of the false light invasion of privacy tort are that it is in tension with the constitutional guarantees of free speech, is duplicative of defamation, and contributes to judicial inefficiency.

Professor Diane Leenheer Zimmerman argues that false light's chilling effect on speech renders the tort "unworkable" and ***554** "conceptually empty."[FN40] The analogy of false light to defamation is misleading.[FN41] False light includes a wider class of speech than defamation, especially statements that are false but do not harm the plaintiff's reputation.[FN42] Further, false light has few of the common law restrictions that limit defamation claims.[FN43] Therefore, false light does not rationally fit into our constitutional scheme, which offers great protections for most speech.[FN44] Zimmerman also argues that falsehoods have "affirmative value as speech" because they promote the search for truth.[FN45]

In his 1992 article, Professor J. Clark Kelso noted the judicial reliance on Prosser's reputation as a leading torts scholar by analyzing false light cases reported after Prosser's article was published.[FN46] Kelso found more than 600 cases mentioning false light and privacy but could not find "a single good case in which false light can be clearly identified as adding anything distinctive to the law."[FN47] Kelso concluded that false light does not deserve independent recognition as a tort because even the two cases where false light was the sole, non-overlapping cause of action could have been treated as libel or intentional infliction of emotional distress.[FN48] "Unfortunately, the mere act of repeatedly quoting the Restatement or Prosser tends to bring an aura of reality to false light privacy," Kelso wrote.[FN49]

***555** Some authors argue that the tort should remain viable but with certain limitations. Professor Gary Schwartz proposes limiting the tort to cases where it does not overlap with defamation and even then requiring an actual malice standard of liability. False statements that do not harm one's reputation but are highly offensive include: false claims about plaintiffs' private lives; false claims about very personal thoughts or emotions of plaintiffs; false statements that portray plaintiffs as being severely victimized (i.e., suffering from a serious illness or being kidnapped); and statements that attribute virtues to plaintiffs that are unearned.

Media attorney Steven Zansberg advocates the approach of courts that refuse to recognize false light claims if the publication focuses on issues of legitimate public concern. Examples of scenarios that would not be actionable under a theory of false light invasion of privacy are: public officials who wish to sue based on publication in connection with their public duties, public or private figures who wish to sue based on reports of their "public personae," and businesspersons who want to sue based on publication regarding their professional conduct.

James B. Lake, also a media attorney, argues that existing limits on the defamation tort (such as Internet service provider immunity, pre-suit notice, and the "wire service defense") "ought to apply to . . . alternative torts, such as false light, insofar as they involve defamatory falsehoods."[FN54] Lake also suggests several legal tactics that can be ***556** invoked in order to challenge false light claims that accompany defamation claims.

Despite convincing arguments against the recognition of false light, some authors contend that the tort should be recognized as a cause of action distinct from defamation. The personal dignity interest served by false

light is just as important as the reputational interest served by defamation, according to one author, and thus the cause of action should be available to the aggrieved plaintiff who suffered mental distress but not reputational harm. Another student author argued that false light claims can actually promote First Amendment values by encouraging public debate and can protect self-determination. Privacy protections also promote independent thinking and government participation without fear of unwanted publicity. Policy considerations such as the ability for advanced technology to infringe on individual privacy also support the existence of a false light tort.

Scholarly analysis of the arguments for and against recognition of the false light tort have been echoed in the opinions of many state supreme courts as they grappled with the decision of whether to accept the relatively new, controversial, and sometimes puzzling cause of action. These opinions, as well as the current legal landscape of false light law, are discussed in Part II.

II. The Current Legal Landscape: Trends in False Light Jurisprudence

This part presents an overview of state treatment of the false light tort. It uses the two most recent appellate cases directly considering ***557** the merits of false light--Jews for Jesus, Inc. v. Rapp and Meyerkord v. Zipatoni Co. --to illustrate the current debate over whether false light should be recognized as a cause of action separate from defamation. This part also discusses Anderson v. Gannett Co., a companion case to Rapp, whose facts go to the heart of the very real danger for jurisdictions that recognize false light.

A. State Approaches to False Light

Thirty-one states have accepted false light as a viable cause of action. A few of these states distinguish between public and private ***558** plaintiffs, similar to the lesser burden of proof for private defamation plaintiffs established in Gertz v. Welch.[FN64] . . .

The Supreme Court in Cantrell v. Forest City Publishing left open the question of whether variable fault standards in false light suits are constitutional under the First Amendment.[FN69] Perhaps as the number of decisions related to false light increase, so too will the chance that the ***559** Court will answer whether such a variable fault standard is constitutional in false light claims.

Ten states have specifically rejected false light. Tensions between the First Amendment and tort law were at the heart of most of these decisions. The Colorado Supreme Court called false light "too amorphous a tort" that "risks inflicting an unacceptable chill on those in the media seeking to avoid liability."[FN71] Minnesota's Supreme Court held that "to the extent that false light is more expansive than defamation, tension between this tort and the First Amendment is increased."[FN72] Judicial inefficiency was a concern for North Carolina's Supreme Court, which thought false light "would reduce judicial efficiency by requiring our courts to consider two claims for the same relief [defamation and false light] which, if not identical, would not differ significantly."[FN73] False light's duplication of defamation and lack of the procedural safeguards found in defamation law "unacceptably increase[s] the tension that already exists between free speech constitutional guarantees and tort law," according to the Texas Supreme Court.

Five of the remaining states mention false light in a general sense but do not specifically address the tort. North Dakota and ***560** Vermont, for example, are states where it is still unclear whether common law invasion of privacy is recognized. In Wyoming, while the state supreme court has restated Prosser's four invasion of privacy torts in a general sense, it has not directly addressed false light as a viable cause of action.

Finally, four states discuss false light but specifically decline to either reject or recognize false light. In these states, the high courts have directly sidestepped the issue of whether they will recognize the tort. As the Oregon Supreme Court put it: "This court previously has not recognized the tort of invasion of privacy by false light . . . we need not decide in this case whether to do so because, even if that tort is available in Oregon, plaintiff has failed to allege it here."

Despite its acceptance by a majority of states, false light "'remains the least-recognized and most controversial aspect of invasion of privacy.'" The three most recent appellate decisions considering whether to accept or reject false light illustrate the continuing debate over the tort despite the acceptance by a majority of states. The first decision, issued by the Florida Supreme Court in Fall 2008, considered a Jewish woman's claim that a Jews

for Jesus newsletter article alleging her conversion to Christianity cast her in a false light.

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III. Danger Ahead: The Potential for False Light to Dim the Lights on Free Speech

Privacy law is a relatively new area of the common law, and as Professors Don R. Pember and Dwight L. Teeter Jr. quipped a quarter century ago, "[t]o say that the law of privacy is not a great hallmark of ***568** logic and clarity in American law is to indulge in egregious understatement." Warren and Brandeis' assertion of a right to privacy was considered by courts for decades, but Prosser's articulation of the four privacy torts and their subsequent inclusion in the Restatement (Second) of Torts put these causes of action on the fast-track to widespread judicial acceptance. In some cases, through mere repetition, these torts, especially false light, took hold in American jurisprudence without adequate inquiry into their necessity or actual basis in case law. The result is a cause of action--false light--that is hard to define, duplicative of defamation, and most concerning, threatens speech. False light's rate of appearance in published court decisions has also increased dramatically over the years, making the issue all the more important to the press.

Consider defamation law, an area that is as well-defined as possible[FN129] with case law that for nearly fifty years has been applied with the First Amendment lens established in New York Times Co. v. Sullivan as protection for speech. The usefulness of defamation is perhaps best illustrated by the willingness of courts to freely borrow from its concepts in false light cases. Why borrow from an established body of law to patch together an alternative tort that rarely, if ever, redresses a wrong that cannot be remedied by a defamation claim?[FN131]

The strongest argument of false light proponents is that false light remedies harm resulting from non-defamatory falsehoods. Put another way, false light provides redress for truthful statements that cast ***569** the plaintiff in a false light. Injecting the word "truthful" into the debate can, and should, raise constitutional red flags. Further, the scenarios used by Prosser and most recently the Florida Supreme Court in Rapp involve the juxtaposition of images with unrelated news content. For example, a photo of a cab driver is "truthful" in that it is an accurate depiction of that driver. An accompanying story about unethical fare practices would by itself be "truthful" as well. False light proponents argue that while the content is truthful, the overall impression is false. That analogy makes sense for images and unrelated content scenarios, but what about the Anderson case? A newspaper was hit with an $18-million false light verdict based on what all parties agreed was entirely truthful reporting. Using images and unrelated content scenarios to extend false light to truthful reporting is flawed logic.

The solution to this problem--the justifiable need to protect innocent subjects of stock photos who end up associated with negative stories versus the First Amendment dangers of suppressing truthful reporting--lies within existing law. As Professor Kelso has argued, many of the cases Prosser relies upon to support his assertion of the existence of the false light tort can almost uniformly be addressed by other causes of action.[FN132] In the images and unrelated content scenario, the remedy is a misappropriation of likeness action . . . **[*570]**

This leaves the Anderson scenario--what if a news story or broadcast is truthful but this truthful information is allegedly arranged in such a way that creates a false light? Exposing the press to liability in situations such as these is simply too big of a gamble to take with First Amendment freedoms. First, the pace of the modern newsroom (especially in the age of the Internet) dictates quick decision-making. The process of intentionally choosing a photo and then placing it with an unrelated and often controversial story is one in which an editor would probably have a reasonable opportunity to assess the potential for backlash from the photo subject. In contrast, the process of determining whether the subtle arrangement of sentences in a truthful story might be "highly offensive to the reasonable person" is a near-impossible task and to charge the press with doing so would impermissibly violate the First Amendment.

IV. Conclusion

Despite its acceptance by a majority of states, false light remains the most controversial and least understood aspect of invasion of privacy. Legislatures and judges around the country have struggled with this issue since the U.S. Supreme Court recognized the false light tort more than 40 years ago but at that time failed to establish the constitutional parameters and the necessary protections for free speech in a society that values the marketplace of ideas and free-wheeling debate.[FN137]

***571** As a result, false light claims threaten fundamental First Amendment freedoms where journalists print truthful information about matters of public concern. In these cases, reporters can be punished for writing stories that would likely be protected under the constitutional guarantees provided by libel law but are not mandatory under many states' false light tort statutes or court opinions.

In addition to strong First Amendment grounds, there are other important reasons for courts around the country to reconsider the constitutionality and viability of false light claims. First, the claim is elusive, amorphous, confusing, and controversial. Second, the tort is a waste of judicial resources, as it requires courts to consider two claims, defamation and false light, for the same relief. Third, false light torts lack the procedural safeguards found in defamation law, thereby increasing the tension between free speech and tort law. Finally, false light lawsuits are intended to protect against emotional harm and potentially require journalists to predict how the subject of the story or the readers will interpret the truth.

The tort of false light is inconsistent with First Amendment values and historic protections for journalists. False light plaintiffs should not be allowed to punish speech that is rightfully protected by the First Amendment simply because their feelings get hurt. Unfortunately, sometimes the truth hurts. But that is no excuse to trample on America's longstanding commitment to a free press.

[FN1] Peterson v. Grisham, 594 F.3d 723, 725 (10th Cir. 2010). Williamson and Fritz spent more than a decade in jail before being exonerated. They were convicted of a 1982 rape and murder based primarily on hair samples, jailhouse informant testimony, and Williamson's statement to police that he had a dream in which he committed the murder. In 1999, DNA testing showed that neither Williamson nor Fritz could have contributed the hair or semen samples found at the crime scene. Id.

[FN2] Id. at 727.

[FN3] John Grisham, The Innocent Man: Murder and Injustice in a Small Town (Doubleday 2006).

[FN5] Id. (quoting John Grisham, The Innocent Man: Murder and Injustice in a Small Town 380 (Doubleday 2006)).

[FN7] William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 398-401 (1960).

[FN11] Florida businessman Joe Anderson, Jr. sued the Pensacola News Journal for false light invasion of privacy based on a 1998 article on Anderson's political clout that also addressed his wife's 1988 death. Gannett Co. v. Anderson (Anderson I), 947 So. 2d 1, 2 (Fla. Dist. Ct. App. 2006), aff'd, 994 So. 2d 1048 (Fla. 2008). Anderson apparently shot his wife in what law enforcement officials deemed a hunting accident. Id. at 2-3. Anderson admitted that the News Journal's story was factually correct but alleged that the story gave the false impression that he had murdered his wife. Id. at 3. Anderson's suit, filed March 21, 2001, alleged defamation, but he missed the 2-year statute of limitations for defamation. Id. at 2. He then amended the suit to add a false light count, which the trial court found to fall within Florida's 4-year limit for "unspecified torts." Id. at 2. "[A] jury awarded [Anderson] $18.28 million in compensatory damages." Id. Florida's First District Court of Appeals reversed the trial court's decision, applying the 2-year statute of limitations. Id. See also Anderson v. Gannett Co. (Anderson II), 994 So. 2d 1048, 1051 (Fla. 2008) (declining to address whether the 2- or 4-year statute of limitations applied based on its decision in a companion case rejecting the false light cause of action).

[FN13] Restatement (Second) of Torts§ 652E (1977).

[FN14] Id. at§ 558 (1977).

[FN16] 418 U.S. 323, 332 (1974) (holding that "a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted").

[FN18] 419 U.S. 245, 250-51 (1974) ("[T]his case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious

to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in Time, Inc. v. Hill applies to all false-light cases."). Cantrell was decided approximately six months after the Court's decision in Gertz.

[FN19] Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967) (holding that the constitutional protections for speech and press precluded "the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth"). The Hill case involved the fictionalization of the kidnapping ordeal of the Hill family. Id. at 378. The Hills sued Life magazine for invasion of privacy after an article about the incident (and about a new play based on the hostage-taking) portrayed their experience as being much worse than it actually was. Id.

[FN24] Samuel Warren & Louis Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). [FN25] Restatement (Second) of Torts § 652A (1977).

[FN26] Warren & Brandeis, supra note 24.

[FN33] See Restatement (Second) of Torts § 652A (1977); see infra note 35 (Prosser was the American Law Institute Reporter who drafted the language.).

[FN35] Prosser, supra note 7, at 398. [FN36] Prosser, supra note 7, at 400. [FN37] Prosser, supra note 7, at 401.

[FN38] Id. Prosser stated:

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

[FN40] Diane Leenheer Zimmerman, False Light Invasion of Privacy: The Light that Failed, 64 N.Y.U. L. Rev. 364, 369-70 (1989) (noting that the distinctions between the torts of defamation and false light do not support analogizing defamation in order to find a rationale for false light). See also Patricia Avidan, Protecting the Media's First Amendment Rights in Florida: Making False Light Plaintiffs Play by Defamation Rules, 35 Stetson L. Rev. 227 (2005) (arguing that the overlap between false light and defamation require courts to be vigilant in distinguishing the two in order to protect the First Amendment rights of the media).

[FN41] Id., supra note 40, at 393.

[FN42] Id. at 394.

[FN43] Id. at 394.

[FN44] Zimmerman, supra note 40, at 395. [FN45] Id. at 404-05.

[FN46] J. Clark Kelso, False Light Privacy: A Requiem, 32 Santa Clara L. Rev. 783 (1992). [FN47] Id. at 785.

[FN48] Id. at 886-87.

[FN49] Id. at 825.

[FN54] James B. Lake, Restraining False Light: Constitutional and Common Law Limits on a "Troublesome Tort", 61 Fed. Comm. L.J. 625, 627 (2008). Lake notes the well-established body of law in the area of defamation:

Courts and legislatures have spent decades developing intricate rules that govern claims for defamation. Given this well-established jurisprudence, "there is nothing to be gained from taking a problem easily solvable under the traditional rules of defamation and shunting it over to the murky recesses of other torts." In fact, not only is nothing to be gained, but much is to be lost if the well-established speech-protecting rules of defamation law are evaded.

[FN64] In Gertz v. Welch, the U.S. Supreme Court permitted a variable fault standard in defamation claims but specifically declined to address whether such a variable standard would be constitutional for false light claims:

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. Time, Inc. v. Hill, 385 U.S. 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

Gertz v. Welch, 418 U.S. 323, 347-48 (1974) (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967)).

[FN71] Bueno, 54 P.3d at 904.

[FN129] See, e.g., Lake, supra note 54, at 626-27 ("Defamation law in the United States consists of complex rules that have evolved over decades as courts and legislatures have sought to accommodate the varied interests of speakers, recipients of information, and persons discussed.").

[FN131] Professor Kalven noted that "[t]he technical complexity of the law of defamation, which has shown remarkable stamina in the teeth of centuries of acid criticism, may reflect one useful strategy for a legal system forced against its ultimate better judgment to deal with dignitary harms." He also worried, more than 40 years ago, of privacy's potential to expand: "[I]t would be a notable thing if the right of privacy, having, as it were, failed in three-quarters of a century to amount to anything at home, went forth to take over the traditional torts of libel and slander." Kalven, supra note 31, at 341.
Kelso, supra note 46, at 807. Professor Kelso concluded:

[FN132] The core of the cause of action under this analysis is not that the defendant has falsely created the impression that the plaintiff is somehow connected to the subject matter of the article, but the misappropriation of the plaintiff's picture for commercial purposes ... the cases which Prosser cites [for the proposition of false light] are more consistent with this misappropriation analysis than with Prosser's suggested false light tort.

Id. See also Peay v. Curtis Publ'g Co., 78 F. Supp. 305 (D.D.C. 1948) (approving libel and invasion of privacy claims by a cab driver whose photo was used in a Saturday Evening Post story about "dishonest" drivers) and Leverton v. Curtis Publ'g Co., 192 F.2d 974, 974-78 (3d Cir. 1951) (affirming an invasion of privacy claim where the photo of a girl who was innocently struck by a car was used in conjunction with a story about "pedestrian carelessness").

[FN137] See, e.g., John Milton, Areopagitica (1644), in 29 Great Books of the Western World 379, 409 (1952). As Milton eloquently stated:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

Id. See also W. Wat Hopkins, The Supreme Court Defines the Marketplace of Ideas, 73 Journalism & Mass Comm. Q., 40 (Spring 1996) ("No metaphor is more deeply entrenched in the language of First Amendment jurisprudence than the 'marketplace of ideas.'").

Privacy Torts § 4:13. Applicable first amendment standards

Treatise
Privacy Torts
David A. Elder
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Chapter 4. False Light in the Public Eye

A. The Supreme Court and false light

Three years after the famous *New York Times Co. v. Sullivan*[FN1] decision, denominated by Alexander Meiklejohn as "an occasion for dancing in the streets,"[FN2] the Court encountered its first false light privacy case, *Time, Inc. v. Hill*.[FN3] In that case plaintiffs, victims of a hostage incident, sued *Time* for its article on a play based largely on the hostage-taking.[FN4 The Court ultimately adopted the *New York Times* standard "in this discrete context, not through blind application but only upon consideration of the factors which arise in the particular context"[5] of the application of the New York privacy statute to private individuals.[FN6] It rejected a negligence standard, finding that it would be too elusive[FN7] and would impose on the press the "intolerable burden of guessing how far a jury might assess the reasonableness of steps taken to verify accuracy, presenting a grave hazard of discouraging the press from exercising the constitutional guarantees"[FN8] of speech and press.

Justice Brennan noted that if the action before it were one for libel, the comparative opportunities for response of a private individual and a public person might be relevant[FN9] and the added state interest in protection of reputation would be before the Court.[FN10] Likewise, in such a case "(d)ifferent considerations might arise concerning the degree of waiver…"[FN11] But the case before it involved the issue of privacy and the plaintiff's limited interest therein as to matters of public interest: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press."[FN12]

Justice Harlan, concurring in part and dissenting in part, made a powerful and persuasive argument for applying a negligence standard to the private plaintiffs before it, "involuntarily exposed and powerless to protect themselves."[FN13] He rejected Justice Brennan's exposure-assumption-of-risk privacy analysis, concluding that the case before it was not privacy litigation in its "truest sense"—*i.e.*, intrusion upon seclusion or public disclosure of private facts.[FN14] In this false light case involving private individuals, the "marketplace of ideas" approach did not function effectively, as "competition among ideas" was extremely unlikely regarding the hostage incident in question.[FN15] Accordingly, it was unreasonable to assume plaintiff would "find a forum for making a successful refutation" or that the public's interest "would be sufficient for the truth to win out by comparison as it might in that area of discussion central to a free society."[FN16]

Justice Harlan concluded the state interest in private individuals was vastly different from its more limited state interest regarding public officials who "voluntarily assumed the risk of such things by entry into the public arena."[FN17] The private plaintiff before it, by contrast, was thrust involuntarily into the public arena and could "in no sense be considered to have 'waived' any protection the state might justifiably afford him from irresponsible publicity."[FN18] In sum, private individuals generally were more easily injured and their "means of self-defense more limited."[FN19] In such circumstances, the state should be allowed to foster competent research and investigation by imposing a duty of reasonable care comparable to other professional activities of great social value.[FN20]

The Brennan-Harlan dispute concerning the appropriate constitutional standard for private individual suits against the media was revived in 1971 in the libel case of *Rosenbloom v. Metromedia Inc.*,[FN21] involving a private individual's suit for reports portraying him as a purveyor of obscenity. In Justice Brennan's plurality opinion he extended the *New York Times* standard to all matters of "public or general interest,"[FN22] rejecting a status-based distinction between private and public persons as artificial and making "no sense in terms of the First Amendment guarantees."[FN23] In rejecting any voluntariness or assumption of risk criterion as the basis for distinguishing public and private plaintiffs, Justice Brennan stated: "If a matter is a subject of public or general

interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."[FN24]

Justice Brennan likewise rejected the proffered distinction based on the difference in access to the press of public and private persons. In the overwhelming majority of public person cases access to the media to respond would be dependent on the same complicated factors that would determine private person access, *i.e.*, the "unpredictable event of the media's continuing interest in the story."[FN25] Consequently, the "unproved, and highly improbable, generalization" based on presumptive greater access of public persons was "too insubstantial a need on which to rest a constitutional distinction."[FN26]

In his dissenting opinion Justice Harlan reiterated the views proffered in *Time Inc. v. Hill*—"the public person has a greater likelihood of securing access to channels of communication sufficient to rebut falsehoods than do private individuals who do not toil in the public spotlight"[FN27] and such public persons are "more impervious to criticism, and may be held to have run the risk of publicly circulated falsehoods concerning them …"[FN28] Justice Harlan would have adopted a negligence standard in such private[FN29] person cases and limited the plaintiff to recovery of damages for actual harm[FN30] under this standard. He would also have permitted punitive damages for malicious conduct bearing "a reasonable and purposeful relationship to the actual harm done."[FN31] Justices Marshall and Stewart also dissented, agreeing generally with Harlan's analysis, but they would have proscribed punitive damages *in toto* because their unpredictability induced self-censorship by the media.[FN32]

In sum, two evenly divided three person minorities dominated the discussion in *Rosenbloom v. Metromedia, Inc.* Two members of the Court joined Justice Brennan's opinion on other grounds,[FN33] providing a rocky basis for adoption of the subject matter-general or public interest criterion rather than a status-based First Amendment doctrine. The *Rosenbloom* rule did not long survive. Three years later, in *Gertz v. Robert Welch, Inc.*,[FN34] the Court initiated a counter-revolution[FN35] of sorts in which the interests of the plaintiff and defendant were treated as of essentially equal significance,[FN36] with the Court returning to the status approach it adopted in general prior to *Rosenbloom*.

Justice Powell, writing for the majority in *Gertz*, held that the plaintiff therein, a civil rights attorney involved in a civil action against a police officer, was a private person,[FN37] but he declined to approve the plurality opinion of Justice Brennan in *Rosenbloom*.[FN38] He adopted the general approach of the dissenting trio in *Rosenbloom* and incorporated the access-assumption-of-risk rationales discussed therein and in Justice Harlan's opinion in *Time, Inc. v. Hill*. Public persons "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[FN39] By contrast, private persons are more in need of protection and the state's interest in according them redress is proportionately greater.[FN40] A more important distinction, however, is a "compelling normative consideration," i.e., that private persons, unlike public persons, have not voluntarily exposed themselves to enhanced risk of injury from defamatory falsehood, making them "more deserving of recovery."[FN41]

The *Gertz* decision adopted a minimum requirement of negligence[FN42] and limited the plaintiff who fulfilled only that standard to recovery of actual harm, which included, but was not limited to economic harm, impairment of reputation and societal standing, humiliation, and mental distress.[FN43] Implicitly rejecting the Marshall-Stewart stance in *Rosenbloom*, the Court also approved punitive and presumed damages if the higher *New York Times* standard was met.[FN44]

The *Gertz* decision with its status approach and minimum of negligence in private person status cases clearly, in the language of*Gertz's* author, Justice Powell, "calls into question the conceptual basis"[FN45] of *Time, Inc. v. Hill* and its subject matter approach in false light cases. In *Cantrell v. Forest City Pub. Co*.,[FN46] the case was litigated below under the *Time, Inc. v. Hill* standard and the Court concluded that the case did not require it to decide whether a state could adopt "a more relaxed standard for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy."[FN47]

The Restatement (Second) of Torts took a conservative approach and adopted the *Time, Inc. v. Hill* standard in *all* false light cases. It specifically took no position[FN48] on whether any circumstances exist constitutionally justifying liability under a negligence standard.[FN49] In its comments it noted that the authority of *Time, Inc. v. Hill* was in doubt and that *Gertz's* potential impact left the law in an uncertain state.[FN50] The Restatement did opine that *if Gertz* is extended to false light, *Time, Inc. v. Hill* will be limited to public officials and figures.[FN51]

The Supreme Court has intimated it will follow the logical progression of *Rosenbloom-Gertz* and extend the negligence standard tofalse light cases. Earlier, in *Time, Inc. v. Hill*, the Court had cited approvingly authors who "likened the interest protected in those 'privacy'cases which focus on the falsity of the matter to that protected in cases of libel and slander—injury to reputation."[FN52] Later, in *Zacchini v. Scripps-Howard Broadcasting Co*.,[FN53] the Court, in deciphering the differences between the false light and appropriation torts, noted that *Time, Inc. v. Hill* was "hotly contested and decided by a divided Court"[FN54] and concluded that "(t)he interest protected in permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation, with the same overtones of mental distress as in defamation.'"[FN55] It is extremely doubtful that the Court, having on two occasions basically equated the interests protected in defamation and false light, would thereafter retain the repudiated public or general interest test for *all* false light cases, regardless of status.

The argument for limitation of *Time, Inc. v. Hill* to public persons and extension of the *Gertz* rule to private individuals involved infalse light cases is even more compelling if the Court's decision in *Time, Inc. v. Firestone*[FN56] is carefully analyzed. In that case, the Court reaffirmed *Gertz* in the case of a very public[FN57] (but legally private) person and declined to carve out an exception thereto for abuse of the fair report doctrine, *i.e*., an inaccurate report of a judicial-proceeding in which Mrs. Firestone was portrayed as an adulteress.[FN58] More importantly for purpose of analyzing the defamation-false light dichotomy, the Court concluded that the First Amendment did *not* require injury to reputation as a threshold requisite to recovery of other actual damages, i.e., humiliation and mental distress.[FN59] Once the element of reputational impairment is removed and the private plaintiff is allowed to collect for the latter non-reputational damages, the claim, however labeled, is indistinguishable from a false light claim, where reputational injury is a permitted, but not requisite, element[FN60] of damage.

* * *

[FN1] 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).

[FN2] Kalven, *The New York Times Case*, 1964 Sup. Ct. Rev. 191, 221, n. 125.

[FN3] 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).

[FN4] 385 U.S.at 377-378.

FN5] 385 U.S. at 390-391.

[FN6] For a further discussion of the New York statute see Ch 6, *infra.*

[FN7] *Time, Inc.*, 385 US at 389. This is especially so "when the content of the speech itself affords no warning of prospective harm to another through falsity." *Time, Inc.*, 385 US at 389.

[FN8] *Time, Inc.*, 385 US at 389.

[FN9] *Time, Inc.*, 385 US at 391.

[FN10] *Time, Inc.*, 385 US at 391.

[FN11] *Time, Inc.*, 385 US at 391.

[FN12] *Time, Inc.*, 385 US at 388. Note that Justice Brennan's quoted language reflects his perspective of false light as a privacy action comparable to its *true* privacy counterparts— public disclosure and intrusion. Compare the view of Justice Harlan in the text, *infra*.

[FN13] *Time, Inc.*, 385 US at 410 (Harlan, J., concurring in part and dissenting in part).

[FN14] *Time, Inc.*, 385 US at 404.

[FN15] *Time, Inc.*, 385 US at 407.

[FN16] *Time, Inc.*, 385 US at 407-408.

[FN17] *Time, Inc.*, 385 US at 408.

[FN18] *Time, Inc.*, 385 US at 409.

[FN19] *Time, Inc.*, 385 US at 409.

[FN20] *Time, Inc.*, 385 US at 409-410. Under a negligence standard "the fact that the publication involved was not defamatory would enter into a determination of the amount of care which would have been reasonable in the preparation of the article." *Time, Inc.*, 385 US at 409, n. 6. This is an appropriate and adequate response to one of the traditional arguments against retention of false light. For a discussion of the latter, see § 4:1, § 4:7, *supra*.

[FN21] 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971).

[FN22] 403 U.S. at 52. Justice Brennan left open the issue of First Amendment protection involving matters "not within the area of public or general interest." 403 U.S. at 44, n. 12.

[FN23] 403 U.S. at 46.

[FN24] 403 U.S. at 43.

[FN25] 403 U.S. at 46.

[FN26] 403 U.S. at 46-47.

[FN27] 403 U.S. at 70 (Harlan, J., dissenting).

[FN28] 403 U.S. at 70.

[FN29] 403 U.S. at 72.

[FN30] 403 U.S. at 66.

[FN31] 403 U.S. at 77.

[FN32] 403 U.S. at 84-87 (Marshall, J., with Stewart, J., joining, dissenting).

[FN33] Justice Black concurred on absolutist grounds. 403 U.S. at 319-320 (Black, J., concurring). Justice White concluded that the *New York Times* rule extended to the media's broadcast concerning the "official actions of public servants," the police, during the raid. 403 U.S. at 62 (White, J., concurring).

[FN34] 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

[FN35] See Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal For Revification Two Decades After New York Times v. Sullivan, 33 Buff. L. Rev. 579, 660- 661 (1984).*

[FN36] *New York Times v. Sullivan,* 33 Buff. L. Rev. 579, 660-661, n. 407 (1984).

[FN37] Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

[FN38] 418 U.S. at 343-346. The *Rosenbloom* standard inadequately implemented both the competing interests. A private person was required to meet the rigorous requirements
of *New York Times* in matters of public or general interest. By contrast, if no such issue was involved, liability could be imposed despite the fact defendant "took every reasonable precaution." 418 U.S. at 346.

[FN39] 418 U.S. at 344.

[FN40] 418 U.S. at 344.

[FN41] 418 U.S. at 344-345.

[FN42] 418 U.S. at 347-348. The minimum of negligence applied at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" Somewhat different considerations might be involved if the state "purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." The Court referenced *Time, Inc. v. Hill* and concluded this situation was not before it and the Court intimated "no view" as to resolution thereof. 418 U.S. at 348. Compare the persuasive view of Justice Harlan in the text and notes *supra*.

[FN43] 418 U.S. at 350.

[FN44] 418 U.S. at 349-350.

[FN45] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) [Powell, J., concurring].

[FN46] 419 U.S. 245, 95 S. Ct. 465, 42 L. Ed. 2d 419 (1974).

[FN47] 419 U.S. at 250.

[FN48] Restatement (Second) of Torts § 652E, Caveat (1977).

[FN49] Restatement (Second) of Torts § 652E, Caveat (1977).

[FN50] Restatement (Second) of Torts § 652E, Caveat (1977), comm. d. ["If Time v. Hill remains in full force and effect because the injury is not so serious when the statement is not defamatory, the black letter provision will be fully controlling"].

[FN51] Restatement (Second) of Torts § 652E, Caveat (1977).

[FN52] 385 U.S. 374, 385, 87 S.Ct. 534, 17 L.E.2d 456 (1967). The Court also noted that reputational injury could be an element of damages in false light. 385 U.S. 374, 385, 87 S.Ct. 534, 17 L.E.2d 456 (1967).

[FN53] 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977).

[FN54] 433 U.S. at 571.

[FN55] 433 U.S. at 572. See also Pierson v. News Group Publications, Inc., 549 F. Supp. 635, 642 (S.D. Ga. 1982). The Court also noted that reputational injury could be an element of damages in false light. Pierson v. News Group

Publications, Inc., 549 F. Supp. 635, 642 (S.D. Ga. 1982).

[FN56] 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976).

[FN57] For a discussion of the fair report issues therein, see § 4:12, *supra.*

[FN58] *Time, Inc.*, 424 US at 453-457.

[FN59] Time, Inc., 424 US at at 460-461. The Court had no warrant for re-examining an award of $100,000 for the amply evidenced anxiety and concern suffered by Mrs. Firestone.

54 P.3d 893, 31 Media L. Rep. 1137

Denver Publishing Co. v. Bueno

Supreme Court of Colorado,

The DENVER PUBLISHING COMPANY d/b/a Rocky Mountain News, Petitioner,

v.

Manuel Edward ("Eddie") BUENO, Respondent.

No. 01SC386. | Sept. 16, 2002. | Rehearing Denied Oct. 7, 2002.

Opinion

Justice KOURLIS delivered the Opinion of the Court.

With this case we address whether Colorado permits a plaintiff to sue for the tort of false light invasion of privacy: a cause of action arising out of publicity that unreasonably places another person in a false light before the public. In *Bueno v. Denver Publishing Co.*, 32 P.3d 491 (Colo.App.2000), the court of appeals answered that question affirmatively, ruling that plaintiff Eddie Bueno's (Bueno) false light claim against the Denver Publishing Company was properly submitted to the jury. To the contrary, we now decline to recognize the tort, concluding that it is highly duplicative of defamation both in interests protected and conduct averted. Further, we find the subjective component of the false light tort raises the spectre of a chilling effect on First Amendment freedoms. We therefore reverse the court of appeals and join those jurisdictions that do not recognize false light as a viable invasion of privacy tort. We remand this case to the court of appeals for consideration of Eddie Bueno's cross-appeal of the trial court's dismissal of his defamation claim.

I. Facts

The Denver Publishing Company, d/b/a/ Rocky Mountain News (the News), published a four-page, thirteen-column article with the bold headline: "Denver's Biggest Crime Family." Ann Carnahan, *Denver's Biggest Crime Family,* Rocky Mountain News, Aug. 28, 1994, at 20A. Bueno sued the News and Ann Carnahan, contending the story defamed him and invaded his privacy.1 In essence, he argued that the article painted him in a false light as having criminal propensities, like many of his siblings.

The story's first page depicted a "family tree," the center of which contained a photo of Della and Pete Bueno on their wedding day in 1937. Mug-shot style photos of their eighteen children encircled the parents' photo; captions summarized each of the Bueno siblings' misdeeds, misfortunes, and, where applicable, criminal records. The caption under Bueno's photo read, "EDDIE, 55 Oldest of the Bueno children." In the first edition of the paper to be published, the caption under Bueno's youngest brother's photo read, "FREDDIE, 28 Only Bueno brother who stayed out of trouble. Living in the Midwest." Defendants changed this caption in a later edition to read, "Freddie, 28 Youngest Bueno child. Living in the Midwest." The revised version omitted the language, "Only brother to stay out of trouble." The article's first-page subtitle declared, "15 of Pete and Della Bueno's 18 children have ***895** arrest records, making the clan Denver's biggest crime family." Some twenty-five other statements interspersed throughout the article form the basis of Bueno's claims, among them:

> Older siblings lure younger into life of crime [a headline on the article's third page].
>
> The older Bueno brothers are in their 40s and 50s now. They're out of prison, but most of their younger brothers will be in for a long, long time.
>
> Joey can't help but look at his older brothers who robbed. They're out of prison now.

> The younger brothers recall waking up many nights at 2 or 3 a.m. when their older brothers stumbled home drunk. Whenever the boys ended up in jail, Della Bueno bailed them out.
>
> "It seems like all the Buenos are destined to be nothing but criminals," David said. [David is a Bueno sibling.]

Eddie Bueno, now fifty-five, left his home when he was thirteen years old and has had virtually no contact with other family members since then. He married his present wife at age twenty-one, and they have three children, all married with families of their own. Eddie Bueno served six years in the United States Army, departing with an Honorable Discharge. His current employment began twenty-five years ago with the City and County of Denver's vehicle maintenance department. He has worked his way up to the position he now holds, center supervisor. He had no involvement whatsoever in his siblings' criminal activities, nor did he seek publicity in his life generally. Quite the contrary, Eddie Bueno purposefully kept secret from most of his friends and family the fact that he was related to the other, more notorious, Bueno children.

The reporter for the News worked on the story for six months. She interviewed numerous law enforcement officials and reviewed court and police department records. She attempted to contact all surviving children, ultimately interviewing seven of them. Three times she attempted to contact Eddie Bueno, but he did not return her calls. Carnahan and the News insist that the article makes no false statements about Bueno. First, they argue that he did not "stay out of trouble." For this, they point to an "arrest card" in their possession that appears to indicate Bueno had a run-in with police when he was a teenager. No charges, convictions, or other ramifications resulted from that incident and Bueno disputes the card's authenticity. At trial, the judge ruled the arrest card inadmissible for any purpose, and the court of appeals affirmed.

The News further points out a portion of the article it contends rectifies any possible misunderstanding vis-à-vis Eddie Bueno:

> Freddie, the youngest, and Eddie, the oldest, are the only two Bueno boys who have stayed out of trouble.
> Freddie attributes his clean record to his close relationship with his mother. Of all the boys, Eddie had the closest relationship to their father.

These sentences appear on the last page of the article, seven paragraphs from the end.

II. Procedural History

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III. Background

Samuel D. Warren and Louis D. Brandeis first recognized Invasion of Privacy as a tort in their seminal article, *The Right to Privacy*, 4 Harv. L.Rev. 193 (1890). While Warren and Brandeis first presented the right of privacy as a legal theory, it was Dean William L. Prosser who exerted primary influence over its current formulation. In a law review article published in 1960, Prosser explained, [Invasion of privacy] is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, ... "to be let alone."

William L. Prosser, *Privacy*, 48 Cal. L.Rev. 383, 389 (1960) (citation omitted). By 1977, the drafters of the Restatement adopted Prosser's four categories:

1) unreasonable intrusion upon the seclusion of another ("intrusion");
2) publicity that unreasonably places another in a false light before the public ("false light"); 3) unreasonable publicity given to another's private life ("disclosure"); and
4) appropriation of another's name or likeness ("appropriation").

Restatement (Second) of Torts § 652 A-E (1977); Prosser, *supra*, at 389. Whether to adopt these as viable tort claims is a question of state law. *See Angelotta v. Am. Broad. Corp.*, 820 F.2d 806, 809 (6th Cir.1987).

***897 A. Colorado law**

While this court recognized the existence of invasion of privacy as a tort in 1970, *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970), we only recently embraced categories three and four. *Joe Dickerson & Assocs. v. Dittmar*, 34 P.3d 995, 1001 (Colo.2001) (appropriation); *Ozer v. Borquez*, 940 P.2d 371, 377 (Colo.1997) (disclosure). By denying certiorari in *Doe v. High-Tech Institute, Inc.*, 972 P.2d 1060 (Colo.App.1998), we allowed the first category, intrusion, to stand. Thus, three of Prosser's four invasion of privacy categories are viable tort claims in Colorado. *Id.* at 1067. ("[R]ecognition of a claim under one aspect of the privacy tort does not entail recognition of all four.").

Neither this court, nor our state legislature, has expressly adopted the second category of the tort: false light.6 Indeed, previous to the case at bar, only one Colorado Court of Appeals case treated the elements of false light, *McCammon & Associates v. McGraw-Hill Broadcasting Co.*, 716 P.2d 490, 492 (Colo.App.1986). The claim failed on its merits.

Five other cases in our jurisdiction, including the court of appeals case in *Dittmar*, note the tort's existence but do not expressly adopt or apply it. *Borquez*, 940 P.2d at 377; *People v. Home Ins. Co.*, 197 Colo. 260, 591 P.2d 1036, 1038 n. 2 (1979); *Dittmar v. Joe Dickerson & Assocs.*, 9 P.3d 1145, 1146 (Colo.App.1999); *Doe v. High-Tech Inst., Inc.*, 972 P.2d at 1064-65, *rev'd,* 34 P.3d 995 (Colo.2001); *Fire Ins. Exch. v. Bentley*, 953 P.2d 1297, 1301 (Colo.App.1998).

At the same time, four District Court cases in the Tenth Circuit employing Colorado law have applied the elements of false light, apparently assuming Colorado had adopted the tort. *Brown v. O'Bannon,* 84 F.Supp.2d 1176, 1180-81 (D.Colo.2000) (finding plaintiff failed to demonstrate sufficient "publicity" for false light claim) (citing *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060 (Colo.App.1998)); *Seidl v. Greentree Mortg. Co.*, 30 F.Supp.2d 1292, 1302 (D.Colo.1998) (applying Colorado law to determine that business entities lack standing to bring invasion of privacy false light claims); *Smith v. Colo. Interstate Gas Co.*, 777 F.Supp. 854, 857 (D.Colo.1991) (noting Colorado has not defined the parameters of its "invasion of privacy" torts but ruling that under any theory, including false light, plaintiff's claim failed). All four false light claims failed on their merits.

B. Other States

As of this writing, thirty state courts acknowledge false light as a viable claim in their jurisdictions. *See Bueno v. Denver Publ'g Co.,* 32 P.3d 491, 495 (Colo.App.2000) (collecting twenty-seven cases).7 Thirteen states have not expressly adopted the tort. *Id.* Several of those state courts, after examining a false light claim, decided either to reject the tort outright, *e.g., Renwick v. News & Observer Publ'g Co.*, 310 N.C. 312, 312 S.E.2d 405, 410 (1984) ("We will not expand the tort of invasion of privacy ... to include 'false light.' "), or simply noted that the facts presented did not justify recognition, *e.g., Yeager v. Local Union 20, Teamsters*, 6 Ohio St.3d 369, 453 N.E.2d 666, 670 (1983) ("Under the facts of the instant case, we find no rationale which compels us to adopt the 'false light' theory of recovery in Ohio at this time."). A few jurisdictions have yet to confront the issue, *e.g., Riley v. Harr*, 292 F.3d 282, 298 (1st Cir.2002) (noting the uncertainty as to "whether the New Hampshire Supreme Court would recognize the false light tort").

IV. Analysis

Tort law represents the way in which we draw lines around acceptable and unacceptable ***898** non-criminal behavior in our society. Torts are designed to encourage socially beneficial conduct and deter wrongful conduct. *See, e.g.*, Restatement (Second) of Torts, § 901(c) (1979). Correspondingly, liability arises out of culpable behavior wherein the defendant breaches a duty to the plaintiff: crosses the line into unacceptable behavior. Liability not only recompenses the wronged plaintiff, but also deters the socially wrongful conduct in the first place. Hence, clarity and certainty of tort law serves a very important function in regulating how we deal with one another.
Both because it substantially overlaps with another tort, defamation, and because it is difficult to quantify, courts and legal scholars heartily debate whether false light invasion of privacy deserves a place among the recognized

torts. "[F]alse light remains the least-recognized and most controversial aspect of invasion of privacy." *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex.1994) (citing Bruce W. Sanford, *Libel and Privacy*, § 11.4.1 at 567 (2d ed.1991)); *see also* Nathan E. Ray, Note, *Let There be False Light: Resisting the Growing Trend Against an Important Tort*, 84 Minn. L.Rev. 713, 716 (2000) ("[T]his Note will attempt to supply the considerations missing from these decisions [rejecting false light] and demonstrate the need for a false light tort."); J. Thomas McCarthy, *The Rights of Publicity and Privacy*, § 5.12[C], at 5-135 (1996) ("[C]ourts have yet to draw a clear and distinct line between this category of 'privacy' and that of defamation law."); Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 Case W. Res. L.Rev. 885, 886 (1991) ("The current challenge to the false light doctrine is quite welcome."); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L.Rev. 364, 452 (1989) ("[T]he wiser course may be for states to eliminate false light altogether.").

The primary objection courts level at false light is that it substantially overlaps with defamation, both in conduct alleged and interests protected. Additionally, to the extent it does differ from defamation, its parameters remain largely undefined. As a result, legal scholars are concerned that such an amorphous tort risks chilling fundamental First Amendment freedoms. Indeed, Prosser himself, in the very same article where he described the four invasion of privacy categories, aptly described the defamation/false light tension:

> The question may well be raised, and apparently still is unanswered, whether this branch of the tort [false light] is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?

William L. Prosser, *Privacy*, 48 Cal. L.Rev. 383, 401 (1960).

Defamation actions may lie for published or publicly spoken statements, in the forms of defamation by libel or defamation by slander, respectively. Black's Law Dictionary 417 (6th ed.1990). We consider defamation by libel because, as does invasion of privacy by false light, this tort specifically addresses defamation by the written word. *Id.* at 417, 601. Defamation by libel may be defamatory per se when the statements are recognized as inherently injurious to reputation. *Id.* at 417. Alternatively, statements are defamatory per quod when extrinsic facts are necessary to illustrate their libelous nature by way of innuendo. *Id.* Because our principal concern with the tort of false light lies in its overlap with defamation, we now compare defamation and false light in terms of conduct and interests protected to examine whether Colorado stands to benefit from including false light among its recognized torts.

A. Elements

A review of the elements required for defamation by libel per se, defamation by libel ***899** per quod, and false light invasion of privacy demonstrate the overlap among the torts: Clearly, the elements of the torts are substantially similar. Beginning with publication, we review the elements to identify any differences between the torts. One minor difference emerges under the necessary "publicity." In a libel claim, "publication" requires only that some person other than the plaintiff understand the statement; for false light, "publicity" requires communication to the public at large. *Brown v. O'Bannon,* 84 F.Supp.2d 1176, 1180-81 (D.Colo.2000).

The element of "falsity" as set forth in the Jury Instructions varies only slightly between the torts. For libel,

> A statement is false if its substance or gist is contrary to the true facts, and reasonable people learning of the statement would be likely to think significantly less favorably about the person referred to than they would if they knew the true facts. The fact that a statement may have contained some false information does not necessarily make the substance or gist of the statement itself false.

CJI-Civ. 4th 22:11. For false light:

> A statement contains false information if, considered as a whole, the substance or gist of the statement is false. The fact that a statement may have contained some false information does not necessarily make the substance or gist of the statement false.

CJI-Civ. 4th 28:11.

With regard to the mental state, reckless disregard,10 the Jury Instructions use the same definition for either tort, located in section 22:3. An actor publishes a statement "with reckless disregard when, at the time of publication [he or she] believes that the statement is probably false or has serious doubts as to its truth." CJI-Civ. 4th 22:3; *see also Cantrell v. Forest City Publ'g Co.,* 419 U.S. 245, 249-51, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974) (discussing *Time, Inc. v. Hill,* 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), as requiring "actual malice" in public figure false light cases to avoid First Amendment pitfalls).11 In short, under Colorado ***900** law, the requisite mens rea for both defamation and false light would be precisely the same.

On the question of damages, there is no textual difference between the "actual damages" necessary for libel per se and false light; the CJI there refers to the same section, 22:13. However, if the plaintiff is a private person, and the claim is for libel per se, the plaintiff need not prove actual damages. *Gertz v. Robert Welch,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The "special damages" essential for a libel per quod action reside at CJI-Civ. 4th 22:12.

Finally, concerning whether the statement must be "about the plaintiff," we note that the jury instructions require such a finding for libel per quod and false light, but not for libel per se. In this case, the trial court dismissed Bueno's libel per se claim because the statements "were not specifically directed at" the plaintiff. The jury instruction does not itself include a requirement that a libel per se claim need be elementally "about the plaintiff"; however, for that holding, the trial judge relied on language in *McCammon & Associates v. McGraw-Hill Broadcasting Co.,* 716 P.2d 490 (Colo.App.1986), "[t]o be libelous *per se,* the broadcast must contain a defamatory meaning specifically directed at the person claiming injury." *Id.* at 492 (citing *Inter-State Detective Bureau v. Denver Post, Inc.,* 29 Colo.App. 313, 484 P.2d 131 (1971)).12 We take no position here as to whether the trial court, on this basis, properly directed a verdict for defendants on Bueno's libel per se claim, or whether libel per se necessarily includes an explicit element that the publication be about the plaintiff.

The Jury Instructions define "about the plaintiff," but in two different places, one for libel per quod, and one for false light. For libel, "A defamatory communication is made about the plaintiff if the recipients correctly understand, or mistakenly but reasonably understand, that it was intended to refer to the plaintiff." CJI-Civ. 4th 22:8 (citing Restatement (Second) of Torts § 564 (1977); *Keohane v. Stewart,* 882 P.2d 1293, 1300, n. 10 (Colo.1994)). For false light, "A public statement is about the plaintiff if people who (see) (hear) (read) the statement would reasonably understand that it refers to the plaintiff." CJI-Civ. 4th 28:7 (citing R. Sack, *Libel, Slander & Related Problems* § 12.4.3 (3d ed.1999); J. McCarthy, *The Rights of Publicity and Privacy* §§ 3.3[B][2] & 3.4[C] (1997)).

Here again, although the definitions of these elements appear in different sections of the CJI, they are for all intents and purposes the same.

In summary, then, apart from "defamatory" versus "highly offensive," the elements of the two torts are nearly identical.

B. Conduct

Both defamation and false light invasion of privacy seek to avert false publicity damaging to a plaintiff. With the exception of the significantly broader "publicity" required for false light, *see Brown v. O'Bannon,* 84 F.Supp.2d 1176, 1180-81 (D.Colo.2000) (noting that, under the Restatement, false light "publicity" requires communication to the public at large, while "publication" under defamation requires only one other person understand the communication), and the definitional distinction between "defamatory" and "highly offensive," the elements are identical.

Thus, it comes as no surprise when commentators generally agree that in cases in which alleged conduct will support a false light claim, the same conduct will also support a defamation claim. Even the Restatement concedes:

***901** In many cases to which the rule stated here [false light] applies, the publicity given to the plaintiff is defamatory, so that he would [also] have an action for libel or slander .... In such a case the action for invasion of

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.
Restatement (Second) of Torts § 652E cmt.b (1976). *See also Sullivan v. Pulitzer Broad. Co.,* 709 S.W.2d 475, 480-81 (Mo.1986) (disallowing false light when facts amounted to nothing more than a restatement of a statutorily barred defamation claim).

In sum, the similarities far outweigh the differences between the two torts and the act of publicizing a falsity, when done with actual malice, will give rise to one or both torts. It is only with resort to the effect of the publication, i.e., the "interests protected," as will be discussed next, that a difference of significance emerges. In terms of actionable conduct, however, the two torts target substantially similar behavior.

C. Interests Protected

Privacy torts protect one's right "to be let alone." Thomas M. Cooley, *A Treatise on the Law of Torts,* 29 (2d ed. 1888). In false light terms, Prosser describes such "right" as "a person's interest in being let alone" in instances where there "has been publicity of a kind that is highly offensive." Prosser and Keeton, *Torts,* § 117, at 864 (5th ed.1984). "Highly offensive" is the element of false light that distinguishes it from defamation. A defamation claim requires a showing that the publication damaged the plaintiff's reputation in the community. False light requires no such showing. Rather, false light requires a showing that the publication is highly offensive, but need not have damaged that plaintiff's reputation in the community. The theory is that a publication could be highly offensive to an individual without meeting the standard of lowering that person's reputation in the community, a standard required by defamation law. *Bolduc v. Bailey,* 586 F.Supp. 896, 900 (D.Colo.1984) ("The gravamen of an action for defamation is the damage to one's reputation in the community caused by the defamatory statement(s)."). If the statement did lower the person's reputation, it would clearly be actionable as defamation. If it did not, then, and only then, would there be a need for a false light tort that was not coextensive with defamation. In sum, defamation protects individuals from (public) offense, but only false light will serve where the offense does not lower that individual's reputation in the community.

The question then is what is the nature of the interest that the tort protects? Scholars writing on false light variously describe the protected interest as "peace of mind," "injury to the inner person," "freedom from scorn and ridicule, freedom from embarrassment, humiliation and harassment, freedom from personal outrage, freedom from injury to feelings, freedom from mental anguish, freedom from contempt and disgrace, and the right to be let alone." Ray, *supra,* at 726 (citation omitted) (adding the protection of one's right to "self-determination" to the list). Lying at the core of all these "interests" are the personal feelings of the false light plaintiff. The issue is not whether others are given cause to change their perception of the plaintiff, but how the plaintiff himself responds to the publication. Courts that recognize false light view one's reputation in the community and one's personal sense of offense as separate interests. *See Crump v. Beckley Newspapers, Inc.,* 173 W.Va. 699, 320 S.E.2d 70, 83 (1984) (" 'Secondly, in defamation cases the interest sought to be protected is the objective one of reputation,.... In privacy cases the interest affected is the subjective one of injury to [the] inner person.' ") (quoting Thomas I. ***902** Emerson, *The Right of Privacy and Freedom of the Press,* 14 Harv. C.R.-C.L. L.Rev. 329, 333 (1979)). But even those states that accept as important the difference between these two interests, reputation and personal feelings, recognize an "affinity" between them:

> There are differing interests protected by the law of defamation and the law of privacy, which account for the substantive gradations between these torts. The interest protected by the duty not to place another in a false light is that of the individual's peace of mind, *i.e.,* his or her interest "in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is." "The action for defamation," on the other hand, "is to protect a person's interest in a good reputation ...." Nevertheless, despite analytical distinctions, there is a conceptual affinity between the causes of action based on these two theories.

Romaine v. Kallinger, 109 N.J. 282, 537 A.2d 284, 290 (1988) (citations omitted).

We believe that recognition of the different interests protected rests primarily on parsing a too subtle distinction between an individual's personal sensibilities and his or her reputation in the community. In fact, the United States Supreme Court trampled any such subtleties in *Zacchini v. Scripps-Howard Broadcasting Co.,* 433

U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). " 'The interest protected' in permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation, with the same overtones of mental distress as in defamation.' " *Id.* at 573, 97 S.Ct. 2849 (quoting Prosser, *supra,* at 400.).

We agree. False statements that a plaintiff finds "highly offensive" will generally either portray that plaintiff negatively or attack his conduct or character. At the same time, publicized statements that are disparaging and false satisfy the elements of defamation. *See* Schwartz, *supra,* at 887. Thus, the same publications that defame are likely to offend, and publications that offend are likely to defame. For example, if the article here did indeed portray Eddie Bueno as a criminal, then that statement is defamatory and not merely offensive. Those cases in which offense is taken, although no damage is done to plaintiff's reputation, are few and far between. Because the likelihood of a chilling effect is much greater than the likelihood that an offended plaintiff will be left with no cause of action, we feel that defamation law will adequately and most appropriately protect the public.

Delving into case law where a plaintiff brought false light and defamation claims further exposes the similarity between the two torts. Remarkably few instances exist where the false light claim proceeded, but defamation failed. Those that did were on atypical facts or dubious legal grounds. *See, e.g., Howard v. Antilla,* 160 F.Supp.2d 169, 171, 174-75 (D.N.H.2001) (permitting as "not inconsistent" a jury verdict for defendant on defamation claim but for plaintiff on false light claim where defendant's article identified plaintiff as the chairman of two publicly traded companies and entertained a rumor that plaintiff was actually a convicted felon who had violated securities laws); *Moore v. Sun Publ'g Corp.,* 118 N.M. 375, 881 P.2d 735 (Ct.App.1994) (ruling defamation claim failed as opinion, but false light could proceed to jury on remand where defendant's mailings portrayed plaintiff as culpable for a poor business decision).

These anomalies aside, however, there do exist scenarios where false light arguably fits, but defamation fails. *See* Schwartz, *supra,* at 893-96. Schwartz's categories are essentially two. The first involves cases where the defendant reveals intimate and personal, but false, details of plaintiff's private life, for example, portraying plaintiff as the victim of sexual harassment, *Crump,* 320 S.E.2d at 80, or as being poverty-stricken, *Cantrell v. Forest City Publ'g Co.,* 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974), or as having a terminal illness or suffering from depression.14 These depictions are not necessarily ***903** defamatory, but are potentially highly offensive. The second category encompasses portrayals of the plaintiff in a *more positive* light than he deserves. *See, e.g., Spahn v. Julian Messner, Inc.,* 43 Misc.2d 219, 250 N.Y.S.2d 529, 538-40, 543 (N.Y.Sup.Ct.1964), *aff'd,* 260 N.Y.S.2d 451, 23 A.D.2d 216 (1965), *aff'd,* 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543 (1966), *vacated,* 387 U.S. 239, 87 S.Ct. 1706, 18 L.Ed.2d 744 (1967) (trial court finding invasion of privacy where plaintiff was depicted in book as a war hero who earned Bronze Star and "raced out into the teeth of the enemy barrage"-two of a multitude of characterizations that were utterly false and embarrassing to plaintiff).

We acknowledge the potential for precluding such claims, but we are convinced that those scenarios represent a decidedly narrow band of cases. If the published statement insults and disparages the plaintiff, he will quite naturally suffer shame and humiliation because those that read the falsity will view him differently, and defamation will properly lie. Colorado's defamation law compensates plaintiffs for "personal humiliation, mental anguish and suffering." CJI-Civ. 4th 22:13. If, however, the published intimate details are true, then "disclosure" is the proper cause of action. Should the publication take plaintiff's likeness and use it for pecuniary gain, the tort of appropriation provides relief. And there remains the tort of intentional infliction of emotional distress/outrageous conduct for offensive publications in which the defendant engaged in "extreme and outrageous conduct, recklessly or with the intent of causing the plaintiff severe emotional distress," provided the plaintiff actually incurs severe emotional distress as a result of the defendant's conduct. *McKelvy v. Liberty Mut. Ins. Co.,* 983 P.2d 42, 44 (Colo.App.1998). The great majority of the scenarios proffered above would support a cause of action under one of these alternative theories. We therefore believe that the highly offended plaintiff is adequately protected by existing remedies.

V. Constitutional Implications

Our decision today to reject false light in Colorado reflects not only caution with respect to adopting new torts, but also our recognition that the tort implicates First Amendment principles. Freedom of the press is a critical part of our constitutional framework. We must weigh torts in this area carefully against the infringement they represent upon freedom of the press.

Although we, as readers or viewers of the news, sometimes regret excesses or empathize with individuals whose unfortunate plights are exploited, we nonetheless rely heavily upon open and full disclosure.
Because tort law is intended both to recompense wrongful conduct and to prevent it, it is important that it be clear in its identification of that wrongful conduct. The tort of false light fails that test. The sole area in which it differs from defamation is an area fraught with ambiguity and subjectivity. Recognizing "highly offensive" information, even framed within the context of what a reasonable person would find highly offensive, necessarily involves a subjective component. The publication of highly offensive material is more difficult to avoid than the publication of defamatory information that damages a person's reputation in the community. In order to prevent liability under a false light tort, the media would need to anticipate whether statements are "highly offensive" to a reasonable person of ordinary sensibilities even though their publication does no harm to the individual's reputation. To the contrary, defamatory statements are more easily recognizable by an author or publisher because such statements are those that would damage someone's reputation in the community. In other words, defamation is measured by its results; whereas false light invasion of privacy is measured by perception. It is even possible that what would be highly offensive in one location would not be in another; or what would have been highly offensive in 1962 would not be highly offensive in 2002. In other words, the standard is difficult to quantify, and shifts based ***904** upon the subjective perceptions of a community.

We would all hope that the press considers the impact of publicity upon the individuals involved; we would also hope that the press scrupulously avoids the publication of any false material. However, defamation law adequately proscribes inappropriate conduct in this area and punishes breach with relative clarity and certainty. We are comfortable that existing law adequately protects us from false publications, from cavalier reporting, or from malice.

Conversely, in the limited area in which false light invasion of privacy and defamation are not coextensive, there is ambiguity and subjectivity that would invariably chill open and robust reporting. We purposefully avoid upsetting "the delicate balance that has developed in the law of defamation between the protection of an 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." *Fellows v. Nat'l Enquirer, Inc.,* 42 Cal.3d 234, 228 Cal.Rptr. 215, 721 P.2d 97, 106 (1986).

VI. Conclusion

Our holding today is a deliberate exercise of caution. We believe false light is too amorphous a tort for Colorado, and it risks inflicting an unacceptable chill on those in the media seeking to avoid liability. The Supreme Court of Texas, in rejecting false light invasion of privacy, observed:

> "[w]hatever is added to the field of libel is taken from the field of free debate." While less compelling, these same considerations are also at play in private, non-political expression. Thus, the defamation action has been narrowly tailored to limit free speech as little as possible.

Cain v. Hearst Corp., 878 S.W.2d 577, 582 (Tex.1994) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 272, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (1942))). Such tailoring has yet to develop in the nascent false light tort, and we are not inclined to become the workshop. When we "take from the field of free debate," we should at the very least know what and how much we are taking. Absent that, we find no benefit to our jurisprudence by adopting the tort of false light invasion of privacy. The tort applies only to a narrow band of cases such that any potential gain in individual protection is offset by the chilling effect the new, undefined tort could have on speech.
Finally, we note that the Colorado General Assembly retains full authority to promulgate statutory causes of action of the type we here reject. Should they deem this decision overly cautious, they are, of course, free to legislate a remedy. Therefore, the court of appeals judgment is reversed and the case is remanded for consideration by that court of Eddie Bueno's cross appeal.

Chief Justice MULLARKEY dissents, and Justice MARTINEZ and Justice RICE join in the dissent. Chief Justice MULLARKEY, dissenting:

I respectfully dissent because I believe the majority opinion fails to sufficiently justify its decision to eliminate the tort of false light invasion of privacy from this jurisdiction.

By refusing to formally recognize the tort of false light invasion of privacy, the court today narrows privacy protections in Colorado and closes an independent avenue of relief available to plaintiffs in thirty other states. *See* maj. op. at 897 n. 7; *Bueno v. Denver Publ'g. Co.,* 32 P.3d 491, 495 (Colo.App.2000). In so holding, the court deprives plaintiffs of a tort that effectively has been recognized in this jurisdiction for many years. As for the immediate ramifications of this decision, the court precludes Plaintiff Eddie Bueno from recovering under his false light claim for harm caused to him by a Rocky Mountain News article, sending him back to the court of appeals with the burden of resurrecting his defamation arguments.

***905** Today's majority opinion offers two primary rationales for its decision to reject the false light tort and to restrict the privacy protections available in this state. First, the court reasons that false light duplicates defamation in several respects and is therefore an unnecessary claim. *See* maj. op. at 894. Second, the court asserts that the tort might have a chilling effect on First Amendment freedoms. *Id.*
In my view, these arguments are not persuasive. First, the mere overlap of some false light and defamation elements does not warrant a complete foreclosure of an independent false light claim. A better solution to overlap is simply to preclude duplicative damages awards. Second, false light offers the same First Amendment protections that defamation provides, therefore false light will not chill First Amendment freedoms. Third, today's decision needlessly places Colorado at odds with a clear majority rule, and the application of the majority's analysis to Bueno's case leads to an unfairly burdensome result.

*** * * [*906]**

III. False Light Adequately Protects First Amendment Freedoms

In order to justify the preclusion of claims that fall under only the false light tort, the majority opinion explains that First Amendment concerns outweigh the need to provide an independent false light remedy. *See* maj. op. at 902-903. At the outset, I disagree with the majority's conclusion that false light is particularly threatening to First Amendment freedoms due to its "subjective component." *See id.* at 903. The majority attempts to distinguish false light from defamation by noting that "defamation is measured by its results; whereas false light invasion of privacy is measured by perception." *Id.* at 903. I do not see a meaningful difference between the level of objectivity of these two tests. In my view, neither standard is easily quantifiable and neither standard can be measured without some consideration of the geographic or temporal context of the statement in question. Therefore, the objective false light standard is no more threatening to First Amendment rights than the objective defamation standard.

Furthermore, the identical "actual malice" standard protects First Amendment freedoms in both defamation and false light cases,1 and this court can easily apply the full range of other constitutional protections afforded to defamation cases to false light invasion of privacy cases. *See, e.g., Lerman v. Flynt Distrib. Co.,* 745 F.2d 123, 135 (2d Cir.1984) (applying the same constitutional protections to both libel and false light cases). Under these constitutional protections, false light does not pose any unusual threat to First Amendment freedoms.

IV. The Majority's Analysis in Rejecting False Light Has Negative Ramifications Both Generally and As Applied to Bueno

A. General Ramifications

I must first emphasize the national context in which today's decision takes place. The majority opinion leaves Colorado at odds with the United States Supreme Court and a clear majority of states that recognize the ***907** false light tort, joining only three states that explicitly reject the tort in its entirety. *See Cain,* 878 S.W.2d at 579; *Lake v. Wal-Mart Stores, Inc.,* 582 N.W.2d 231, 235-36 (Minn.1998); *Renwick v. News & Observer Publ'g. Co.,* 310 N.C. 312, 312 S.E.2d 405, 413 (1984). We depart from the majority rule despite our recent acknowledgement that we traditionally rely upon majority jurisdictions with respect to invasion of privacy torts. *See Dickerson & Assoc. v. Dittmar,* 34 P.3d 995, 1001 (Colo.2001).

Furthermore, no modern trend explains today's decision-Tennessee, the most recent state before Colorado to consider this debate in light of current cases and commentary, explicitly embraced the majority rule just last year, recognizing false light as a viable and independent tort. *West v. Media Gen. Convergence, Inc.,* 53 S.W.3d 640, 648 (Tenn.2001).

I also note that although the majority opinion claims that its decision reflects "caution with respect to adopting new torts," maj. op. at 903, the decision is more accurately described as one that deprives plaintiffs of a tort that is already, in effect, recognized in this state. While it is true that this court never explicitly adopted false light in the past, we have made consistent references to its existence. *See People v. Home Ins. Co.,* 197 Colo. 260, 263 n. 2, 591 P.2d 1036, 1038 n. 2 (Colo.1979) (referring to the "four distinct kinds of invasion [of privacy]" set forth in the Restatement (2d) of Torts); *see also Ozer v. Borquez,* 940 P.2d 371, 377 (Colo.1997); *Dittmar,* 34 P.3d at 1000. Furthermore, in *McCammon & Associates, Inc. v. McGraw-Hill Broadcasting Co.,* 716 P.2d 490, 492 (Colo.App.1986), the court of appeals expressly recognized false light and defined its elements.

Due to the uncritical manner in which both this court and the court of appeals have treated the false light tort over the past twenty years, even the United States District Court for the district of Colorado has been led to conclude that false light is viable under Colorado law. *See Brown v. O'Bannon,* 84 F.Supp.2d 1176, 1180 (D.Colo.2000); *Seidl v. Greentree Mortg. Co.,* 30 F.Supp.2d 1292, 1302 (D.Colo.1998); *Smith v. Colorado Interstate Gas Co.,* 777 F.Supp. 854, 857 (D.Colo.1991). Clearly, Eddie Bueno and other plaintiffs who have raised false light claims in Colorado have been reasonable in relying on the impression that the false light tort is actionable in this state. Today's decision punishes that reasonable reliance.

*** * * [*908]**

For the above reasons, I respectfully dissent.

391 U.S. 145, 88 S.Ct. 1444

Duncan v. State of Louisiana

Supreme Court of the United States

Gary DUNCAN, Appellant,

v.

STATE OF LOUISIANA.

No. 410.

Argued Jan. 17, 1968.
Decided May 20, 1968.
Rehearing Denied June 17, 1968.

Opinion

***146** Mr. Justice WHITE delivered the opinion of the Court.

* * *

[***147 **1446]** The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due process of law.' In resolving conflicting ***148** claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That ****1447** clause now protects the right to compensation for property taken by the State;[FN4] the rights of speech, press, and religion covered by the First Amendment;[FN5] the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized;[FN6] the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination;[FN7] and the Sixth Amendment rights to counsel,[FN8] to a speedy[FN9] and public[FN10] trial, to confrontation of opposing witnesses,[FN11] and to compulsory process for obtaining witnesses.[FN12]

The test for determining whether a right extended by the [bill or rights] is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. [Those ways include:] whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Powell v. State of Alabama, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932);[FN13] whether ***149** it is 'basic in our system of jurisprudence,' In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948) . . .

* * *

[FN4] Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

[FN5] See, e.g., Fiske v. State of Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927).

[FN6] See Mapp v. State of Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

[FN7] Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

[FN8] Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

[FN9] Klopfer v. State of North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967).

[FN10] In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

[FN11] Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

[FN12] Washington v. State of Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

[FN13] Quoting from Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 (1926).

419 U.S. 245, 95 S.Ct. 465

Cantrell v. Forest City Publishing Company

Supreme Court of the United States

Margaret Mae CANTRELL et al., Petitioners,

v.

FOREST CITY PUBLISHING CO. et al.

No. 73-5520.
Argued Nov. 13, 1974.
Decided Dec. 18, 1974.

Opinion

Mr. Justice STEWART delivered the opinion of the Court.

Margaret Cantrell and four of her minor children brought this diversity action in a Federal District Court for invasion of privacy against the Forest City Publishing Co., publisher of a Cleveland newspaper, the Plain Dealer, and against Joseph Eszterhas, a reporter formerly employed by the Plain Dealer, and Richard Conway, a Plain Dealer photographer. The Cantrells alleged that an article published in the Plain Dealer Sunday Magazine unreasonably placed their family in a false light before the public through its many inaccuracies and untruths. The District Judge struck the claims relating to punitive damages as to all the plaintiffs and dismissed the actions of three of the Cantrell children in their entirety, but allowed the case to go to the jury ***247** as to Mrs. Cantrell and her oldest son, William. The jury returned a verdict against all three of the respondents for compensatory money damages in favor of these two plaintiffs.

The Court of Appeals for the Sixth Circuit reversed, holding that, in the light of the First and Fourteenth Amendments, the District Judge should have granted the respondents' motion for a directed verdict as to all the Cantrells' claims. 484 F.2d 150. We granted certiorari, 418 U.S. 909, 94 S.Ct. 3202, 41 L.Ed.2d 1156.

I

In December 1967, Margaret Cantrell's husband Melvin was killed along with 43 other people when the Silver Bridge across the Ohio River at Point Pleasant, W.Va., collapsed. The respondent Eszterhas was assigned by the Plain Dealer to cover the story of the disaster. He wrote a 'news feature' story focusing on the funeral of Melvin Cantrell and the impact of his death on the Cantrell family.

Five months later, after conferring with the Sunday Magazine editor of the Plain Dealer, Eszterhas and photographer Conway returned to the Point Pleasant area to write a follow-up feature. The two men went to the Cantrell ****468** residence, where Eszterhas talked with the children and Conway took 50 pictures. Mrs. Cantrell was not at home at any time during the 60 to 90 minutes that the men were at the Cantrell residence.

Eszterhas' story appeared as the lead feature in the August 4, 1968, edition of the Plain Dealer Sunday Magazine. The article stressed the family's abject poverty; the children's old, ill-fitting clothes and the deteriorating condition of their home were detailed in both the text and accompanying photographs. As he had done in his original, prize-winning article on the Silver Bridge disaster, Eszterhas used the Cantrell family to ***248** illustrate the impact of the bridge collapse on the lives of the people in the Point Pleasant area.

It is conceded that the story contained a number of inaccuracies and false statements. Most conspicuously, although Mrs. Cantrell was not present at any time during the reporter's visit to her home, Eszterhas wrote, 'Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of non-expression she wore at the funeral. She is a proud woman. Her world has changed. She says that after it happened, the people in town offered to help them out with money and they refused to take it.' Other significant

misrepresentations were contained in details of Eszterhas' descriptions of the poverty in which the Cantrells were living and the dirty and dilapidated conditions of the Cantrell home.

The case went to the jury on a so-called 'false light' theory of invasion of privacy. In essence, the theory of the case was that by publishing the false feature story about the Cantrells and thereby making them the objects of pity and ridicule, the respondents damaged Mrs. Cantrell and her son William by causing them to suffer outrage, mental distress, shame, and humiliation.

***249 II**

In Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456, the Court considered a similar false-light, invasion-of-privacy action. The New York Court of Appeals had interpreted New York Civil Rights Law, McKinney's Consol.Laws, c. 6, ss 50-51 to give a 'newsworthy person' a right of action when his or her name, picture or portrait was the subject of a 'fictitious' report or article. Material and substantial falsification was the test for recovery. 385 U.S., at 384-386, 87 S.Ct. at 540-541. Under this doctrine the New York courts awarded the plaintiff James Hill compensatory damages based on his complaint that Life Magazine had falsely reported that a new Broadway play portrayed the Hill family's experience in being held hostage by three escaped convicts. This Court, guided by its decision in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, which recognized constitutional limits on a State's power to award damages for libel in actions brought by public officials, held that the constitutional protections for speech and press precluded the application of the New York statute to allow recovery for 'false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.' ****469** 385 U.S., at 388, 87 S.Ct., at 542. Although the jury could have reasonably concluded from the evidence in the Hill case that Life had engaged in knowing falsehood or had recklessly disregarded the truth in stating in the article that 'the story re-enacted' the Hill family's experience, the Court concluded that the trial judge's instructions had not confined the jury to such a finding as a predicate for liability as required by the Constitution. Id., at 394, 87 S.Ct., at 545.

The District Judge in the case before us, in contrast to the trial judge in Time, Inc. v. Hill, did instruct the jury that liability could be imposed only if it concluded that the false statements in the Sunday Magazine feature ***250** article on the Cantrells had been made with knowledge of their falsity or in reckless disregard of the truth.[FN3]

[FN3] The District Judge instructed the jury in part:

> '(T)he constitutional protection for speech and press preclude(s) redress for false reports of matters of public interest in the absence of proof that the defendants published the report with knowledge of its falsity or in reckless disregard of the truth.
>
> 'Thus, in this case the burden of proof is upon the plaintiffs to prove by a preponderance of the evidence their assertions of an invasion of privacy, the elements of which are:
>
> '(1) An unwarranted and/or wrongful intrusion by the defendants into their private or personal affairs with which the public had no legitimate concern.
>
> '(2) Publishing a report or article about plaintiff with knowledge of its falsity or in reckless disregard of the truth.
>
> '(3) Defendants' acts of publishing a report or article about plaintiffs with knowledge of its falsity or in reckless disregard of the truth caused plaintiffs injury as individuals of ordinary sensibilities and damage in the form of outrage or mental suffering, shame or humiliation.
>
> 'Thus, if it be your conclusion and determination that plaintiffs have failed to prove by a preponderance of the evidence that defendants invaded the (plaintiffs') privacy by publishing a report or article about them with knowledge of its falsity or in reckless disregard of the truth, you need not deliberate further and you will return a verdict in favor of the defendants.'

The District Judge also charged the jury:

> 'An act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.
>
> 'Recklessness implies a higher degree of culpability than negligence. Recklessly means wantonly, with indifference to consequence.'

No objection was made by any of the parties to this knowing-or-reckless-falsehood instruction. Consequently, this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard ***251** announced in Time, Inc. v. Hill applies to all false-light cases. Cf. Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789. Rather, the sole question that we need decide is whether the Court of Appeals erred in setting aside the jury's verdict.

III

At the close of the petitioners' case-in-chief, the District Judge struck the demand for punitive damages. He found that Mrs. Cantrell had failed to present any evidence to support the charges that the invasion of privacy 'was done maliciously within the legal definition of that term.' The Court of Appeals interpreted this finding to be a determination by the District Judge that there was no evidence of knowing falsity or reckless disregard of the truth introduced at the trial. Having made such a determination, the Court of Appeals held that the District Judge should have granted the motion for a directed verdict for respondents as to all the Cantrells' claims. 484 F.2d, at 155.

The Court of Appeals appears to have assumed that the District Judge's finding of no malice 'within the legal definition of that term' was a finding based on the definition of 'actual ****470** malice' established by this Court in New York Times Co. v. Sullivan, 376 U.S., at 280, 84 S.Ct., at 726: 'with knowledge that (a defamatory statement) was false or with reckless disregard of whether it was false or not.' As so defined, of course, 'actual malice' is a term of art, created to provide a convenient shorthand expression for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers.[FN4]

> FN[4] In Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456, the Court did not employ this term of art. Instead, the Court repeated the actual standard of knowing or reckless falsehood at every relevant point. See, e.g., id., at 388, 390, 394, 87 S.Ct. at 542, 543, 545.

As ***252** such, it is quite different from the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages. In a false-light case, common-law malice-frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights-would focus on the defendant's attitude toward the plaintiff's privacy, not toward the truth or falsity of the material published. See Time, Inc. v. Hill, 385 U.S., at 396 n. 12, 87 S.Ct., at 546 n. 12. See generally W. Prosser, Law of Torts 9-10 (4th ed.).

Although the verbal record of the District Court proceedings is not entirely unambiguous, the conclusion is inescapable that the District Judge was referring to the common-law standard of malice rather than to the New York Times 'actual malice' standard when he dismissed the punitive damages claims. For at the same time that he dismissed the demands for punitive damages, the District Judge refused to grant the respondents' motion for directed verdicts as to Mrs. Cantrell's and William's claims for compensatory damages. And, as his instructions to the jury made clear, the District Judge was fully aware that the Time, Inc. v. Hill meaning of the New York Times 'actual malice' standard had to be satisfied for the Cantrells to recover actual damages. Thus, the only way to harmonize these two virtually simultaneous rulings by the District Judge is to conclude, contrary to the decision of the Court of Appeals, that in dismissing the punitive damages claims he was not determining that Mrs. Cantrell had failed to introduce any evidence of knowing falsity or reckless disregard of the truth. This conclusion is further fortified by the District Judge's subsequent denial of the respondents' motion for judgment n.o.v. and alternative motion for a new trial.

Moreover, the District Judge was clearly correct in believing that the evidence introduced at trial was sufficient ***253** to support a jury finding that the respondents Joseph Eszterhas and Forest City Publishing Co. had published knowing or reckless falsehoods about the Cantrells. There was no dispute during the trial that Eszterhas,

who did not testify, must have known that a number of the statements in the feature story were untrue. In particular, his article plainly implied that Mrs. Cantrell had been present during his visit to her home and that Eszterhas had observed her 'wear(ing) the same mask of nonexpression she wore (at her husband's) funeral.' These were 'calculated falsehoods,' and the jury was plainly ****471** justified in finding that Eszterhas had portrayed the Cantrells in a false light through knowing or reckless untruth.

The Court of Appeals concluded that there was no evidence that Forest City Publishing Co. had knowledge of any of the inaccuracies contained in Eszterhas' article. However, these was sufficient evidence for the jury to find that Eszterhas' writing of the feature was within the scope of his employment at the Plain Dealer and that Forest City Publishing Co. was therefore liable under traditional doctrines of respondeat superior. Although Eszterhas was not regularly ***254** assigned by the Plain Dealer to write for the Sunday Magazine, the editor of the magazine testified that as a staff writer for the Plain Dealer, Eszterhas frequently suggested stories he would like to write for the magazine. When Eszterhas suggested the follow-up article on the Silver Bridge disaster, the editor approved the idea and told Eszterhas the magazine would publish the feature if it was good. From this evidence, the jury could reasonably conclude that Forest City Publishing Co., publisher of the Plain Dealer, should be held vicariously liable for the damage caused by the knowing falsehoods contained in Eszterhas' story.

For the foregoing reasons, the judgment of the Court of Appeals is reversed and the case is remanded to that court with directions to enter a judgment affirming the judgment of the District Court as to the respondents Forest City Publishing Co. and Joseph Eszterhas.

It is so ordered.

Reversed and remanded.

Mr. Justice DOUGLAS, dissenting.

I adhere to the views which I expressed in Time, Inc. v. Hill, 385 U.S. 374, 401-402, 87 S.Ct. 534, 549, 17 L.Ed.2d 456 (1967), and to those of Mr. Justice Black in which I concurred, id., at 398-401, 87 S.Ct., at 547-549. Freedom of the press is 'abridged' in violation of the First ***255** and Fourteenth Amendments by what we do today. This line of cases, which of course includes New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), seems to me to place First Amendment rights of the press at a midway point similar to what our ill-fated Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), did to the right to counsel. The press will be 'free' in the First Amendment sense when the judge-made qualifications of that freedom are withdrawn and the substance of the First Amendment restored to what I believe was the purpose of its enactment.

A bridge accident catapulted the Cantrells into the public eye and their disaster became newsworthy. To make the First Amendment freedom to report the news turn on subtle differences between common-law malice and actual malice is to stand the Amendment on its head. Those who write the current news seldom have the objective, dispassionate point of view-or the time-of scientific analysts. They deal in fast-moving events and the need for 'spot' reporting. The jury under today's formula sits as a censor with broad powers-not to impose a prior restraint, but to lay heavy damages on the press. The press is 'free' only if the jury is sufficiently disenchanted with the Cantrells to let the press be free of this damages claim. That regime is thought by some ****472** to be a way of supervising the press which is better than not supervising it at all. But the installation of the Court's regime would require a constitutional amendment. Whatever might be the ultimate reach of the doctrine Mr. Justice Black and I have embraced, it seems clear that in matters of public import such as the present news reporting, there must be freedom from damages lest the press be frightened into playing a more ignoble role than the Framers visualized.

I would affirm the judgment of the Court of Appeals.

486 U.S. 46, 108 S.Ct. 876

Hustler Magazine, Inc. v. Falwell

Supreme Court of the United States

HUSTLER MAGAZINE, INC. and Larry C. Flynt, Petitioners

v.

Jerry FALWELL.

No. 86–1278.
Argued Dec. 2, 1987
Decided Feb. 24, 1988.

Opinion

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of ***48** privacy, libel, and intentional infliction of emotional distress. The District Court ****878** directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments of the United States Constitution.

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody—not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

Soon after the November issue of Hustler became available to the public, respondent brought this diversity action in the United States District Court for the Western District of Virginia against Hustler Magazine, Inc., Larry C. Flynt, and Flynt Distributing Co., Inc. Respondent stated in his complaint that publication of the ad parody in Hustler entitled ***49** him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial. At the close of the evidence, the District Court granted a directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The jury ruled for respondent on the intentional infliction of emotional distress claim, however, and stated that he should be awarded $100,000 in compensatory damages, as well as $50,000 each in punitive damages from petitioners. Petitioners' motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against petitioners. *Falwell v. Flynt*, 797 F.2d 1270 (1986). The court rejected petitioners' argument that the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), must be met before respondent can recover for emotional distress. The court agreed that because respondent is concededly a public figure, petitioners are "entitled to the same level of first amendment protection in the claim for intentional infliction

of emotional distress that they received in [respondent's] claim for libel." 797 F.2d, at 1274. But this does not mean that a literal application of the actual malice rule is appropriate in the context of an emotional distress claim. In the court's view, the *New York Times* decision emphasized the constitutional importance not of the falsity of the statement or the defendant's disregard for the truth, but of the heightened level of culpability embodied ****879** in the requirement of "knowing ... or reckless" conduct. Here, the *New York* ***50** *Times* standard is satisfied by the state-law requirement, and the jury's finding, that the defendants have acted intentionally or recklessly. The Court of Appeals then went on to reject the contention that because the jury found that the ad parody did not describe actual facts about respondent, the ad was an opinion that is protected by the First Amendment. As the court put it, this was "irrelevant," as the issue is "whether [the ad's] publication was sufficiently outrageous to constitute intentional infliction of emotional distress." *Id.*, at 1276. Petitioners then filed a petition for rehearing en banc, but this was denied by a divided court. Given the importance of the constitutional issues involved, we granted certiorari. 480 U.S. 945, 107 S.Ct. 1601, 94 L.Ed.2d 788 (1987).

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he ***51** freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503–504, 104 S.Ct. 1949, 1961, 80 L.Ed.2d 502 (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974). As Justice Holmes wrote, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market...." *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (dissenting opinion).

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164, 87 S.Ct. 1975, 1996, 18 L.Ed.2d 1094 (1967) (Warren, C.J., concurring in result). Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U.S. 665, 673–674, 64 S.Ct. 1240, 1245, 88 L.Ed. 1525 (1944), when he said that ****880** "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times, supra*, 376 U.S., at 270, 84 S.Ct., at 721. "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts ***52** to demonstrate the contrary." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274, 91 S.Ct. 621, 626, 28 L.Ed.2d 35 (1971).

Of course, this does not mean that *any* speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, 376 U.S., at 279–280, 84 S.Ct., at 726. False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. See *Gertz*, 418 U.S., at 340, 344, n. 9, 94 S.Ct., at 3007, 3009, n. 9. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," *id.*, at 340, 94 S.Ct., at 3007, and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require 'breathing space.' " *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772, 106 S.Ct. 1558, 1561, 89 L.Ed.2d 783 (1986) (quoting *New York Times, supra*, 376 U.S., at 272, 84 S.Ct., at 721). This breathing space is provided by

a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. Cf. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (ruling that the "actual malice" standard does not apply to the tort of appropriation of a right of publicity). In respondent's view, and in the view of the ***53** Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), we held that even when a speaker or writer is motivated by hatred or illwill his expression was protected by the First Amendment:

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak ****881** out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.*, at 73, 85 S.Ct., at 215.

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." Webster's New Unabridged Twentieth ***54** Century Dictionary of the English Language 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

> "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." Long, The Political Cartoon: Journalism's Strongest Weapon, The Quill 56, 57 (Nov. 1962).

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." M. Keller, The Art and Politics of Thomas Nast 177 (1968). Another writer explains that the success of the Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners." C. Press, The Political Cartoon 251 (1981).

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal ***55** Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published

in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description ****882** "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. See *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 910, 102 S.Ct. 3409, 3424, 73 L.Ed.2d 1215 (1982) ("Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action"). And, as we stated in *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978):

> "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. ***56** For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.,* at 745–746, 98 S.Ct., at 3038.

See also *Street v. New York,* 394 U.S. 576, 592, 89 S.Ct. 1354, 1366, 22 L.Ed.2d 572 (1969) ("It is firmly settled that ... the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in *Pacifica Foundation,* that speech that is " 'vulgar,' 'offensive,' and 'shocking' " is "not entitled to absolute constitutional protection under all circumstances." 438 U.S., at 747, 98 S.Ct., at 3039. In *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), we held that a State could lawfully punish an individual for the use of insulting " 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.,* at 571–572, 62 S.Ct., at 769. These limitations are but recognition of the observation in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758, 105 S.Ct. 2939, 2945, 86 L.Ed.2d 593 (1985), that this Court has "long recognized that not all speech is of equal First Amendment importance." But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.,* with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, see *Time, Inc. v. Hill,* 385 U.S. 374, 390, 87 S.Ct. 534, 543, 17 L.Ed.2d 456 (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

***57** Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law.[5] The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The Court of Appeals interpreted the jury's finding to be that the ****883** ad parody "was not reasonably believable," 797 F.2d, at 1278, and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

[FN5] Neither party disputes this conclusion. Respondent is the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He is also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications. Who's Who in America 849 (44th ed. 1986–1987).

Reversed.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice WHITE, concurring in the judgment.

As I see it, the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment.

997 So.2d 1098, 33 Fla. L. Weekly S849

Jews for Jesus, Inc. v. Rapp

Supreme Court of Florida.

JEWS FOR JESUS, INC., Petitioner,
v.
Edith RAPP, Respondent.

No. SC06-2491.
Oct. 23, 2008.
Rehearing Denied Dec. 17, 2008..

PARIENTE, J.

The issue in this case is whether the tort of false light invasion of privacy should be recognized in Florida. In *Rapp v. Jews for Jesus, Inc.*, 944 So.2d 460 (Fla. 4th DCA 2006), the Fourth District Court of Appeal certified the following question to be of great public importance:

Does Florida recognize the tort of false light invasion of privacy, and if so, are the elements of the tort set forth in section 652E of Restatement (Second) of Torts?
Id. at 468 . . .

Because we conclude that false light is largely duplicative of existing torts, but without the attendant protections of the First Amendment, we decline to recognize the tort and answer the certified question in the negative. In declining to recognize false light, we resolve two additional issues raised by this case. First, we conclude that Florida recognizes a cause of action for defamation by implication. Second, we hold that a communication can be considered defamatory if it "prejudices" the plaintiff in the eyes of a "substantial and respectable minority of the community," as set forth in comment e of the Restatement (Second) of Torts § 559 (1972). We elaborate on these two existing principles of defamation law because they further support our decision not to recognize false light in view of the competing policy considerations.

FACTS AND PROCEDURAL HISTORY

We begin with the facts that gave rise to the claim for false light invasion of privacy in this case, which are based on the allegations contained in the second amended complaint of the petitioner, Edith Rapp. Edith Rapp was married to Marty Rapp until his death in 2003. Bruce Rapp, who was Marty's son and Edith Rapp's stepson, was employed by Jews for Jesus, Inc. Prior to Marty's death, Bruce reported the following account in the Jews for Jesus newsletter:

I had a chance to visit with my father in Southern Florida before my Passover tour. He has been ill for sometime and I was afraid that I may not have another chance to be with him. I had been witnessing to him on the telephone for the past few months. He would listen and allow me to pray for him, but that was about all. On this visit, whenever I talked to my father, my stepmother, Edie (also Jewish), was always close by, listening quietly. Finally, one morning Edie began to ask me questions about Jesus. I explained how G-d [sic] gave us Y'Shua (Jesus) as the final sacrifice for our atonement, and showed her the parallels with the Passover Lamb. She began to cry, and when I asked her if she would like to ask G-d for forgiveness for her sins and receive Y'Shua she said yes! My stepmother repeated the sinner's prayer with me-praise G-d! Pray for Edie's faith to grow and be strengthened. ***1101** And please pray for my father Marty's salvation.

Rapp, 944 So.2d at 462. The complaint alleged that the newsletter was published on the internet and seen by one of Edith's relatives. *Id.*

The gravamen of Rapp's claim is that Jews for Jesus falsely and without her permission stated that she had "joined Jews for Jesus, and/or [become] a believer in the tenets, the actions, and the philosophy of Jews for Jesus."

Second Amended Complaint at 2, *Rapp v. Jews for Jesus, Inc.*, No. 502003CA013234XXOCAH (Fla. 15th Cir. Mar. 28, 2005). Rapp's complaint alleged: (1) false light invasion of privacy; (2) defamation; and (3) intentional infliction of emotional distress. The trial court granted Jews for Jesus's motion to dismiss without prejudice and also struck several paragraphs from the complaint described by the Fourth District as "primarily polemical" against Jews for Jesus, Inc. *Id.* at 462-63.[FN1]

FN1. A total of 13 paragraphs were stricken from the original 38-paragraph complaint. For example, paragraph 4 alleged that "Jews for Jesus attempts to convince Jews that they can accept concepts which are alien and contrary to Jewish beliefs yet remain Jewish in order to fraudulently induce them to join their movement." Complaint at 1, *Rapp v. Jews for Jesus, Inc.*, No. 502003CA013234XXOCAH (Fla. 15th Cir. Dec. 11, 2003), 2003 WL 25757568. Further, in paragraph 20, the complaint alleges that "[a] further motive for fabrication was to help advance the erroneous concept that many Jews have adopted the beliefs of Jews for Jesus. In order to promote its false teachings, Jews for Jesus attempts to inflate the number of its converts." *Id.* at 4.

* * *

[*1102] As to the count for the tort of false light, the court reviewed section 652E of the Restatement (Second) of Torts, which defines the cause of action. *Id.* at 467. The Fourth District noted that the tort involved a " 'major misrepresentation' of a person's 'character, history, activities or beliefs' " and that just as a misrepresented political party affiliation could be such an example, so too could misrepresentation of a person's religious beliefs. *Id.* at 467-68. The Fourth District determined that if it were "writing on a blank slate," the court would be inclined to side with the courts that have rejected the cause of action, but concluded that this Court's prior precedent "tacitly recognized the cause of action." *Id.* at 468. However, because of uncertainty in this area of the law, the Fourth District certified to us the question of whether the tort of false light is recognized in Florida. . .

ANALYSIS

I. The Origins of False Light

Our discussion of false light naturally begins with an overview of the common law tort of invasion of privacy. First recognized in 1890 as a legal theory by Samuel D. Warren and Louis D. Brandeis,[FN5] common law invasion of privacy was expounded upon in 1960 by William L. Prosser, a leading scholar in tort law. William L. Prosser, *Privacy*, 48 Cal. L.Rev. 383 (1960). Prosser proposed that invasion of privacy consisted of four distinct torts: (1) intrusion upon the seclusion of another; (2) commercial appropriation of one's name or likeness; (3) publication of private facts; and (4) false light. *Id.* at 389. Prosser defined the tort of false light as one that "consists of publicity that places the plaintiff in a false light in the public eye." *Id.* at 398. The United States Supreme Court in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974), a case involving the false light theory of invasion of privacy, referred to the claim as being "generally recognized as one of the several distinct kinds of invasions actionable under the ***1103*** privacy rubric." *Id.* at 248 n. 2, 95 S.Ct. 465.

FN5. In *The Right to Privacy*, 4 Harv. L.Rev. 193, 206 (1890), Warren and Brandeis concluded that the law "affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds." Brandeis was later appointed to the United States Supreme Court and served as a justice from 1916 to 1939.

* * *

II. To Recognize or Not to Recognize-That is the Certified Question

This Court has previously acknowledged Prosser's paradigm of the four general categories of invasion of privacy, one of which is a cause of action for false light. *See Allstate Ins. Co. v. Ginsberg*, 863 So.2d 156, 160-61 (Fla.2003); *Agency for Health Care Admin. v. Associated Industries of Fla., Inc.*, 678 So.2d 1239, 1252 n. 20 (Fla.1996) (citing *Forsberg v. Hous. Auth. of Miami Beach*, 455 So.2d 373 (Fla.1984) (Overton, J., concurring)) [hereinafter *AHCA]*. However, we have reviewed each of these cases and conclude that the Court was simply repeating citations from academic treatises or law review articles about privacy torts in general or discussing an

alternative tort in particular. For example, in *AHCA*, the Court noted that it had previously recognized a cause of action for invasion of privacy and specifically cited the four general categories outlined by Prosser, which included false light. 678 So.2d at 1252 n. 20 (ruling on the constitutionality of a statute that abolished affirmative defenses recognized at common law). Then, in *Ginsberg*, the Court again set forth the four general categories of invasion of privacy by quoting *AHCA*, albeit in the context of deciding whether there was a cause of action for intrusion upon the seclusion of another based upon touching in a sexual manner or sexually offensive comments. 863 So.2d at 162.[FN7]Importantly, none of these cases actually involved a claim of false light, and we have never discussed any of the competing policy concerns; the issue of whether to recognize false light as a new common law cause of action has never been before the Court. We therefore begin by looking to common law principles and public policy considerations to facilitate our analysis of this issue of first impression.

FN7. In *Ginsberg,* we stated that the four categories were:

(1) appropriation-the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion-physically or electronically intruding into one's private quarters; (3) public disclosure of private facts-the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye-publication of facts which place a person in a false light even though the facts themselves may not be defamatory. 863 So.2d at 162 (quoting *AHCA*, 678 So.2d at 1252 n. 20). Although the Court noted that it had previously "set out the categories of the tort of invasion of privacy for the purpose of illustrating a point, not to directly address the point of what alleged facts state a cause of action for the tort of invasion of privacy," we "affirm[ed] that the statement in *AHCA* does correctly state what is included in Florida's tort of invasion of privacy." *Id.* However, this statement is purely dicta because the issue before the Court in that case did not involve false light.

Florida adopted the English common law as it existed on July 4, 1776, ***1104** "to the extent that it [wa]s not inconsistent with the statutes and constitutions of Florida and the United States." *Stone v. Wall*, 734 So.2d 1038, 1043 (Fla.1999). Although the tort of false light did not exist at common law, this Court can recognize new common law causes of action where that recognition is neither in conflict with contrary legislation nor outweighed by any competing interests. We have explained that the common law "must keep pace with changes in our society" and "may be altered when the reason for the rule of law ceases to exist, or when the change is demanded by public necessity or required to vindicate fundamental rights." *Stone*, 734 So.2d at 1043 (quoting *United States v. Dempsey*, 635 So.2d 961, 964 (Fla.1994)). Indeed, this was the impetus for the Court's decision to recognize invasion of privacy as a common law cause of action in *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944).

* * *

The common law has shown an amazing vitality and capacity for growth and development. This is so largely because the great fundamental object and principle of the common law was the protection of the individual in the enjoyment of all his inherent and essential rights and to afford him a legal remedy for their invasion. *Id.* at 250.

Based on both the common law and Florida's Constitution, the Court found that the right to privacy was a distinct and cognizable tort. However, the Court recognized that the right would be subject to limitations because of competing rights, such as freedom of speech and of the press, and that the right must be restricted to "ordinary sensibilities" and cannot extend to the hypersensitive plaintiff. *Id.* at 251. Finally, in discussing the balancing of the rights at stake, the Court agreed that:

The right of privacy does not prohibit the publication of matter which is of legitimate public or general interest. At some point the public interest in obtaining information becomes dominant over the individual's desire for privacy. It has been said that the truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest. However, the phrase "public or general interest," in this connection, does not mean mere curiosity.

Id.

Because there is no statutory prohibition against recognizing the tort of false light and because our case law

concerning the other categories of invasion of privacy may seem to support recognition of false light, we next review the main ***1105*** policy arguments against its adoption. We do this with the view that the "primary purpose of tort law is 'that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct.' " *Clay Elec. Coop. v. Johnson,* 873 So.2d 1182, 1190 (Fla.2003) (quoting *Weinberg v. Dinger,* 106 N.J. 469, 524 A.2d 366, 375-79 (1987)). As cogently explained by the Colorado Supreme Court,

Tort law represents the way in which we draw lines around acceptable and unacceptable non-criminal behavior in our society. Torts are designed to encourage socially beneficial conduct and deter wrongful conduct. *See, e.g.,* Restatement (Second) of Torts, § 901(c) (1979). Correspondingly, liability arises out of culpable behavior wherein the defendant breaches a duty to the plaintiff: crosses the line into unacceptable behavior. Liability not only recompenses the wronged plaintiff, but also deters the socially wrongful conduct in the first place. Hence, clarity and certainty of tort law serves a very important function in regulating how we deal with one another. *Denver Publ'g Co. v. Bueno,* 54 P.3d 893, 897-98 (Colo.2002).

Although false light has been recognized in a substantial number of jurisdictions, it "remains the least-recognized and most controversial aspect of invasion of privacy." *Id.* at 898 (quoting *Cain v. Hearst Corp.,*878 S.W.2d 577, 579 (Tex.1994)). The reason most often given for rejecting false light is that "it substantially overlaps with another tort, defamation," *id.* at 898, and allows the plaintiff to circumvent the strict requirements that have been adopted by statute and developed by case law to ensure the right to freedom of expression. *Id.* at 903-04. Prosser himself expressed these concerns when proposing the tort:

The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?

Prosser, *supra,* at 401.

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

A. The Elements: False Light v. Defamation

Although Prosser described false light as one of the four causes of action for invasion of privacy, it is more closely related to defamation than the other three privacy torts. When the elements of false light are compared to those of defamation, the overlap between the two torts is evident. As previously mentioned, false light has the following six elements: (1) publicity; ***1106** (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity; (4) actual damages; (5) publicity must be highly offensive to a reasonable person; and (6) publicity must be about the plaintiff. *See* Restatement (Second) of Torts § 652E; *see also Bueno,* 54 P.3d at 899-900. Defamation has the following five elements: (1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory. *See* Restatement (Second) of Torts §§ 558B, 580A-580B. Except for the distinction between publicity that is "highly offensive" and a publication that is "defamatory," which we will discuss in more detail below, a comparison reveals that the elements of these two torts are remarkably similar.

B. Recovery for True Statements that Give a False Impression

Despite the apparent similarity in the elements, one argument often advanced to support the recognition of false light is that, unlike defamation, it allows recovery for literally true statements that create a false

impression. *See, e.g., Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781, 787 (1989); *see also Straub v. Lehtinen, Vargas & Riedi, P.A.*, 980 So.2d 1085, 1086-87 (Fla. 4th DCA 2007)(stating that a false light cause of action could be based on the publication of true facts that create a false impression); *Heekin v. CBS Broad., Inc.*, 789 So.2d 355, 358 (Fla. 2d DCA 2001). For example, in *Heekin*,which appears to be the first appellate case in Florida that directly involved a cause of action for false light and discussed the tort in detail, the plaintiff alleged that a broadcast falsely portrayed him as a spouse abuser by juxtaposing an interview with his former spouse along with stories and pictures of women who had been abused and killed by domestic partners. 789 So.2d at 357 ("Heekin's complaint alleged that the specific facts about Heekin contained in the broadcast were true, but that the juxtaposition of these facts with the other stories created the false impression that Heekin had abused and battered his wife and children."). The Restatement also provides for false light recovery in cases like the present one, where statements could be literally true but juxtaposed in such a manner as to create a false impression. Restatement (Second) of Torts § 652E cmt. b (illustrating that a taxi driver whose photograph is used in a news article about drivers who cheat the public on fares has a claim for false light because the article implies that he engages in this practice).

Although proponents often argue that allowing recovery for these types of true statements justifies the necessity of false light, defamation already recognizes the concept that literally true statements can be defamatory where they create a false impression. This variation is known as defamation by implication and has a longstanding history in defamation law. . . [***1107**]

Relying on such longstanding precedent, Jews for Jesus and the amici for the media contend that Florida already recognizes a cause of action for "defamation by implication." Although this Court has never directly discussed defamation by implication, district courts in this state have recognized the tort as a valid variation of defamation. *See, e.g., Boyles v. Mid-Fla. Television Corp.*, 431 So.2d 627 (Fla. 5th DCA 1983)(reversing dismissal of libel per se claim based on statements that implied that plaintiff was a suspect in the death of the child, was a habitual tormentor of retarded patients, and had raped a patient in his care), *approved*, 467 So.2d 282 (Fla.1985); *Brown v. Tallahassee Democrat, Inc.*, 440 So.2d 588 (Fla. 1st DCA 1983) (reversing trial court's dismissal of plaintiff's complaint that defendant published plaintiff's photograph in a story about a murder in which the plaintiff was not involved but the juxtaposition of the photograph implied his association with the murder). For example, the First District Court of Appeal held that false light should be governed by the same statute of limitations as defamation, rejecting the assertion that only false light claims can be based on statements that are true. *Gannett Co. v. Anderson*, 947 So.2d 1, 11 (Fla. 1st DCA 2006), *approved in part*, 994 So.2d 1048 (Fla. 2008). Citing its previous decision in *Brown* and the Fifth District's decision in *Boyles*, the First District explained that the "fallacy in this argument is that a claim of libel can also be asserted on the theory that the defamatory fact was implied." *Id.*

In addition, our own standard jury instructions state that in a claim of defamation, a "statement is substantially true *if its substance or gist* conveys essentially the same meaning that the truth would have conveyed. In making this determination, you should consider the context in which the statement is made and disregard any minor inaccuracies that do not affect the substance of the statement." ***1108** *Standard Jury Instructions-Civil Cases (No. 00-1)*, 795 So.2d 51, 57 (Fla.2001) (emphasis added). The legal significance of the "gist" of a publication was noted in W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 116, at 117 (5th ed. Supp.1988), which stated that while defamation law shields publishers from liability for minor factual inaccuracies, "it also works in reverse, to impose liability upon the defendant who has the details right but the 'gist' wrong." Simply put, "if the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts, he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct." *Id.* (footnotes omitted).

We agree with petitioner and its amici that defamation by implication is a well-recognized species of defamation that is subsumed within the tort of defamation. All of the protections of defamation law that are afforded to the media and private defendants are therefore extended to the tort of defamation by implication. *See, e.g., Locricchio v. Evening News Ass'n*, 438 Mich. 84, 476 N.W.2d 112, 133-34 (1991)(stating that defamation by implication claims must conform to the First Amendment principles of general defamation law). [FN13] Because defamation by implication applies in circumstances where literally true statements are conveyed in such a way as to create a false impression, we conclude that there is no meaningful distinction on that basis to justify recognition of false light as a separate tort.

FN13. We have carefully considered the risk of constitutional infringement of free speech by imposing liability for publication of a true statement. Indeed, the Florida Constitution states: In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated. Art. I, § 4, Fla. Const. However, in a defamation by implication claim, the "matter charged as defamatory" is not the literally true statement, but the false impression given by the juxtaposition or omission of facts. Accordingly, truth remains an available defense to defendants who can prove that the defamatory implication is true.

C. Nature of the Interests Protected

Although there is substantial overlap with defamation, proponents often argue that an important distinction lies in the nature of the interests sought to be protected. As the Restatement explains, it is "not ... necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position." *See* Restatement (Second) of Torts § 652E cmt. b. For the tort of false light, the standard is whether the statement is highly offensive to a reasonable person. Id. § 652E(a). Conversely, a defamatory statement is one ***1109** that tends to harm the reputation of another by lowering him or her in the estimation of the community or, more broadly stated, one that exposes a plaintiff to hatred, ridicule, or contempt or injures his business or reputation or occupation. . .

The use of a different standard, which is the main distinction between the elements of false light and defamation, is the theoretical mechanism for protecting the two different interests at issue. A false light plaintiff must prove that the publicity would be "highly offensive to a reasonable person," whereas a defamation plaintiff must prove injury to his or her reputation in the community. As explained by the Ohio Supreme Court in recognizing false light, "in defamation cases the interest sought to be protected is the*objective* one of reputation, either economic, political, or personal, in the outside world. In privacy cases the interest affected is the *subjective* one of injury to [the] inner person." *Welling v. Weinfeld,* 113 Ohio St.3d 464, 866 N.E.2d 1051, 1057 (2007) (emphases added) (quoting *Crump v. Beckley Newspapers, Inc.,* 173 W.Va. 699, 320 S.E.2d 70, 83 (1984)).

We acknowledge the nature of the interests to be protected is always a relevant concern in deciding whether to recognize a cause of action. As we stated in *Cason,* it is the Court's duty in this realm to ensure that there is "protection of the individual in the enjoyment of all of his inherent and essential rights and to afford a legal remedy for their invasion." 20 So.2d at 250. Therefore, if there is a unique interest that could be protected by false light, that certainly might be one reason for deciding to recognize the tort. However, if the interest is not unique and is adequately addressed by defamation, then that would militate against the need for the tort.

In this instance, although the standard may be different in principle, it may be a distinction without a difference in practice because conduct that defames will often be highly offensive to a reasonable person, just as conduct that is highly offensive will often result in injury to one's reputation. *See Bueno,* 54 P.3d at 902. As noted by the Colorado Supreme Court:

We believe that recognition of the different interests protected rests primarily on parsing a too subtle distinction between an individual's personal sensibilities and his or her reputation in the community. In fact, the United States Supreme Court trampled any such subtleties in *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). " 'The interest protected' in permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation, with the same overtones of mental distress as in defamation.' " *Id.* at 573, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (quoting Prosser,*supra,* at 400.) ... False statements that a plaintiff finds "highly offensive" will generally either portray that plaintiff negatively or attack his conduct or character. At the same time, publicized statements that are disparaging and false satisfy the elements of defamation. Thus, the same publications that defame are likely to offend, and publications that offend are likely to defame.

Bueno, 54 P.3d at 902 (citation omitted).

Moreover, the interests are even less distinct when considering the fact that a false light plaintiff may also recover damages for "harm to his reputation," even though false light originally existed to compensate a plaintiff for an injury to their inner and personal feelings or emotional***1110** distress. See Restatement (Second) of Torts § 652H,

cmt. a. This mirrors the harm that defamation law seeks to prevent, which has led some courts to conclude that while the torts are theoretically dissimilar, they are almost identical when put into practice . . .

On the other hand, the very fact that false light is defined in subjective terms is one of the main causes for concern because the type of conduct prohibited is difficult to define. Unlike defamation, which has a defined body of case law and applicable restrictions that objectively proscribe conduct with "relative clarity and certainty," false light and its subjective standard create a moving target whose definition depends on the specific locale in which the conduct occurs or the particular sensitivities of the day. As we now discuss, utilizing a subjective standard that "fails to draw reasonably clear lines between lawful and unlawful conduct" may impermissibly restrict free speech under the First Amendment. *Cain*, 878 S.W.2d at 584.

D. First Amendment Implications

As noted by the United States Supreme Court, "[o]ur profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)). "Whatever is added to the field of libel is taken from the field of free debate." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The same can also be said for the tort of false light invasion of privacy. Indeed, this Court recognized in *Cason* that there was an important need to balance the right to be let alone against the legitimate interests flowing from free speech and free press. 20 So.2d at 251.

However, the "highly offensive to a reasonable person" standard runs the risk of chilling free speech because the type of conduct prohibited is not entirely clear:

Because tort law is intended both to recompense wrongful conduct and to prevent it, it is important that it be clear in its identification of that wrongful conduct. The tort of false light fails that test. The sole area in which it differs from defamation is an area fraught with ambiguity and subjectivity. Recognizing "highly offensive" information, even framed within the context of what a reasonable person would find highly offensive, necessarily involves a subjective component. The publication of highly ***1111** offensive material is more difficult to avoid than the publication of defamatory information that damages a person's reputation in the community. In order to prevent liability under a false light tort, the media would need to anticipate whether statements are "highly offensive" to a reasonable person of ordinary sensibilities even though their publication does no harm to the individual's reputation. To the contrary, defamatory statements are more easily recognizable by an author or publisher because such statements are those that would damage someone's reputation in the community. *In other words, defamation is measured by its results; whereas false light invasion of privacy is measured by perception.*

Bueno, 54 P.3d at 903 (emphasis added). The Colorado Supreme Court ultimately refused to recognize false light because it "is too amorphous a tort" and "risks inflicting an unacceptable chill on those in the media seeking to avoid liability." *Id.* at 904. This sentiment was echoed by the Texas Supreme Court:

The Restatement adds an element not associated with defamation, the requirement that the statement places the subject in a false light "highly offensive" to the reasonable person. The distinction fails to draw reasonably clear lines between lawful and unlawful conduct, however. "A law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process." *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)(classification of speech as "outrageous" for suits for intentional infliction of emotional distress does not provide a meaningful standard, and would allow jury to impose damages on the basis of the jurors' tastes or views). Thus, the uncertainty of not knowing what speech may subject the speaker or writer to liability would have an unacceptable chilling effect on freedom of speech.

Cain, 878 S.W.2d at 584.

In addition, many safeguards and privileges have been established throughout the years that have effectively balanced the right of individuals to be free from defamatory statements against the rights guaranteed by the First Amendment to freedom of expression . . . [***1112**]

Although defamation actions are governed by these extensive protections, the same cannot be said for actions in false light. Without these protections that have slowly developed over the years, recognizing false light could persuade plaintiffs to circumvent these safeguards in order to ensure recovery, even though the same conduct could equally be remedied under defamation law. The Restatement echoes this concern:

When the false publicity is also defamatory so that either action can be maintained by the plaintiff, 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 upon a different theory of later origin, in the development of which the attention of the courts has not been directed to the limitations.

As yet there is little authority on this issue. The answers obviously turn upon the nature of the particular restrictive rule, the language of a particular statute and the circumstances of the case, and no generalization can be made.

Restatement (Second) of Torts § 652E cmt. e.

We acknowledge that this risk could be alleviated by simply extending all of the defamation safeguards to actions for false light, much as some courts in other jurisdictions have done . . . However, we conclude that it is more prudent for the Florida legislature to address these issues by statute, such as the application of privileges, the prerequisites to suit, and the governing statute of limitations . . . Furthermore, because many statements could form the basis of actions for either defamation or ***1113** false light, "no useful purpose would be served by the separate tort if these restrictions [we]re imposed." *Cain,* 878 S.W.2d at 582.

E. Rejection Of The False Light Tort

Based upon our review of the law in Florida and in many other jurisdictions, we simply cannot ignore the significant and substantial overlap between false light and defamation. Although we acknowledge that a majority of the states have recognized the false light cause of action, we are struck by the fact that our review of these decisions has revealed no case, nor has one been pointed out to us, in which a judgment based solely on a false light cause of action was upheld. In fact, as exemplified by the Texas Supreme Court's decision in *Cain,* many of the decisions reveal that the cause of action could have been brought as, or was included as an alternative to, a claim for defamation. *See* 878 S.W.2d at 581 (noting that all of the false light claims brought in Texas "could have been brought ... under another legal theory," and refusing to recognize false light "when recovery for that tort is substantially duplicated by torts [such as defamation] already established in [Texas]"). As one commentator concluded, after reviewing six hundred false light cases through the country, false light most often duplicates defamation and "there is not even a single good case in which false light can be clearly identified as adding anything distinctive to the law." J. Clark Kelso, *False Light Privacy: A Requiem,* 32 Santa Clara L.Rev. 783, 785 (1992). Our own review of cases in Florida reveals a similar conclusion.

These observations lead us to two competing conclusions. On the one hand, recognizing the tort would apparently not open the proverbial floodgates to false light claims. Yet, the fact that we can find no judgment that has been upheld by an appellate court solely on the basis of false light leads us to conclude that the absence of false light does not create any significant void in the law. Indeed, there are relatively few scenarios where defamation is inadequate and false light provides a potential for relief. The Restatement discusses one such example:

A is a war hero, distinguished for bravery in a famous battle. B makes and exhibits a motion picture concerning A's life, in which he inserts a detailed narrative of a fictitious private life attributed to A, including a non-existent romance with a girl. B knows this matter to be false. Although A is not defamed by the motion picture, B is subject to liability to him for invasion of privacy.

Restatement (Second) of Torts § 652E cmt. b, illus. 5. Another illustration may be the portrayal of the plaintiff as suffering from a terminal illness, which is "not necessarily defamatory, but [is] potentially highly offensive." ****1114*** *Bueno,* 54 P.3d at 902-03. However, to the extent that there may be a subset of cases where there is a wrong without a remedy, we consider that interest too tenuous to be recognized through the tort, most especially in light of the First Amendment concerns. In fact, it appears that the reason there has recently been a spate of false

light claims in this State may be because of an attempt to circumvent the shorter statute of limitations for defamation as well as the other statutory prerequisites for a defamation claim . . .

We once again acknowledge that it is our duty to ensure the "protection of the individual in the enjoyment of all of his inherent and essential rights and to afford a legal remedy for their invasion." *Cason,* 20 So.2d at 250. However, because the benefit of recognizing the tort, which only offers a distinct remedy in relatively few unique situations, is outweighed by the danger of unreasonably impeding constitutionally protected speech, we decline to recognize a cause of action for false light invasion of privacy . . . [***1115**]

It is so ordered.

***1116** QUINCE, C.J., ANSTEAD and LEWIS, JJ., concur.

WELLS, J., concurs in part and dissents in part with an opinion. [OPINION OMITTED].

CANADY and POLSTON, JJ., did not participate.

WELLS, J., concurring in part and dissenting in part. [OPINION OMITTED].

582 N.W.2d 231, 26 Media L. Rep. 2175

Lake v. Wal-Mart Stores, Inc.

Supreme Court of Minnesota.

Elli LAKE, et al., pet., Appellants,

v.

WAL–MART STORES, INC., et al., Respondents.

No. C7–97–263.
July 30, 1998.

OPINION

BLATZ, Chief Justice.

Elli Lake and Melissa Weber appeal from a dismissal of their complaint for failure to state a claim upon which relief may be granted. The district court and court of appeals held that Lake and Weber's complaint alleging intrusion upon seclusion, appropriation, publication of private facts, and false light publicity could not proceed because Minnesota does not recognize a common law tort action for invasion of privacy. We reverse as to the claims of intrusion upon seclusion, appropriation, and publication of private facts, but affirm as to false light publicity.

Nineteen-year-old Elli Lake and 20–year–old Melissa Weber vacationed in Mexico in March 1995 with Weber's sister. During the vacation, Weber's sister took a photograph of Lake and Weber naked in the shower together. After their vacation, Lake and Weber ***233** brought five rolls of film to the Dilworth, Minnesota Wal–Mart store and photo lab. When they received their developed photographs along with the negatives, an enclosed written notice stated that one or more of the photographs had not been printed because of their "nature."

In July 1995, an acquaintance of Lake and Weber alluded to the photograph and questioned their sexual orientation. Again, in December 1995, another friend told Lake and Weber that a Wal–Mart employee had shown her a copy of the photograph. By February 1996, Lake was informed that one or more copies of the photograph were circulating in the community.

Lake and Weber filed a complaint against Wal–Mart Stores, Inc. and one or more as-yet unidentified Wal–Mart employees on February 23, 1996, alleging the four traditional invasion of privacy torts—intrusion upon seclusion, appropriation, publication of private facts, and false light publicity. Wal–Mart denied the allegations and made a motion to dismiss the complaint under Minn. R. Civ. P. 12.02, for failure to state a claim upon which relief may be granted. The district court granted Wal–Mart's motion to dismiss, explaining that Minnesota has not recognized any of the four invasion of privacy torts. The court of appeals affirmed.

Whether Minnesota should recognize any or all of the invasion of privacy causes of action is a question of first impression in Minnesota.[FN1] The Restatement (Second) of Torts outlines the four causes of action that comprise the tort generally referred to as invasion of privacy. Intrusion upon seclusion occurs when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns * * * if the intrusion would be highly offensive to a reasonable person."[FN2] Appropriation protects an individual's identity and is committed when one "appropriates to his own use or benefit the name or likeness of another." [FN3] Publication of private facts is an invasion of privacy when one "gives publicity to a matter concerning the private life of another * * * if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." [FN4] False light publicity occurs when one "gives publicity to a matter concerning another that places the other before the public in a false light * * * if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." [FN5]

FN1. Previous cases have addressed the right to privacy torts only tangentially, in dicta. *See* *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (1996); *Hendry v. Conner*, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975).

FN2. Restatement (Second) of Torts, § 652B (1977).

FN3. *Id.* at § 652C.

FN4. *Id.* at § 652D.

FN5. *Id.* at § 652E.

I.

This court has the power to recognize and abolish common law doctrines. The common law is not composed of firmly fixed rules. Rather, as we have long recognized, the common law:

> is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men. It is the growth of ages, and an examination of many of its principles, as enunciated and discussed in the books, discloses a constant improvement and development in keeping with advancing civilization and new conditions of society. Its guiding star has always been the rule of right and wrong, and in this country its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs.[FN7]

FN7. *State ex rel. City of Minneapolis v. St. Paul, M. & M. Ry. Co.*, 98 Minn. 380, 400–01, 108 N.W. 261, 268 (1906) (citations omitted).

***234** As society changes over time, the common law must also evolve:

> It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions.[FN8]

FN8. *Tuttle v. Buck*, 107 Minn. 145, 148–49, 119 N.W. 946, 947 (1909).

To determine the common law, we look to other states as well as to England. [FN9]

FN9. *See Shaughnessy v. Eidsmo*, 222 Minn. 141, 23 N.W.2d 362 (1946), *Jacobs v. Jacobs*, 136 Minn. 190, 161 N.W. 525 (1917); *Seymour v. McAvoy*, 121 Cal. 438, 53 P. 946, 947 (1898).

The tort of invasion of privacy is rooted in a common law right to privacy first described in an 1890 law review article by Samuel Warren and Louis Brandeis.[FN10] The article posited that the common law has always protected an individual's person and property, with the extent and nature of that protection changing over time. The fundamental right to privacy is both reflected in those protections and grows out of them:

FN10. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L.Rev. 193 (1890).

> Thus, in the very early times, the law gave a remedy only for physical interference with life and property, for trespass *vi et armis.* Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of a man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.[FN11]

FN11. *Id.* at 193.

Although no English cases explicitly articulated a "right to privacy," several cases decided under theories

of property, contract, or breach of confidence also included invasion of privacy as a basis for protecting personal violations.[FN12] The article encouraged recognition of the common law right to privacy, as the strength of our legal system lies in its elasticity, adaptability, capacity for growth, and ability "to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong." [FN13]

FN12. *Id.* at 203–10.

FN13. *Id.* at 213, n. 1.

The first jurisdiction to recognize the common law right to privacy was Georgia.[FN14] In *Pavesich v. New England Life Ins. Co.*, the Georgia Supreme Court determined that the "right of privacy has its foundation in the instincts of nature," and is therefore an "immutable" and "absolute" right "derived from natural law." [FN15] The court emphasized that the right of privacy was not new to Georgia law, as it was encompassed by the well-established right to personal liberty.[FN16]

FN14. 122 Ga. 190, 50 S.E. 68 (1905).

FN15. *Id.* 50 S.E. at 69–70.

FN16. *Id.* at 70.

Many other jurisdictions followed Georgia in recognizing the tort of invasion of privacy, citing Warren and Brandeis' article and *Pavesich.* Today, the vast majority of jurisdictions now recognize some form of the right to privacy. Only Minnesota, North Dakota, and Wyoming have not yet recognized any of the four privacy torts. Although New York and Nebraska courts have declined to recognize a common law basis for the right to privacy and instead provide statutory protection, ***235** [FN17] we reject the proposition that only the legislature may establish new causes of action. The right to privacy is inherent in the English protections of individual property and contract rights and the "right to be let alone" is recognized as part of the common law across this country. Thus, it is within the province of the judiciary to establish privacy torts in this jurisdiction.

FN17. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442, 447 (1902); *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803, 806 (1955).

Today we join the majority of jurisdictions and recognize the tort of invasion of privacy. The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.

Here Lake and Weber allege in their complaint that a photograph of their nude bodies has been publicized. One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection. Therefore, without consideration of the merits of Lake and Weber's claims, we recognize the torts of intrusion upon seclusion, appropriation, and publication of private facts. Accordingly, we reverse the court of appeals and the district court and hold that Lake and Weber have stated a claim upon which relief may be granted and their lawsuit may proceed.

II.

We decline to recognize the tort of false light publicity at this time. We are concerned that claims under false light are similar to claims of defamation, and to the extent that false light is more expansive than defamation, tension between this tort and the First Amendment is increased.

False light is the most widely criticized of the four privacy torts and has been rejected by several jurisdictions.[FN18] Most recently, the Texas Supreme Court refused to recognize the tort of false light invasion of privacy because defamation encompasses most false light claims and false light "lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law." [FN19] Citing "numerous procedural and substantive hurdles" under Texas statutory and common law that limit defamation actions, such as privileges for public meetings, good faith, and important public interest and mitigation factors, the court concluded that these restrictions

"serve to safeguard the freedom of speech." [FN20] Thus to allow recovery under false light invasion of privacy, without such safeguards, would "unacceptably derogate constitutional free speech." [FN21] The court rejected the solution of some jurisdictions—application of the defamation restrictions to false light—finding instead that any benefit to protecting nondefamatory false speech was outweighed by the chilling effect on free speech.[FN22]

FN18. *See, e.g.,* *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475 (Mo.1986); *Renwick v. News and Observer Pub. Co.*, 310 N.C. 312, 312 S.E.2d 405 (1984); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex.1994).

FN19. *Cain*, 878 S.W.2d at 579–80.

FN20. *Id.* at 581–82.

FN21. *Id.* at 581.

FN22. *Id.* at 584.

We agree with the reasoning of the Texas Supreme Court. Defamation requires a false statement communicated to a third party that tends to harm a plaintiff's reputation.[FN23] False light requires publicity, to a large number of people, of a falsity that places the plaintiff in a light that a reasonable person would find highly offensive.[FN24] The primary difference between defamation and false light is that defamation addresses harm to reputation in the external world, while false light protects harm to one's inner self.[FN25] Most ***236** false light claims are actionable as defamation claims; because of the overlap with defamation and the other privacy torts, a case has rarely succeeded squarely on a false light claim. [FN2]

FN23. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn.1980).

FN24. Restatement (Second) of Torts, § 652E.

FN25. *See Sullivan*, 709 S.W.2d at 479.

FN26. J. Clark Kelso, *False Light Privacy: A Requiem*, 32 Santa Clara L.Rev. 783, 785–86 (1992).

Additionally, unlike the tort of defamation, which over the years has become subject to numerous restrictions to protect the interest in a free press and discourage trivial litigation,[FN27] the tort of false light is not so restricted. Although many jurisdictions have imposed restrictions on false light actions identical to those for defamation, we are not persuaded that a new cause of action should be recognized if little additional protection is afforded plaintiffs.

FN27. For privileges against defamation claims, *see, e.g.*, Minn.Stat. § 548.06 (1996) (providing that published retraction may mitigate damages); *Johnson v. Dirkswager*, 315 N.W.2d 215 (Minn.1982) (absolute privilege in defamation for public service or administration of justice); *Mahnke v. Northwest Publications Inc.*, 280 Minn. 328, 160 N.W.2d 1 (1968) (conditional privilege regarding public officials and candidates for office—official must prove actual malice); *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 203 N.W. 974 (1925) (privilege for communication made in good faith when publisher has an interest or duty).

We are also concerned that false light inhibits free speech guarantees provided by the First Amendment. As the Supreme Court remarked in *New York Times Co. v. Sullivan:* "Whatever is added to the field of libel is taken from the field of free debate." [FN28] Accordingly, we do not want to:

FN28. 376 U.S. 254, 272, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

> create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter.[FN29]

FN29. *Time, Inc. v. Hill*, 385 U.S. 374, 389, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

Although there may be some untrue and hurtful publicity that should be actionable under false light, the risk of chilling speech is too great to justify protection for this small category of false publication not protected under defamation.

Thus we recognize a right to privacy present in the common law of Minnesota, including causes of action in tort for intrusion upon seclusion, appropriation, and publication of private facts, but we decline to recognize the tort of false light publicity. This case is remanded to the district court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part.

TOMLJANOVICH, Justice (dissenting).

I respectfully dissent. If the allegations against Wal–Mart are proven to be true, the conduct of the Wal–Mart employees is indeed offensive and reprehensible. As much as we deplore such conduct, not every contemptible act in our society is actionable.

I would not recognize a cause of action for intrusion upon seclusion, appropriation or publication of private facts. "Minnesota has never recognized, either by legislative or court action, a cause of action for invasion of privacy." *Hendry v. Conner*, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975). As recently as 1996, we reiterated that position. *See Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (Minn.1996).

An action for an invasion of the right to privacy is not rooted in the Constitution. "[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' " *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Those privacy rights that have their origin in the Constitution are much more fundamental rights of privacy—marriage and reproduction. *See Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (penumbral rights of privacy and repose protect notions of privacy surrounding the marriage relationship and reproduction).

We have become a much more litigious society since 1975 when we acknowledged that we have never recognized a cause of action for invasion of privacy. We should be ***237** even more reluctant now to recognize a new tort.

In the absence of a constitutional basis, I would leave to the legislature the decision to create a new tort for invasion of privacy.

STRINGER, Justice.

I join in the dissent of Justice TOMLJANOVICH.

418 U.S. 323, 94 S.Ct. 2997

Gertz v. Welch

Supreme Court of the United States

Elmer GERTZ, Petitioner,

v.

ROBERT WELCH, INC.

No. 72-617.
Argued Nov. 14, 1973.
Decided June 25, 1974.

Opinion

Mr. Justice POWELL delivered the opinion of the Court.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen. 410 U.S. 925, 93 S.Ct. 1355, 35 L.Ed.2d 585 (1973).

I

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of American Opinion commissioned an article on the murder trial of Officer Nuccio. For this purpose he engaged a regular contributor to the magazine. In March 1969 respondent published the resulting article under the title 'FRAME-UP: Richard ***326** Nuccio And The War On Police.' The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the Communist campaign against the police.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but he neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the 'frame-up.' According to the article, the police file on petitioner took 'a big, Irish cop to lift.' The article stated that petitioner had been an official of the 'Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government.' It labeled Gertz a 'Leninist' and a 'Communist-fronter.' It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that 'probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention.'

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a 'leninist' or a 'Communist-fronter.' And he had never been a

member of the 'Marxist League for Industrial Democracy' or the 'Intercollegiate Socialist Society.'

***327** The managing editor of American Opinion made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction ****3001** stating that the author had 'conducted extensive research into the Richard Nuccio Case.' And he included in the article a photograph of petitioner and wrote the caption that appeared under it: 'Elmer Gertz of Red Guild harasses Nuccio.' Respondent placed the issue of American Opinion containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. Before filing an answer, respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted, apparently on the ground that petitioner failed to allege special damages. But the court ruled that statements contained in the article constituted libel per se under Illinois law and that consequently petitioner need not plead special damages. 306 F.Supp. 310 (1969).

After answering the complaint, respondent filed a pretrial motion for summary judgment, claiming a constitutional privilege against liability for defamation. It asserted that petitioner was a public official or a public figure and that the article concerned an issue of public interest and concern. For these reasons, respondent argued, it was entitled to invoke the privilege enunciated in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Under this rule respondent would escape liability unless ***328** petitioner could prove publication of defamatory falsehood 'with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' Id., at 279-280, 84 S.Ct., at 726. Respondent claimed that petitioner could not make such a showing and submitted a supporting affidavit by the magazine's managing editor. The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author's reputation and on his prior experience with the accuracy and authenticity of the author's contributions to American Opinion.

The District Court denied respondent's motion for summary judgment in a memorandum opinion of September 16, 1970 . . . The jury awarded $50,000 to petitioner. ****3002** . . . the court entered judgment for respondent notwithstanding the jury's verdict . . .

* * *

[3003 *332]** The Court of Appeals therefore affirmed, 471 F.2d 801 (1972). For the reasons stated below, we reverse.

II

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. The Court considered this question on the rather different set of facts presented in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971). Rosenbloom, a distributor of nudist magazines, was arrested for selling allegedly obscene material while making ***333** a delivery to a retail dealer. The police obtained a warrant and seized his entire inventory of 3,000 books and magazines. He sought and obtained an injunction prohibiting further police interference with his business. He then sued a local radio station for failing to note in two of its newscasts that the 3,000 items seized were only 'reportedly' or 'allegedly' obscene and ****3004** for broadcasting references to 'the smut literature racket' and to 'girlie-book peddlers' in its coverage of the court proceeding for injunctive relief. He obtained a judgment against the radio station, but the Court of Appeals for the Third Circuit held the New York Times privilege applicable to the broadcast and reversed. 415 F.2d 892 (1969).

This Court affirmed the decision below, but no majority could agree on a controlling rationale. The eight Justices who participated in Rosenbloom announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case, they also reflect divergent traditions of thought about the general problem of reconciling the law of

defamation with the First Amendment. One approach has been to extend the New York Times test to an expanding variety of situations. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation. To place our holding in the proper context, we preface our discussion of this case with a review of the several Rosenbloom opinions and their antecedents.

In affirming the trial court's judgment in the instant case, the Court of Appeals relied on Mr. Justice Brennan's ***334** conclusion for the Rosenbloom plurality that 'all discussion and communication involving matters of public or general concern,' 403 U.S., at 44, 91 S.Ct., at 1820, warrant the protection from liability for defamation accorded by the rule originally enunciated in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). There this Court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation. The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law-enforcement officials. A police commissioner established in state court that certain misstatements in the advertisement referred to him and that they constituted libel per se under Alabama law. This showing left the Times with the single defense of truth, for under Alabama law neither good faith nor reasonable care would protect the newspaper from liability. This Court concluded that a 'rule compelling the critic of official conduct to guarantee the truth of all his factual assertions' would deter protected speech, id., at 279, 84 S.Ct., at 725, and announced the constitutional privilege designed to counter that effect:

'The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' Id., at 279-280, 84 S.Ct. at 726. [FN6]

> [FN6] New York Times and later cases explicated the meaning of the new standard. In New York Times the Court held that under the circumstances the newspaper's failure to check the accuracy of the advertisement against news stories in its own files did not establish reckless disregard for the truth. 376 U.S., at 287-288, 84 S.Ct., at 729-730. In St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), the Court equated reckless disregard of the truth with subjective awareness of probable falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' In Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967), the Court emphasized the distinction between the New York Times test of knowledge of falsity or reckless disregard of the truth and 'actual malice' in the traditional sense of ill-will. Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), made plain that the new standard applied to criminal libel laws as well as to civil actions and that it governed criticism directed at 'anything which might touch on an official's fitness for office.' Id., at 77, 85 S.Ct., at 217. Finally, in Rosenblatt v. Baer, 383 U.S. 75, 85, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966), the Court stated that 'the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct or governmental affairs.'
>
> In Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), the Court applied the New York Times standard to actions under an unusual state statute. The statute did not create a cause of action for libel. Rather, it provided a remedy for unwanted publicity. Although the law allowed recovery of damages for harm caused by exposure to public attention rather than by factual inaccuracies, it recognized truth as a complete defense. Thus, nondefamatory factual errors could render a publisher liable for something akin to invasion of privacy. The Court ruled that the defendant in such an action could invoke the New York Times privilege regardless of the fame or anonymity of the plaintiff. Speaking for the Court, Mr. Justice Brennan declared that this holding was not an extension of New York Times but rather a parallel line of reasoning applying that standard to this discrete context:
>
> 'This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in New York Times guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. It

therefore serves no purpose to distinguish the facts here from those in New York Times. Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Cf. Rosenblatt v. Baer, 383 U.S. 75, 91, 86 S.Ct. 669, 15 L.Ed.2d 597 (Stewart, J., concurring).' 385 U.S., at 390-391, 87 S.Ct., at 543.

[3005 *335]** Three years after New York Times, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of 'public figures.' This extension ***336** was announced in Curtis Publishing Co. v. Butts and its companion, Associated Press v. Walker, 388 U.S. 130, 162, 87 S.Ct. 1975, 1995, 18 L.Ed.2d 1094 (1967). The first case involved the Saturday Evening Post's charge that Coach Wally Butts of the University of Georgia had conspired with Coach 'Bear' Bryant of the University of Alabama to fix a football game between their respective schools. Walker involved an erroneous Associated Press account of former Major General Edwin Walker's participation in a University of Mississippi campus riot. Because Butts was paid by a private alumni association and Walker had resigned from the Army, neither could be classified as a 'public official' under New York Times. Although Mr. Justice Harlan announced the result in both cases, a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the New York Times test should apply to criticism of 'public figures' as well as 'public officials.' The Court extended the constitutional ***337** privilege announced in that case to protect defamatory criticism of nonpublic persons who 'are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.' Id., at 164, 87 S.Ct., at 1996 (Warren, C.J., concurring in result).

In his opinion for the plurality in ****3006** Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), Mr. Justice Brennan took the New York Times privilege one step further. He concluded that its protection should extend to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. He abjured the suggested distinction between public officials and public figures on the one hand and private individuals on the other. He focused instead on society's interest in learning about certain issues: 'If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved.' Id., at 43, 91 S.Ct., at 1819. Thus, under the plurality opinion, a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the New York Times test.

Two members of the Court concurred in the result in Rosenbloom but departed from the reasoning of the plurality. Mr. Justice Black restated his view, long shared by Mr. Justice Douglas, that the First Amendment cloaks the news media with an absolute and indefeasible immunity from liability for defamation. Id., at 57, 91 S.Ct., at 1826. Mr. Justice White concurred on a narrower ground. Ibid. He concluded that 'the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public ***338** servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view.' Id., at 62, 91 S.Ct., at 1829. He therefore declined to reach the broader questions addressed by the other Justices.

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[*339 **3007]

III

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but ***340** on the competition of other ideas. [FN8]

[FN8] As Thomas Jefferson made the point in his first Inaugural Address: 'If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.'

But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. New York Times Co. v. Sullivan, 376 U.S., at 270, 84 S.Ct., at 721. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942).

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' 4 J. Elliot, Debates on the Federal Constitution of 1787, p. 571 (1876). And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in New York Times Co. v. Sullivan, supra, 376 U.S., at 279, 84 S.Ct., at 725: 'Allowance of the defense of truth, ***341** with the burden of proving it on the defendant, does not mean that only false speech will be deterred.' The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. See New York Times Co. v. Sullivan, supra, at 293, 84 S.Ct., at 733 (Black, J., concurring); Garrison v. Louisiana, 379 U.S., at 80, 85 S.Ct., at 218 (1964) (Douglas, J., concurring); ****3008** Curtis Publishing Co. v. Butts, 388 U.S., at 170, 87 S.Ct., at 1999 (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name

'reflects no more than our basic concept of the essential dignity and worth of every human being-a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.' Rosenblatt v. Baer, 383 U.S. 75, 92, 86 S.Ct. 669, 679, 15 L.Ed.2d 597 (1966) (concurring opinion).

***342** Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, 'some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.' Curtis Publishing Co. v. Butts, supra, 388 U.S., at 152, 87 S.Ct., at 1990. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise. NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). To that end this Court has extended a measure of strategic protection to defamatory falsehood.

The New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test. Despite this ***343** substantial abridgment of the state law right to compensation for wrongful

hurt to one's reputation, the Court has concluded that the protection of the New York Times privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. New York Times Co. v. Sullivan, supra; Curtis Publishing Co. v. Butts, supra. We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the New York Times rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in ****3009** compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. As Mr. Justice Harlan hypothesized, 'it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed.' Rosenbloom v. Metromedia, Inc., 403 U.S., at 63, 91 S.Ct., at 1829 (footnote omitted). But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general ***344** application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help-using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private individuals normally enjoy. [FN9]

> [FN9] Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in Garrison v. Louisiana, 379 U.S., at 77, 85 S.Ct., at 217, the public's interest extends to 'anything ***345** which might touch on an official's fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.'

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

****3010** Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a rpivate individual. He has not accepted public office or assumed an 'influential role in ordering society.' Curtis

Publishing Co. v. Butts, 388 U.S., at 164, 87 S.Ct., at 1996 (Warren, C.J., concurring in result). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a ***346** legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not-to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' Rosenbloom v. Metromedia, Inc., 403 U.S., at 79, 91 S.Ct., at 1837. We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the New York Times privilege and the common law of strict liability for defamatory error. The 'public or general interest' test for determining the applicability of the New York Times standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of New York Times. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

***347** We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a ****3011** more equitable ***348** boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement 'makes substantial danger to reputation apparent.' This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

IV

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by New York Times. This conclusion is not based on a belief that the considerations which prompted the adoption of the New York Times privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. ***349** But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any ****3012** system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in

securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We ***350** need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

V

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[*352] In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the New York Times standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

It is ordered.

Reversed and remanded.

***353** Mr. Justice BLACKMUN, concurring.

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[3014 *354]**

Mr. Chief Justice BURGER, dissenting.

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[*355 **3015]

Mr. Justice DOUGLAS, dissenting.

The Court describes this case as a return to the struggle of 'defin(ing) the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.' It is indeed a struggle, once described by Mr. Justice Black as 'the same ***356** quagmire' in which the Court 'is now helplessly struggling in the field of obscenity.' Curtis Publishing Co. v. Butts, 388 U.S. 130, 171, 87 S.Ct. 1975, 2000, 18 L.Ed.2d 1094 (concurring opinion). I would suggest that the struggle is a quite hopeless one, for, in light of the command of the First Amendment, no 'accommodation' of its freedoms can be 'proper' except those made by the Framers themselves.

Unlike the right of privacy which, by the terms of the Fourth Amendment, must be accommodated with reasonable searches and seizures and warrants issued by magistrates, the rights of free speech and of a free press were protected by the Framers in verbiage whose prescription seems clear. I have stated before my view that the First Amendment would bar Congress from passing any libel law. This was the view held by Thomas Jefferson [FN2]

> [FN2] 1798 Jefferson stated:
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> '(The First Amendment) thereby guard(s) in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sancturary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. . . .' 8 The Works of Thomas Jefferson 464-465 (Ford ed. 1904) (emphasis added).

and it is one Congress has never challenged through enactment of a civil libel statute. The sole congressional attempt at this variety of First Amendment muzzle was in the Sedition Act of 1798-a criminal libel act never tested in this Court and one which expired by its terms three years after enactment. As President, Thomas Jefferson pardoned those who were convicted under the Act, and fines levied in its prosecution were repaid by Act of Congress. The general ***357** consensus was that the Act constituted a regrettable legislative exercise plainly in violation of the First Amendment.

With the First Amendment made applicable to the States through the Fourteenth, I do not see how States have any more ability to 'accommodate' freedoms of speech or of the press than does Congress. This is true whether the form of the accommodation is civil or criminal since '(w)hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.' New York Times Co. v. Sullivan, 376 U.S. 254, 277, 84 S.Ct. 710, 724, 11 L.Ed.2d 686. Like Congress, States are without power 'to use a civil libel law or any other law to impose damages for merely ****3016** discussing public affairs.' Id., at 295, 84 S.Ct., at 734 (Black, J., concurring).[FN6]

> [FN6] Since this case involves a discussion of public affairs, I need not decide at this point whether the First Amendment prohibits all libel actions. 'An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.' New York Times Co. v. Sullivan, 376 U.S. 254, 297, 84 S.Ct. 710, 735, 11 L.Ed.2d 686 (Black, J., concurring) (emphasis added). But 'public affairs' includes a great deal more than merely political affairs. Matters of science, economics, business, art, literature, etc., are all matters of interest to the general public. Indeed, any matter of sufficient general interest to prompt media coverage may be said to be a public affair. Certainly police killings, 'Communist conspiracies,' and the like qualify.
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> 'A more regressive view of free speech has surfaced but it has thus far gained no judicial acceptance. Solicitor General Bork has stated:
>
> 'Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.' Bork, Neutral Principles and Some First Amendment Problems, 47 Ind.L.J. 1, 20 (1971).

> According to this view, Congress, upon finding a painting aesthetically displeasing or a novel poorly written or a revolutionary new scientific theory unsound could constitutionally prohibit exhibition of the painting, distribution of the book or discussion of the theory. Congress might also proscribe the advocacy of the violation of any law, apparently without regard to the law's constitutionality. Thus, were Congress to pass a blatantly invalid law such as one prohibiting newspaper editorials critical of the Government, a publisher might be punished for advocating its violation. Similarly, the late Dr. Martin Luther King, Jr., could have been punished for advising blacks to peacefully sit in the front of buses or to ask for service in restaurants segregated by law.

***358** Continued recognition of the possibility of state libel suits for public discussion of public issues leaves the freedom of speech honored by the Fourteenth Amendment a diluted version of First Amendment protection. This view is only possible if one accepts the position that the First Amendment is applicable to the States only through the Due Process Clause of the Fourteenth, due process freedom of speech being only that freedom which this Court might deem to be 'implicit in the concept of ordered liberty.'[FN7]

> [FN7] See Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288. As Mr. Justice Black has noted, by this view the test becomes 'whether the government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, in the opinion of a majority of the Supreme Court, to justify the government's action in doing so. Such a doctrine can be used to justify almost any government suppression of First Amendment freedoms. As I have stated many times before, I cannot subscribe to this doctrine because I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field.' H. Black, A Constitutional Faith 52 (1969).

But the Court frequently has rested ***359** state free speech and free press decisions on the Fourteenth Amendment generally rather than on the Due Process Clause alone. The Fourteenth Amendment speaks not only of due process but also of 'privileges and immunities' of United States citizenship. I can conceive of no privilege or immunity with a higher claim to recognition ****3017** against state abridgment than the freedoms of speech and of the press. In our federal system we are all subject to two governmental regimes, and freedoms of speech and of the press protected against the infringement of only one are quite illusory. The identity of the oppressor is, I would think, a matter of relative indifference to the oppressed.

There can be no doubt that a State impinges upon free and open discussion when it sanctions the imposition of damages for such discussion through its civil libel laws. Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions. It is indeed this very type of speech which is the reason for the First Amendment since speech which arouses little emotion is little in need of protection. The vehicle for publication in this case was the American Opinion, a most controversial periodical which disseminates the views of the John Birch Society, an organization which many deem to be ***360** quite offensive. The subject matter involved 'Communist plots,' 'conspiracies against law enforcement agencies,' and the killing of a private citizen by the police. With any such amalgam of controversial elements pressing upon the jury, a jury determination, unpredictable in the most neutral circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage.

It is only the hardy publisher who will engage in discussion in the face of such risk, and the Court's preoccupation with proliferating standards in the area of libel increases the risks. It matters little whether the standard be articulated as 'malice' or 'reckless disregard of the truth' or 'negligence,' for jury determinations by any of those criteria are virtually unreviewable. This Court, in its continuing delineation of variegated mantles of First Amendment protection, is, like the potential publisher, left with only speculation on how jury findings were influenced by the effect the subject matter of the publication had upon the minds and viscera of the jury. The standard announced today leaves the States free to 'define for themselves the appropriate standard of liability for a publisher or broadcaster' in the circumstances of this case. This of course leaves the simple negligence standard as an option, with the jury free to impose damages upon a finding that the publisher failed to act as 'a reasonable man.' With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking.

Since in my view the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this

discussion of public affairs, I would affirm the judgment below.

***361** Mr. Justice BRENNAN, dissenting.

I agree with the conclusion, expressed in Part V of the Court's opinion, that, at the time of publication of respondent's article, petitioner could not properly have been viewed as either a 'public official' or 'public figure'; instead, respondent's article, dealing with an alleged conspiracy to discredit local police forces, concerned petitioner's purported involvement in 'an event of 'public or general interest.' Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 31-32, 91 S.Ct. 1811, 1814, 29 L.Ed.2d 296 (1971); see ante, at 3002 n. 4. I cannot agree, however, that free and robust debate-so essential to the proper functioning of our system of government-is permitted adequate 'breathing space,' N A A C P v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), when, as the Court holds, the States may impose all but strict liability for defamation if the defamed party is a private person and 'the substance of the defamatory statement 'makes substantial danger to reputation apparent.'' Ante, at 3011. I adhere to my view expressed ****3018** in Rosenbloom v. Metromedia, Inc., supra, that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only when we require States to apply the New York, Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.

The Court does not hold that First Amendment guarantees do not extend to speech concerning private persons' involvement in events of public or general interest. It recognizes that self-governance in this country perseveres because of our 'profound national commitment ***362** to the principle that debate on public issues should be uninhibited, robust, and wide-open.' Id., at 270, 84 S.Ct., at 721 (emphasis added). Thus, guarantees of free speech and press necessarily reach 'far more than knowledge and debate about the strictly official activities of various levels of government,' Rosenbloom v. Metromedia, Inc., supra, 403 U.S., at 41, 91 S.Ct., at 1818 for '(f)reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093 (1940).

* * *

Although acknowledging that First Amendment values are of no less significance when media reports concern private persons' involvement in matters of public concern, the Court refuses to provide, in such cases, the same level of constitutional protection that has been afforded the media in the context of defamation of public persons. The accommodation that this Court has established between free speech and libel laws in cases involving public officials and public figures-that defamatory falsehood be shown by clear and convincing evidence to have been published with knowledge of falsity or with reckless disregard of truth-is not apt, the Court holds, because ***363** the private individual does not have the same degree of access to the media to rebut defamatory comments as does the public person and he has not voluntarily exposed himself to public scrutiny.

*** * ***

[*365 **3020]

We recognized in New York Times Co. v. Sullivan, supra, 376 U.S. at 279, 84 S.Ct., at 725, that a rule requiring a critic of official conduct to guarantee the truth of all of his factual contentions would inevitably lead to self-censorship when ***366** publishers, fearful of being unable to prove truth or unable to bear the expense of attempting to do so, simply eschewed printing controversial articles. Adoption, by many States, of a reasonable-care standard in cases where private individuals are involved in matters of public interest-the probable result of today's decision-will likewise lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication . . .

* * *

[*369 **3022].

Mr. Justice WHITE, dissenting.

For some 200 years-from the very founding of the Nation-the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of ***370** state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.

But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will not be required.

I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. I do not suggest that the decision is illegitimate or beyond the bounds of judicial review, but it is an ill-considered exercise of the power entrusted to this Court, particularly when the ***371** Court has not had the benefit of briefs and argument addressed to most of the major issues which the Court now decides. I respectfully dissent.

* * *

II

[***389 **3027]** The Court does not contend, and it could hardly do so, that those who wrote the First Amendment intended to prohibit the Federal Government, within its sphere of influence in the Territories and the District of Columbia, from providing the private citizen a peaceful remedy for damaging falsehood. At the time of the adoption of the First Amendment, many of the consequences of libel law already described had developed, particularly the rule that libels and some slanders were so inherently injurious that they were actionable without special proof of damage to reputation. As the Court pointed out in Roth v. United States, 354 U.S. 476, 482, 77 S.Ct. 1304, 1307, 1 L.Ed.2d 1498 (1957), 10 of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free ***381** expression, and 13 of the 14 nevertheless provided for the prosecution of libels. Prior to the Revolution, the American Colonies had adopted the common law of libel. Contrary to some popular notions, freedom of the press was sharply curtailed in colonial America. Seditious libel was punished as a contempt by the colonial legislatures and as a criminal offense in the colonial courts.

Scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers. On the contrary,

'(i)t is conceded on all sides that the common-law rules that subjected the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitutions.' 2 T. Cooley, Constitutional Limitations 883 (8th ed. 1927).

Moreover, consistent with the Blackstone formula, these ***382** common-law actions did not abridge freedom of the press. See generally L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 247-248 (1960); Merin, Libel and the Supreme Court, 11 Wm. & Mary L.Rev. 371, 376 (1969); Hallen, ****3028** Fair Comment, 8 Tex.L.Rev. 41, 56 (1929). Alexander Meiklejohn, who accorded generous reach to the First Amendment, nevertheless acknowledged:

'No one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander. . . . All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the First Amendment. That amendment, then, we may take it for granted, does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech. It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is.' Political Freedom, The Constitutional Powers of the People 21 (1965).

Professor Zechariah Chafee, a noted First Amendment scholar, has persuasively argued that conditions in 1791 'do not arbitrarily fix the division between lawful and unlawful speech for all time.' Free Speech in the United States 14 (1954). At the same time, however, ***383** he notes that while the Framers may have intended to abolish seditious libels and to prevent any prosecutions by the Federal Government for criticism of the Government, 'the free speech clauses do not wipe out the common law as to obscenity, profanity, and defamation of individuals.'

The debates in Congress and the States over the Bill of Rights are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee. We know that Benjamin Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstone standard. ***384** Jefferson endorsed Madison's formula that 'Congress shall make no law . . . abridging the freedom of speech or the press' only after he suggested:

****3029** The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty or reputation of others . . ..' F. Mott, Jefferson and the Press 14 (1943).

Doubt has been expressed that the Members of Congress envisioned the First Amendment as reaching even this far. Merin, Libel and the Supreme Court, 11 Wm. & Mary L.Rev. 371, ss 379-380 (1969).

* * *

The Court's consistent view prior to New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), was that defamatory ***385** utterances were wholly unprotected by the First Amendment. In Patterson v. Colorado, ex rel. Attorney General, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907), for example, the Court said that although freedom of speech and press is protected from abridgment by the Constitution, these provisions 'do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.' This statement was repeated in Near v. Minnesota, ex rel. Olson, 283 U.S. 697, 714, 51 S.Ct. 625, 630, 75 L.Ed. 1357 (1931), the Court adding:

'But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions.' Id., at 715, 51 S.Ct. at 630.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942) (footnotes omitted), reflected the same view:

> 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'

Beauharnais v. Illinois, 343 U.S. 250, 254-257, 72 S.Ct. 725, 729-731, 96 L.Ed. 919 (1952) (footnotes omitted), repeated the Chaplinsky statement, noting also that nowhere at the time of the adoption of ***386** the Constitution 'was there any suggestion that the crime of libel be abolished.' And in Roth v. United States, 354 U.S., at 483, 77 S.Ct., at 1308 (footnote omitted), the Court further examined the meaning of the First Amendment:

'In light of this history, it is apparent that the unconditional phrasing of ****3030** the First Amendment was not

intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. Beauharnais v. Illinois, 343 U.S. 250, 266, 72 S.Ct. 725, 735, 96 L.Ed. 919. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.'

The Court could not accept the generality of this historic view in New York Times Co. v. Sullivan, supra. There the Court held that the First Amendment was intended to forbid actions for seditious libel and that defamation actions by public officials were therefore not subject to the traditional law of libel and slander. If these officials (and, later, public figures occupying semiofficial or influential, although private, positions) were to recover, they were required to prove not only that the publication was false but also that it was knowingly false or published with reckless disregard for its truth or falsity. This view that the First Amendment was written to forbid ***387** seditious libel reflected one side of the dispute that reged at the turn of the nineteenth century and also mirrored the views of some later scholars.

The central meaning of New York Times, and for me the First Amendment as it relates to libel laws, is that seditious libel-criticism of government and public officials-falls beyond the police power of the State. 376 U.S., at 273-276, 84 S.Ct., at 722-724. In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither New York Times nor its progeny suggests that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted. Simply put, the First Amendment did not confer a 'license to defame the citizen.' W. Douglas, The Right of the People 36 (1958).

I do not labor the foregoing matters to contend that the Court is foreclosed from reconsidering prior interpretations of the First Amendment.[FN25]

> [FN25] 'The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. . . . As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument.' Dennis v. United States, 341 U.S. 494, 523, 71 S.Ct. 857, 873, 95 L.Ed. 1137 (1951) (Frankfurter, J., concurring).

But the Court apparently finds a clean slate where in fact we have instructive historical experience dating from long before ***388** the first settlors, with their notions of democratic government and human freedom, journeyed to this land. Given this rich background of history and precedent and because we deal with fundamentals when we construe the First Amendment, we should proceed with ****3031** care and be presented with more compelling reasons before we jettison the settled law of the States to an even more radical extent.

* * *

V

[***398 **3037]** In disagreeing with the Court on the First Amendment's reach in the area of state libel laws protecting nonpublic persons, I do not repudiate the principle that the First Amendment 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.' Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1425, 89 L.Ed. 2013 (1945); see also Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, at 260, 94 S.Ct. 2831, at 2840, 41 L.Ed.2d 730 (White, J., concurring).

* * *

[***399]** I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media. If anything, ***400** this trend may provoke a new and radical imbalance in the communications process. Cf. Barron, Access to the Press-A New First Amendment Right, 80

Harv.L.Rev. 1641, 1657 (1967). It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head. Note, The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L.J. 642, 649 (1966); Merin, 11 Wm. & Mary L.Rev., at 418. David Riesman, writing in the midst of World War II on the fascists' effective use of defamatory attacks on their opponents, commented: 'Thus it is that the law of libel, with its ecclesiastic background and domestic character, its aura of heart-balm suits and crusading nineteenth-century editors, becomes suddenly important for modern democratic survival.' Democracy and Defamation: ****3037** Fair Game and Fair Comment I, 42 Col.L.Rev. 1085, 1088 (1942).

This case ultimately comes down to the importance the Court attaches to society's 'pervasive and strong interest in preventing and redressing attacks upon reputation.' Rosenblatt v. Baer, 383 U.S. at 86, 86 S.Ct. at 676. From all that I have seen, the Court has miscalulated and denigrates that interest at a time when escalating assaults on individuality and personal dignity counsel otherwise. ***401** At the very least, the issue is highly debatable, and the Court has not carried its heavy burden of proof to justify tampering with state libel laws.

***402** While some risk of exposure 'is a concomitant of life in a civilized community,' Time, Inc. v. Hill, 385 U.S. 374, 388, 87 S.Ct. 534, 542 (1967), the private citizen does not bargain for defamatory falsehoods. Nor is society powerless to vindicate unfair injury to his reputation.

'It is a fallacy . . . to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. . . .

'The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being-a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the ****3038** individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.' Rosenblatt v. Baer, supra, 383 U.S., at 92, 86 S.Ct., at 679 (Stewart, J., concurring).

The case against razing state libel laws is compelling when considered in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few.[44] Surely, our political 'system cannot flourish if regimentation takes hold.' Public Utilities Comm'n v. Pollak, 343 U.S. 451, 469, 72 S.Ct. 813, 824, 96 L.Ed. 1068 (1952) (Douglas, J., dissenting). Nor can it survive if our people are deprived of an effective method ***403** of vindicating their legitimate interest in their good names.[45]

Freedom and human dignity and decency are not antithetical. Indeed, they cannot survive without each other. Both exist side-by-side in precarious balance, one always threatening to over-whelm the other. Our experience as a Nation testifies to the ability of our democratic institutions to harness this dynamic tension. One of the mechanisms seized upon by the common law to accommodate these forces was the civil libel action tried before a jury of average citizens. And it has essentially fulfilled its role. Not because it is necessarily the best or only answer, but because

'the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition.' B. Cardozo, Selected Writings 149 (Hall ed.1947).

In our federal system, there must be room for allowing the States to take diverse approaches to these vexing questions. We should 'continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems . . ..' Mapp v. Ohio, 367 U.S. at 681, 81 S.Ct. at 1706 (Harlan, J., dissenting); see also Murnaghan, From Figment to Fiction to Philosophy-The Requirement of Proof of Damages in Libel Actions, 22 Cath.U.L.Rev. 1, 38 (1972). ***404** Cf. Younger v. Harris, 401 U.S. 37, 44-45, 91 S.Ct. 746, 750-751, 27 L.Ed.2d 669 (1971). Whether or not the course followed by the majority is wise, and I have indicated my doubts that it is, our constitutional scheme compels a proper respect for the role of the States in acquitting their duty to obey the Constitution. Finding no evidence that they have shirked this responsibility, particularly when the law of defamation is even now in transition, I would await some demonstration of the diminution of freedom of expression before acting.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals and reinstate the jury's verdict.

84 S.Ct. 710, 95 A.L.R.2d 1412, 11 L.Ed.2d 686, 1 Media L. Rep. 1527

New York Times Co. v. Sullivan

Supreme Court of the United States

The NEW YORK TIMES COMPANY, Petitioner,

v.

L. B. SULLIVAN.

Ralph D. ABERNATHY et al., Petitioners,

v.

L. B. SULLIVAN.

Nos. 39, 40.
Argued Jan. 6 and 7, 1964.
Decided March 9, 1964.

Opinion

***256** Mr. Justice BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was 'Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales.' He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of $500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. 273 Ala. 656, 144 So.2d 25.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. Entitled 'Heed Their Rising Voices,' the advertisement began by stating that 'As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.' It went on to charge that 'in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. * * *' Succeeding ***257** paragraphs purported to illustrate the 'wave of terror' by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, 'the struggle for the right-to-vote,' and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their ****714** activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading 'We in the south who are struggling daily for dignity and freedom warmly endorse this appeal,' appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the 'Committee to Defend Martin Luther King and the Struggle for Freedom in the South,' and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

'In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.'

Sixth paragraph:

'Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have ***258** assaulted his person. They have arrested him seven times-for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'-a felony under which they could imprison him for ten years. * * *'

Although neither of these statements mentions respondent by name, he contended that the word 'police' in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of 'ringing' the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement 'They have arrested (Dr. King) seven times' would be read as referring to him; he further contended that the 'They' who did the arresting would be equated with the 'They' who committed the other described acts and with the 'Southern violators.' Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with 'intimidation and violence,' bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capital steps, they sang the National Anthem and not 'My ***259** Country, 'Tis of Thee.' Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on ****715** a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time 'ring' the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

***260** Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.[FN3]

[FN3] Approximately 394 copies of the edition of the Times containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the

Times for that day was approximately 650,000 copies.

One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he 'would want to be associated with anybody who would be a party to such things that are stated in that ad,' and that he would not re-employ respondent if he believed 'that he allowed the Police Department to do the things that the paper say he did.' But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

The cost of the advertisement was approximately $4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, 'We in the south * * * warmly endorse this appeal,' and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability ***261** Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it ****716** bore the endorsement of 'a number of people who are well known and whose reputation' he 'had no reason to question.' Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, s 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that 'we * * * are somewhat puzzled as to how you think the statements in any way reflect on you,' and 'you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you.' Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with 'grave misconduct and * * * improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama.' When asked to explain why there had been a retraction for the Governor but not for respondent, the ***262** Secretary of the Times testified: 'We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman * * *.' On the other hand, he testified that he did not think that 'any of the language in there referred to Mr. Sullivan.'

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were 'libelous per se' and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made 'of and concerning' respondent. The jury was instructed that, because the statements were libelous per se, 'the law * * * implies legal injury from the bare fact of publication itself,' 'falsity and malice are presumed,' 'general damages need not be alleged or proved but are presumed,' and 'punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.' An award of punitive damages-as distinguished from 'general' damages, which are compensatory in nature-apparently requires proof of actual malice under Alabama law, and the judge charged that 'mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages.' He refused to charge, however, that the jury must be 'convinced' of malice, in the sense of 'actual intent' to harm or 'gross negligence and recklessness,' to make such an award, and he also refused

to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' contention ***263** that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

****717** In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. 273 Ala. 656, 144 So.2d 25. It held that '(w)here the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt,' they are 'libelous per se'; that 'the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff'; and that it was actionable without 'proof of pecuniary injury * * *, such injury being implied.' Id., at 673, 676, 144 So.2d, at 37, 41. It approved the trial court's ruling that the jury could find the statements to have been made 'of and concerning' respondent, stating: 'We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.' Id., at 674-675, 144 So.2d at 39. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' 'irresponsibility' in printing the advertisement while 'the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement'; from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the Times and 'the matter contained in the advertisement was equally false as to both parties'; and from the testimony of the Times' Secretary that, ***264** apart from the statement that the dining hall was padlocked, he thought the two paragraphs were 'substantially correct.' Id., at 686-687, 144 So.2d, at 50-51. The court reaffirmed a statement in an earlier opinion that 'There is no legal measure of damages in cases of this character.' Id., at 686, 144 So.2d, at 50. It rejected petitioners' constitutional contentions with the brief statements that 'The First Amendment of the U.S. Constitution does not protect libelous publications' and 'The Fourteenth Amendment is directed against State action and not private action.' Id., at 676, 144 So.2d, at 40.

Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. 371 U.S. 946, 83 S.Ct. 510, 9 L.Ed.2d 496. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. ****718** We ***265** further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

I.

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny.

* * *

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, 'commercial' advertisement. The argument relies on Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in Chrestensen reaffirmed the constitutional protection for 'the freedom of communicating ***266** information and disseminating opinion'; its holding was based upon the factual conclusions that the handbill was 'purely commercial advertising' and that the protest against official action had been added only to evade the ordinance.

The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public

interest and concern. See N.A.A.C.P. v. Button, 371 U.S. 415, 435, 83 S.Ct. 328, 9 L.Ed.2d 405. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Smith v. California, 361 U.S. 147, 150, 80 S.Ct. 215, 4 L.Ed.2d 205; cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64, n. 6, 83 S.Ct. 631, 9 L.Ed.2d 584. Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities-who wish to exercise their freedom of speech even though they are not members of the press. Cf. Lovell v. City of Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949; Schneider v. State, 308 U.S. 147, 164, 60 S.Ct. 146, 84 L.Ed. 155. The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013. ****719** To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.

***267 II.**

Under Alabama law as applied in this case, a publication is 'libelous per se' if the words 'tend to injure a person * * * in his reputation' or to 'bring (him) into public contempt'; the trial court stated that the standard was met if the words are such as to 'injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust * * *.' The jury must find that the words were published 'of and concerning' the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. Alabama Ride Co. v. Vance, 235 Ala. 263, 178 So. 438 (1938); Johnson Publishing Co. v. Davis, 271 Ala. 474, 494-495, 124 So.2d 441, 457-458 (1960). His privilege of 'fair comment' for expressions of opinion depends on the truth of the facts upon which the comment is based. Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 450, 61 So. 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. Johnson Publishing Co. v. Davis, supra, 271 Ala., at 495, 124 So.2d, at 458.

***268** The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in Pennekamp v. Florida, 328 U.S. 331, 348-349, 66 S.Ct. 1029, 1038, 90 L.Ed. 1295, that 'when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants,' implied no view as to what remedy might constitutionally be afforded to public officials. In Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and 'liable to cause violence and disorder.' But the Court was careful to note that it 'retains and ****720** exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel'; for 'public men, are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.' Id., at 263-264, 72 S.Ct. at 734, 96 L.Ed. 919 and n. 18. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the Court was equally divided and the question was not decided. Schenectady Union Pub. Co. v. Sweeney, 316 U.S. 642, 62 S.Ct. 1031, 86 L.Ed. 1727. ***269** In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. N.A.A.C.P. v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been

challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 536, 75 L.Ed. 1117. '(I)t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' Bridges v. California, 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192, and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' N.A.A.C.P. v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405. ***270** The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' United States v. Associated Press, 52 F.Supp. 362, 372 (D.C.S.D.N.Y.1943). Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U.S. 357, 375-376, 47 S.Ct. 641, 648, 71 L.Ed. 1095, gave the principle its classic formulation:

> 'Those who won our independence believed * * * that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, ****721** hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.'

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131; ***271** De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 81 L.Ed. 278. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth-whether administered by judges, juries, or administrative officials-and especially one that puts the burden of proving truth on the speaker. Cf. Speiser v. Randall, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 2 L.Ed.2d 1460. The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' N.A.A.C.P. v. Button, 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405. As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' 4 Elliot's Debates on the Federal Constitution (1876), p. 571. In Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, the Court declared:

> 'In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.'

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression

***272** are to have the 'breathing space' that they 'need * * * to survive,' N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405, was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v. Patterson, 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678, 63 S.Ct. 160, 87 L.Ed. 544. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

'Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. * * * The interest of the public here outweighs the interest of appellant ****722** or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. * * * Whatever is added to the field of libel is taken from the field of free debate.'[FN13]

[FN13]See also Mill, On Liberty (Oxford: Blackwell, 1947), at 47:

> '* * * (T)o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion * * * all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.'

Injury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and ***273** reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192. This is true even though the utterance contains 'half-truths' and 'misinformation.' Pennekamp v. Florida, 328 U.S. 331, 342, 343, n. 5, 345, 66 S.Ct. 1029, 90 L.Ed. 1295. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546; Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569. If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' Craig v. Harney, supra, 331 U.S., at 376, 67 S.Ct., at 1255, 91 L.Ed. 1546, surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, Legacy of Suppression (1960), at 258 et seq.; Smith, Freedom's Fetters (1956), at 426, 431 and passim. That statute made it a crime, punishable by a $5,000 fine and five years in prison, 'if any person shall write, print, utter or publish * * * any false, scandalous and malicious ***274** writing or writings against the government of the United States, or either house of the Congress * * *, or the President * * *, with intent to defame * * * or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.' The Act allowed the defendant the defense of truth, and provided that the jury were ****723** to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it

'doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress * * *. (The Sedition Act) exercises * * * a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto-a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.' 4 Elliot's Debates, supra, pp. 553-554.

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.' The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects. 'Is ***275** it not natural and necessary, under such different circumstances,' he asked, 'that a different degree of freedom in the use of the press should be contemplated?' Id., pp. 569-570. Earlier, in a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: 'In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands * * *.' 4 Elliot's Debates, supra, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.

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[*276 **724] There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government, and ***277** that Jefferson, for one, while denying the power of Congress 'to controul the freedom of the press,' recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in Dennis v. United States, 341 U.S. 494, 522, n. 4, 71 S.Ct. 857, 95 L.Ed. 1137 (concurring opinion). But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions. See, e.g., Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138; Schneider v. State, 308 U.S. 147, 160, 60 S.Ct. 146, 84 L.Ed. 155; Bridges v. California, 314 U.S. 252, 268, 62 S.Ct. 190, 86 L.Ed. 192; Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed.2d 697.

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[*278 **725] The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements hnestly made is no less essential here than was the requirement of proof of guilty knowledge which, in Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, we held indispensiable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

'For if the bookseller is criminally liable without knowledge of the contents, * * * he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. * * * And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. * * * (H)is timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally ***279** suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.' (361 U.S. 147, 153-154, 80 S.Ct. 215, 218, 4 L.Ed.2d 205.)

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions-and to do so on pain of libel judgments virtually unlimited in amount-leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.[FN19]

> [FN19] Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' Mill, On Liberty (Oxford: Blackwell, 1947), at 15; see also Milton, Areopagitica, in Prose Works (Yale, 1959), Vol. II, at 561.

Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., Post Publishing Co. v. Hallam, 59 F. 530,

540 (C.A.6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' Speiser v. Randall, supra, 357 U.S., at 526, 78 S.Ct. at 1342, 2 L.Ed.2d 1460. The rule thus dampens the vigor and limits the variety of public debate. It is ****726** inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made ***280** with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

*** * ***

[727 *282]** Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. In Barr v. Matteo, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 1434, this Court held the utterance of a federal official to be absolutely privileged if made 'within the outer perimeter' of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise 'inhibit the fearless, vigorous, and effective administration of policies of government' and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' Barr v. Matteo, supra, 360 U.S., at 571, 79 S.Ct., at 1339, 3 L.Ed.2d 1434. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See Whitney v. California, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (concurring opinion of Mr. Justice Brandeis), quoted supra, pp. 720, 721. As Madison said, see supra, p. 723, 'the censorial power is in the people over the Government, and not in the Government over the people.' It would give public servants an unjustified preference over the public they serve, if critics of official conduct ***283** did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III.

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[FN23]

> [FN23] We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. Barr v. Matteo, 360 U.S. 564, 573-575, 79 S.Ct. 1335, 1340-1341, 3 L.Ed.2d 1434. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department. As to the statements alleging the assaulting of Dr. King and the bombing of his home, it is immaterial that they might not be considered to involve respondent's official conduct if he himself had been accused of perpetrating the assault and the bombing. Respondent does not claim that the statements charged him personally with these acts; his contention is that the advertisement connects him with them only in his official capacity as the Commissioner supervising the police, on the theory that the police might be equated with the 'They' who did the bombing and assaulting. Thus, if these allegations can be read as referring to respondent at all, they must be read as describing his performance of his official duties.

the rule requiring proof of actual malice is applicable. While ****728** Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is 'presumed.' Such a

presumption is inconsistent ***284** with the federal rule. 'The power to create presumptions is not a means of escape from constitutional restrictions,' Bailey v. Alabama, 219 U.S. 219, 239, 31 S.Ct. 145, 151, 55 L.Ed. 191; '(t)he showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff * * *.' Lawrence v. Fox, 357 Mich. 134, 146, 97 N.W.2d 719, 725 (1959). Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. Stromberg v. California, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535, 75 L.Ed. 1117; Williams v. North Carolina, 317 U.S. 287, 291-292, 63 S.Ct. 207, 209-210, 87 L.Ed. 279; see Yates v. United States, 354 U.S. 298, 311-312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356; Cramer v. United States, 325 U.S. 1, 36, n. 45, 65 S.Ct. 918, 935, 940, 89 L.Ed. 1441.

*** * ***

[732 *291]** 'We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.' 273 Ala., at 674-675, 144 So.2d, at 39.

This proposition has disquieting implications for criticism of governmental conduct. For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.' ***292** City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88, 28 A.L.R. 1368 (1923). The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, 'reflects not only on me but on the other Commissioners and the community.' Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.[FN30]

> [FN30] Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. See American Law Institute, Restatement of Torts (1938), s 607. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

****733** The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

***293** Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins (concurring).

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that 'the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.' Ante, p. 727. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if 'actual malice' can be

proved against them. 'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. I do not base my vote to reverse on any failure to prove that these individual defendants signed the advertisement or that their criticism of the Police Department was aimed at the plaintiff Sullivan, who was then the Montgomery City Commissioner having supervision of the City's police; for present purposes I assume these things were proved. Nor is my reason for reversal the size of the half-million-dollar judgment, large as it is. If Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials perform or fail ***294** to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages.

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called 'outside agitators,' a term which can be made to fit papers like the Times, which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been ****734** awarded to another Commissioner. There a jury again gave the full amount claimed. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which ***295** might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press-now that it has been shown to be possible-is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state news-papers easy prey for libel verdict seekers.

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction-by granting the press an absolute immunity for criticism of the way public officials do their public duty. Compare Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434. Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about 'malice,' 'truth,' 'good motives,' 'justifiable ends,' or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

I agree with the Court that the Fourteenth Amendment made the First applicable to the States. This means to me that since the adoption of the Fourteenth Amendment a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United ***296** States to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted and ever since. Congress never has sought to challenge this viewpoint by passing any civil libel law. It did pass the Sedition Act in 1798, which made it a crime-'seditious libel'-to criticize federal officials or the Federal Government. As the Court's opinion correctly points out, however, ante, pp. 722-723, that Act came to an ignominious end and by common consent has generally been treated as having been a wholly unjustificable and much to be regretted violation of the First Amendment. Since the First Amendment is now made applicable to the States by the Fourteenth, it no more permits the States to impose damages for libel than it does the Federal Government.

We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of our elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as 'obscenity,' ****735** Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, and 'fighting words,' Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1061, are not expression within the protection of the First Amendment, freedom to discuss public affairs and public officials ***297** is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. 'For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.' An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

Mr. Justice GOLDBERG, with whom Mr. Justice DOUGLAS joins (concurring in the result).

The Court today announces a constitutional standard which prohibits 'a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ***298** 'ACTUAL MALICE'-THAT IS, WITH KNOWLEDGe that it was false or with reckless disregard of whether it was false or not.' Ante, at p. 726. The Court thus rules that the Constitution gives citizens and newspapers a 'conditional privilege' immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history and precedent marshaled by the Court, however, confirms my belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The prized American right 'to speak one's ****736** mind,' cf. Bridges v. California, 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192, about public officials and affairs needs 'breathing space to survive,' N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405. The right should not depend upon a probing by the jury of the motivation[FN2]

> [FN2] The requirement of proving actual mallice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard. The thought suggested by Mr. Justice Jackson in United States v. Ballard, 322 U.S. 78, 92-93, 64 S.Ct. 882, 889, 88 L.Ed. 1148, is relevant here: '(A)s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen.' See note 4, infra.

of the citizen or press. The theory ***299** of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

It has been recognized that 'prosecutions for libel on government have (no) place in the American system of jurisprudence.' City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88, 28 A.L.R. 1368. I fully agree. Government, however, is not an abstraction; it is made up of individuals-of governors responsible to the governed.

In a democratic society where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily 'of and concerning' the governors and any statement critical of the governors' official conduct is necessarily 'of and concerning' the government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution.

We must recognize that we are writing upon a clean slate.[FN3]

[FN3] It was not until Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138, decided in 1925, that it was intimated that the freedom of speech guaranteed by the First Amendment was applicable to the States by reason of the Fourteenth Amendment. Other intimations followed. See Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108. In 1931 Chief Justice Hughes speaking for the Court in Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, declared: 'It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech.' Thus we deal with a constitutional principle enunciated less than four decades ago, and consider for the first time the application of that principle to issues arising in libel cases brought by state officials.

As the Court notes, although there have been ***300** 'statements of this Court to the effect that the Constitution does not protect libelous publications * * * (n)one of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.' Ante, at p. 719. We should be particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments. It may be urged that deliberately and maliciously false statements have no ****737** conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisments dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. Cf. Farmers Educational & Coop. Union v. WDAY, Inc., 360 U.S. 525, 530, 79 S.Ct. 1302, 1305, 3 L.Ed.2d 1407. The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms ***301** in the area of race relations. The American Colonists were not willing, nor should we be, to take the risk that '(m)en who injure and oppress the people under their administration (and) provoke them to cry out and complain' will also be empowered to 'make that very complaint the foundation for new oppressions and prosecutions.' The Trial of John Peter Zenger, 17 Howell's St. Tr. 675, 721-722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect 'the obsolete doctrine that the governed must not criticize their governors.' Cf. Sweeney v. Patterson, 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458.

Our national experience teaches that repressions breed hate and 'that hate menaces stable government.' Whitney v. California, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (Brandeis, J., concurring). We should be ever mindful of the wise counsel of Chief Justice Hughes:

'(I)mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.' De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278.

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defendant has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not ***302** abridge the freedom of public speech or any other freedom protected by the First Amendment.[FN4]

[FN4] In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. I recognize, of course, that there will be a gray area. The difficulties of applying a public-private standard are, however, certainly, of a different genre from those attending the differentiation between a malicious and nonmalicious state of mind. If the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the injury will fail properly to apply the constitutional standard set by the elusive concept of malice. See note 2, supra.

This, of course, cannot be said 'where ****738** public officials are concerned or where public matters are involved. * * * (O)ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.' Douglas, The Right of the People (1958), p. 41.

In many jurisdictions, legislators, judges and executive officers are clothed with absolute immunity against liability for defamatory words uttered in the discharge of their public duties. See, e.g., Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434; City of Chicago v. Tribune Co., 307 Ill., at 610, 139 N.E., at 91. Judge Learned Hand ably summarized the policies underlying the rule:

'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the ***303** case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. * * *

'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. * * *' Gregoire v. Biddle, 2 Cir., 177 F.2d 579, 581.

***304** If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and 'fearless, vigorous, and effective administration of policies of government' not be inhibited, Barr v. Matteo, supra, 360 U.S. at 571, 79 S.Ct. at 1339, 3 L.Ed.2d 1434, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct. Their ardor as citizens will thus not be dampened and they will ****739** be free 'to applaud or to criticize the way public employees do their jobs, from the least to the most important.'[FN5]

[FN5] Mr. Justice Black concurring in Barr v. Matteo, 360 U.S. 564, 577, 79 S.Ct. 1335, 1342, 3 L.Ed.2d 1434, observed that: 'The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.'

If liability can attach to political criticism because it damages the reputation of a public official as a public official, then no critical citizen can safely utter anything but faint praise about the government or its officials. The vigorous criticism by press and citizen of the conduct of the government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct.[FN6]

[FN6] See notes 2, 4, supra.

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. 'Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment * * * of free speech * * *.' Wood v. Georgia, 370 U.S. 375, 389, 82 S.Ct. 1364, 1372, 8 L.Ed.2d 569.

The public ***305** official certainly has equal if not greater access than most private citizens to media of communication. In any event, despite the possibility that some excesses and abuses may go unremedied, we must recognize that 'the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, (certain) liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.' Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213. As Mr. Justice Brandeis correctly observed, 'sunlight is the most powerful of all disinfectants.'[7]

For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. It necessarily follows that in a case such as this, where all agree that the allegedly defamatory statements related to official conduct, the judgments for libel cannot constitutionally be sustained.

277 U.S. 438, 48 S.Ct. 564

Olmstead v. United States

Supreme Court of the United States

OLMSTEAD et al.

v.

UNITED STATES.
GREEN et al.

v.

SAME
McINNIS

v.

SAME.

No. 493. | No. 532. | No. 533.

Argued Feb. 20 and 21, 1928.
Decided June 4, 1928.

Opinion

***455 **564** Mr. Chief Justice TAFT delivered the opinion of the Court.

The petitioners were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act (27 USCA) by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Seventy-two others, in addition to the petitioners, were indicted. Some were not apprehended, some were acquitted, and others pleaded guilty.

* * *

[***456 **565**] The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small ****457*** wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.

* * *

[**457 ****The Fourth Amendment provides:

'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

And the Fifth:

'No person * * * shall be compelled in any criminal case to be a witness against himself.'

* * *

[***463 **567**]The well-known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will . . .

* * *

[***464 **568]** The Fourth Amendment may have proper application to a sealed letter in the mail, because of the constitutional provision for the Postoffice Department and the relations between the government and those who pay to secure protection of their sealed letters . . . It is plainly within the words of the amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers of effects. The letter is a paper, an effect, and in the custody of a government that forbids carriage, except under its protection.

The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

* * *

[***465]** The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.

* * *

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, ***466** and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

* * *

****570 *471** Mr. Justice **BRANDEIS** (dissenting).

The defendants were convicted of conspiring to violate the National Prohibition Act (27 USCA). Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wire tapping was employed, on behalf of the government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The typewritten record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wire tapping, on the ground that the government's wire tapping constituted an unreasonable search and seizure, in violation of the Fourth Amendment, and that the use as evidence of the conversations overheard compelled the defendants to be witnesses against themselves, in violation of the Fifth Amendment.

The government makes no attempt to defend the methods employed by its officers. Indeed, it concedes ***472** that, if wire tapping can be deemed a search and seizure within the Fourth Amendment, such wire

tapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the amendment, and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

'We must never forget,' said Mr. Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 407 4 L. Ed. 579, 'that it is a Constitution we are expounding.' Since then this court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the fathers could not have dreamed . . . We have likewise held that general limitations on the powers of government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the states from meeting modern conditions by regulations which 'a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.' Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 387, 47 S. Ct. 114, 118 (71 L. Ed. 303); Buck v. Bell, 274 U. S. 200, 47 S. Ct. 584, 71 L. 1000. Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this court said in Weems v. United States, 217 U. S. 349, 373, 30 S. Ct. 544, 551 (54 L. Ed. 793, 19 Ann. Cas. 705):

'Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions ***473** and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.'

When the Fourth and Fifth Amendments were adopted, 'the form that evil had theretofore taken' had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify-a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life-a seizure effected, if need be, by breaking and entry. Protection against such invasion of 'the sanctities of a man's home and the privacies of life' was provided in the Fourth and Fifth Amendments by specific language. Boyd v. United States, 116 U. S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746. But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

474** Moreover, 'in the application of a Constitution, our contemplation cannot be only of *****571 what has been, but of what may be.' The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. 'That places the liberty of every man in the hands of every petty officer' was said by James Otis of much lesser intrusions than these. To Lord Camden a far slighter intrusion seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?

A sufficient answer is found in Boyd v. United States, 116 U. S. 616, 627-630, 6 S. Ct. 524, 29 L. Ed. 746, a case that will be remembered as long as civil liberty lives in the United States. This court there reviewed the history that lay behind the Fourth and Fifth Amendments. We said with reference to Lord Camden's judgment in Entick v. Carrington, 19 Howell's State Trials, 1030:

'The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to

all invasions on the part of the government and its employees of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, ***475** personal liberty and private property, where that right has never been forfeited by his conviction of some public offense-it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.'

In Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877, it was held that a sealed letter intrusted to the mail is protected by the amendments. The mail is a public service furnished by the government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below:

'True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference.'

The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations ****476*** between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.
Time and again this court, in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it . . .

* * *

[***478 **572]** The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence ***479** in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wire tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel *****573*** invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

* * *

310 N.C. 312, 312 S.E.2d 405

Renwick v. News and Observer Publishing Company

Supreme Court of North Carolina.

Hayden B. RENWICK

v.

The NEWS AND OBSERVER PUBLISHING COMPANY, d/b/a The Raleigh Times.

No. 412A83.
March 6, 1984.

Opinion

MITCHELL, Justice.

The question before us for review in this consolidated appeal is whether the plaintiff's complaints state a claim upon which relief can be granted against either or both ****407** defendants for either libel or invasion of privacy. We hold that the plaintiff's complaints fail to state a claim against either defendant on either theory.

The plaintiff, Hayden B. Renwick, is Associate Dean of the College of Arts and Sciences at the University of North Carolina ***314** at Chapel Hill. He has been employed by the University since 1969. On April 22, 1981, *The Raleigh Times* published an editorial entitled "And He Calls It Bias?". The same editorial was reprinted on April 26, 1981, in *The Greensboro Daily News and Record* in a commentary section entitled "Around The State" under the title "Discrimination?". The complete text of the editorial as printed in both instances was as follows:

> Some of the continuing deluge of charges from Washington against the University of North Carolina at Chapel Hill-many obviously unfounded-are so ridiculous they only widen the gulf between reason and resentment as the state seeks to create better racial relations.
>
> The latest barrage is based on allegations by Hayden Renwick, Associate Dean of the College of Arts and Sciences at Chapel Hill, in a 1978 newspaper article. Renwick, formerly in charge of minority admissions, said between 1975 and 1978 about 800 black students had been denied admission.
>
> Yet Collin Rustin, the minority admissions director since 1975, flatly denies the charge. Furthermore, the special admission concessions in effect for blacks also give the lie to charges of unfair discrimination against minorities.
>
> According to Rustin, every black student who meets the minimum standard combined score of 800 on the Scholastic Aptitude Test and has a 1.6 predicated grade point average is AUTOMATICALLY admitted. The exception would be if the applicant had not taken high school subjects required for admission.
>
> That's discrimination? When the 800 required is only half the maximum possible score of 1,600? When the average SAT score for other, competitive students admitted to last fall's freshman class at Carolina was between 1,070 and 1,080? When those competitive students admitted were in the top five percent of their high school graduating classes? When only 4,800 of 11,500 applicants clamoring to get in were admitted?
>
> It has taken North Carolinians years to adjust to the necessity to grant some minority applicants, because of their disenfranchised background, special concessions in admissions. ***315** This gives them a chance to prove that their academic deficiencies are only temporary, not permanent.

> But extremists who belittle and criticize these concessions-which, indeed seem here so excessive they do nothing for the student or the quality of education-should be publicly rebuffed.
>
> The fact that, according to a 1979 faculty committee report, only 36 blacks have been denied access to UNC between 1975 and 1979-compared to 6,700 competitive students turned away in one season-attests to UNC's yeoman efforts to make minorities welcome on campus. How long highly qualified whites denied admission will tolerate this reverse discrimination without taking the university to court is undoubtedly affected by irresponsible charges such as this one.

After requesting in writing a retraction of the editorials by the defendants and having received no retraction, the plaintiff filed separate complaints against each defendant alleging libel *per se* and invasion of privacy. The defendants, The News and Observer Publishing Company, which publishes *The Raleigh Times,* and Greensboro News Company, which publishes *The Greensboro Daily News and Record,* each filed a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief could be granted. The trial court entered judgments on March 3, 1982, granting each defendant's motion and dismissing the plaintiff's actions for failure to state a claim. The cases were consolidated for purposes of appeal. A divided panel of the Court of ****408** Appeals held that the trial court had erred and reversed. We reverse the holding of the Court of Appeals.

* * *

[*316] I.

Libel

Three classes of libel are recognized under North Carolina law.

> They are: (1) publications obviously defamatory which are called libel *per se;* (2) publications susceptible of two interpretations one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances become libelous, which are termed libels *per quod.*

Arnold v. Sharpe, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979). As we have previously stated:

> When an unauthorized publication is libelous *per se,* malice and damage are presumed from the fact of publication and no proof is required as to any resulting injury. The law presumes that general damages actually, proximately and necessarily result from an unauthorized publication which is libelous *per se* and they are not required to be proved by evidence since they arise by inference of law, and are allowed whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted.
>
> In an action upon a publication coming within the second class, that is, a publication which is susceptible of two interpretations, one of which is defamatory, it is for the jury to determine under the circumstances whether the publication is defamatory and was so understood by those who saw it.
>
> In publications which are libelous *per quod* the innuendo and special damages must be alleged and proved.

Flake v. Greensboro News Co., 212 N.C. 780, 785, 195 S.E. 55, 59 (1938) (citations omitted).

The plaintiff's complaints in these cases failed to bring the editorial complained of within the second class of libel, since it ***317** was not alleged that the editorial is susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made. *Id.; Wright v. Commercial Credit Company, Inc.,* 212 N.C. 87, 89, 192 S.E. 844, 845 (1937). The complaints failed to bring the editorial within the third class-libel *per quod* -since it was not alleged that the plaintiff suffered special

damages. *Flake v. Greensboro News Co.,* 212 N.C. at 785, 195 S.E. at 59. In fact, the plaintiff's counsel stated with commendable candor and accuracy during oral arguments before this Court that these were actions for libel *per se* or not actions for libel at all. Therefore, we are concerned here only with the law relative to libel *per se.* We must determine whether the editorial is defamatory *per se.* If it is not, the defendants were entitled to judgments ordering dismissal of the plaintiff's claims for relief for libel. *Id.*

Under the well established common law[FN1] of North Carolina, a libel *per se* ****409** is a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace. *Flake v. Greensboro News Co.,* 212 N.C. at 787, 195 S.E. at 60.

> [FN1] As we base our holding that the defendants were entitled to dismissal of the plaintiff's purported claims for libel *per se*exclusively upon the law of libel of this State, we need not decide whether the plaintiff is a public figure such as to bring into play the constitutional limitations on state libel actions first announced in *New York Times Co. v. Sullivan,*376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Therefore, we do not consider whether the plaintiff is a public figure either by reason of his position or by reason of having thrust himself to the forefront of a public controversy in order to influence its resolution. *See generally Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), *cert. denied,* 459 U.S. 1226, 103 S.Ct. 1233, 75 L.Ed.2d 467 (1983). For the same reason we neither reach nor consider the several defenses based on First Amendment principles which the defendants contend apply.

It is not always necessary that the publication involve an imputation of crime, moral turpitude or immoral conduct. *Arnold v. Sharpe,* 296 N.C. at 537, 251 S.E.2d at 455. "But defamatory words to be libelous *per se*must be susceptible of *but one meaning* and of such nature that *the court* can presume *as a matter of law* that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him ****318*** to be shunned and avoided." *Flake v. Greensboro News Co.,* 212 N.C. at 786, 195 S.E. at 60 (emphasis added).

The initial question for the court in reviewing a claim for libel *per se* is whether the publication is such as to be subject to only one interpretation. *Oates v. Wachovia Bank & Trust Co.,* 205 N.C. 14, 16, 169 S.E. 869, 871 (1933). If the court determines that the publication is subject to only one interpretation, it then "is for the court to say whether that signification is defamatory." *Id.* It is only after the court has decided that the answer to both of these questions is affirmative that such cases should be submitted to the jury on a theory of libel *per se.*

We turn then to the question whether the editorial published and republished by the defendants is susceptible of but one interpretation, which is defamatory when considered alone without innuendo or explanatory circumstances. We find that it is not. The worst that could be said of the editorial is that it is "reasonably susceptible of a defamatory meaning." 63 N.C.App. at 213, 304 S.E.2d at 601. However, we find the editorial, at the very least, equally susceptible of a nondefamatory interpretation. Therefore, it could not be libelous *per se. Flake v. Greensboro News Co.,* 212 N.C. at 786, 195 S.E. at 60; *Oates v. Wachovia Bank & Trust Co.,* 205 N.C. at 16-17, 169 S.E. at 871.

In determining whether publications are susceptible of only one meaning, and that a defamatory meaning, so as to be libelous *per se:*

> The principle of common sense requires that courts shall understand them as other people would. The question always is how would ordinary men naturally understand the publication .... The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make them libelous.
>
> In determining whether the article is libelous *per se* the article alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The article must be defamatory on its face "within the four corners thereof."

***319** *Flake v. Greensboro News Co.,* 212 N.C. at 786-87, 195 S.E. at 60 (citations omitted).

In each of his complaints against the defendants, the plaintiff specifically complained that in the editorial in question:

> plaintiff is reported as having said in a 1978 newspaper article that between 1975 and 1978 about 800 black students had been denied admission. That said statement is false. That the entire article ... gives the impression that the plaintiff is an extremist, a liar and is irresponsible in his profession.

****410** We do not think such allegations can find support in the editorial of which the plaintiff complains.

The editorial giving rise to this appeal when viewed "within the four corners thereof" and as ordinary people would understand it simply is not directed toward the plaintiff. Instead, it criticizes "the continuing deluge of charges from Washington against the University of North Carolina at Chapel Hill." The thrust of the editorial is to express the opinion that special admissions concessions in effect for blacks at the University contradict and disprove *charges from Washington* of unfair discrimination against minorities. In fact, the only direct mention of the plaintiff occurs in the second paragraph of the editorial, which states that the "latest barrage" of charges *from Washington* is based on a 1978 newspaper article written by him. The editorial states direct opinions in a robust manner concerning a controversial public issue and takes to task unnamed persons who have expressed contrary opinions. It does not indicate directly or by implication that the plaintiff is "an extremist, a liar and irresponsible in his profession," as alleged by the plaintiff.

We do not find the editorial to be "of such nature that the court can presume as a matter of law that [it tends] to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Flake v. Greensboro News Co.,* 212 N.C. at 786, 195 S.E. at 60. Although every defamation must be false, not every falsehood is defamatory. Here, neither the statement that the defendant wrote such ***320** a 1978 newspaper article nor the characterization of that article are defamatory even if they are untrue.

The majority in the Court of Appeals concluded that the editorial charged that the plaintiff was irresponsible and:

> ordinary men would naturally understand the editorial to imply or insinuate that plaintiff's statistics regarding the number of blacks denied admission to UNC between 1975 and 1979 were either knowingly and intentionally false, or the result of gross incompetence in the conduct of plaintiff's profession.

63 N.C.App. at 211-12, 304 S.E.2d at 600. We have concluded, on the other hand, that the most obvious and natural meaning to be accorded the editorial in question does not tend to defame the plaintiff. Certainly, the editorial at worst is susceptible of two interpretations one of which is defamatory and the other not. When a publication is susceptible of two interpretations, one defamatory and the other not, it will not support an action for a libel of the first class-a libel based upon a publication obviously defamatory which is libel *per se. Arnold v. Sharpe,* 296 N.C. at 537, 251 S.E.2d at 455. As previously pointed out, the plaintiff's complaints failed to allege any class of libel other than libel *per se.* The trial court correctly dismissed the plaintiff's complaints for failure to state a claim for libel upon which relief could be granted. That part of the opinion of the Court of Appeals to the contrary on this issue must be reversed.

II.

Invasion of Privacy

In each of the cases giving rise to this appeal the plaintiff alleged as a second claim for relief that the editorials published by the defendants "placed the plaintiff in a false light before the public and constituted an invasion of the plaintiff's privacy." The trial court entered judgments allowing the defendants' motions to ***321** dismiss these claims. The Court of Appeals was of the opinion that the complaint stated a valid claim for relief for false light invasion of privacy. 63 N.C.App. at 241, 304 S.E.2d at 617. We will not expand the tort of invasion of privacy recognized in this jurisdiction to include "false light" invasions of privacy. We reverse the Court of Appeals on this issue.

****411** The existence of a right of privacy recognizable in law appears to have originated in a law review article by Samuel D. Warren and his law partner Louis D. Brandeis, later to become a Justice of the Supreme Court of the United States, which was published in the Harvard Law Review in 1890. Warren and Brandeis, *The Right to Privacy,* 4 Harv.L.Rev. 193 (1890). Warren and his wife, the daughter of Senator Bayard of Delaware, were among the social elite of Boston. This was during the era of "yellow journalism," and the newspapers of Boston were specializing in articles embarrassing to "blue bloods."

The matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed. It was an annoyance for which the press, the advertisers and the entertainment industry of America were to pay dearly over the next seventy years.
Prosser, *Privacy,* 48 Calif.L.Rev. 383 (1960). The article by Warren and Brandeis had a profound and almost immediate impact and "has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law." *Id.*

The tort of invasion of privacy is now recognized, in one or more of its forms, in a majority of jurisdictions. *See generally,* W. Prosser, Handbook of the Law of Torts, §§ 117, 118 (4th Ed.1971). It is generally recognized that:

> The right of privacy, as an independent and distinctive legal concept has two main aspects: (1) the general law of privacy, which affords a tort action for damages resulting from an unlawful invasion of privacy, and (2) the constitutional right of privacy which protects personal privacy against unlawful governmental invasion.
>
> The general law of the right of privacy, as a matter of tort law, is mainly left to the law of the states ....

***322** Annotation, *Supreme Court's Views As To The Federal Legal Aspects Of The Right Of Privacy,* 43 L.Ed.2d 871, 875-76. A review of the current tort law of all American jurisdictions reveals cases identifying at least four types of invasion of four different interests in privacy: (1) appropriation, for the defendant's advantage, of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's seclusion or solitude or into his *private affairs;* (3) public disclosure of embarrassing *private* facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye. *See* W. Prosser, Handbook of the Law of Torts § 117 (4th Ed.1971) (emphasis added).

This Court was first called upon to consider a claim for invasion of privacy in *Flake v. Greensboro News Co.,* 212 N.C. 780, 195 S.E. 55 (1938). In that case we were concerned, as were the courts of all jurisdictions when considering the early cases, primarily "with the question whether the right of privacy existed at all, and gave little or no consideration to what it would amount to if it did." W. Prosser, Handbook of the Law of Torts § 117 at 804 (4th Ed.1971).

In *Flake* we held that a right of privacy existed and for the first time held that an invasion of privacy by the appropriation of a plaintiff's photographic likeness for the defendant's advantage as a part of an advertisement constitutes a tort giving rise to a claim for relief recognizable at law. Although *Flake* involved overtones of "false light" publicity, we neither reached nor decided the precise question presented by the plaintiff here-whether publicity by a defendant which places a plaintiff in a false light before the public gives rise to a claim for which relief can be granted upon a theory of invasion of privacy. We now hold that such facts do not give rise to a claim for relief for invasion of privacy. A plaintiff must recover in such situations, if at all, in an action for libel or slander. In *Flake,* we specifically noted that questions surrounding the right of privacy involved "a relatively new field in legal jurisprudence. In respect to it the courts are plowing new ground and before the field is fully developed unquestionably perplexing and harassing stumps and runners will be encountered." *Flake v. Greensboro News Co.,* 212 N.C. at 790, 195 S.E. at 62-63. We ****412** also specifically noted that the question of the extent to which a ***323** newspaper may publish information concerning an individual "necessarily involves a consideration of the constitutional right of free speech and of a free press." *Id.* We now have the advantage of almost a half century of cases decided subsequent to *Flake* in this and other jurisdictions for our consideration in deciding whether to recognize a separate tort of false light invasion of privacy in addition to the torts of libel and slander already well

recognized in this jurisdiction. Our continuing "consideration of the constitutional right of free speech and of a free press" guaranteed by the First Amendment to the Constitution of the United States, as well as a proper interest in judicial efficiency, leads us to reject the concept of a separate tort of false light invasion of privacy.

Two basic concerns argue against the recognition of a separate tort of false light invasion of privacy. First, any right to recover for a false light invasion of privacy will often either duplicate an existing right of recovery for libel or slander or involve a good deal of overlapping with such rights. Second, the recognition of a separate tort of false light invasion of privacy, to the extent it would allow recovery beyond that permitted in actions for libel or slander, would tend to add to the tension already existing between the First Amendment and the law of torts in cases of this nature.

Some commentators have specifically expressed concerns as to whether a tort of false light invasion of privacy would overwhelm existing laws of libel and slander. *See* Wade, *Defamation and the Right of Privacy,* 15 Vand.L.Rev. 1093 (1962). It has often been recognized that claims for false light invasion of privacy and claims for libel or slander are at least very similar and that many of the same considerations apply to each type of claim. *See e.g.* Restatement (Second) of Torts §§ 652 E, F, G (1977); Hill,*Defamation and Privacy under the First Amendment,* 76 Colum.L.Rev. 1205, 1207 (1976); Lusky, *Invasion of Privacy: A Clarification of Concepts,* 72 Colum.L.Rev. 693 (1972); Warren and Brandeis, *The Right to Privacy,* 4 Harv.L.Rev. 193 (1890).

As early as 1960 one respected authority pointed out that:

> The false light cases obviously differ from those of intrusion, or disclosure of private facts. The interest protected is clearly that of reputation, with the same overtones of mental ***324** distress as in defamation. There is a resemblance to disclosure; but the two differ in that one involves truth and the other lies, one private or secret facts and the other invention. Both require publicity. There has been a good deal of overlapping of defamation in the false light cases, and apparently either action, or both, will very often lie. The privacy cases do go considerably beyond the narrow limits of defamation, and no doubt have succeeded in affording a needed remedy in a good many instances not covered by the other tort.
>
> It is here, however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?

Prosser, *Privacy,* 48 Calif.L.Rev. 383, 400-401 (1960).

An answer was not long in coming to at least some of the questions raised by Dean Prosser. In cases decided prior to 1964, occasional concern had been expressed about the potential of claims for invasion of privacy to conflict with First Amendment rights of free speech and press. *See e.g.* ****413** *Flake v. Greensboro News Co.,* 212 N.C. at 790, 195 S.E. at 63. In 1964, the Supreme Court of the United States decided *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)which held that the First Amendment itself imposes limitations upon state claims for libel or slander. In 1967, the Supreme Court decided *Time, Inc. v. Hill,* 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) which extended First Amendment protections *at least* as stringent as those required by *Sullivan* to defendants in cases for false light invasion of privacy. *See* Restatement (Second) of Torts § 652E comment d (1977). "By this decision, and others which followed it, the two branches of invasion of privacy which turn on ***325** publicity were taken over under the Constitutional Privilege. The other two, however, are pretty clearly not." W. Prosser, Handbook of the Law of Torts § 118 at 827 (4th Ed.1971).

In those jurisdictions recognizing the tort of false light invasion of privacy, the false light need not necessarily be a defamatory light. *See* Zolich, *Laudatory Invasion of Privacy,* 16 Clev.Marsh.L.Rev. 532, 540

(1967). In many if not most cases, however, the false light is defamatory and an action for libel or slander will also lie. W. Prosser, Handbook of the Law of Torts, § 117 at 813 (4th Ed.1971).

We believe that we will:

create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, *particularly as related to nondefamatory matter.*

Time, Inc. v. Hill, 385 U.S. 374, 389, 87 S.Ct. 534, 542, 17 L.Ed.2d 456 (1967) (emphasis added). This is especially true since plaintiffs in actions for invasions of privacy are entitled to nominal damages and in some cases to injunctive relief-*a prior restraint* -without allegation or proof of special damages. *Flake v. Greensboro News Co.,* 212 N.C. at 792, 195 S.E. at 64.

The conditions which led Warren and Brandeis to argue almost a century ago for a separate tort of invasion of privacy have at least to some extent subsided. Most modern journalists employed in print, television or radio journalism now receive formal training in ethics and journalism entirely unheard of during the era of "yellow journalism." As a general rule journalists simply are more responsible and professional today than history tells us they were in that era. Our recognition of these facts is entitled to some weight in deciding the question before us, even though we are completely aware that nothing in the First Amendment mandates that members of the news media be responsible or professional. As regards this, however, we cannot improve upon the statement of James Madison that:

> ***326** Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.
> It has accordingly been decided ... that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits.

4 Elliot's Debates on the Federal Constitution 571 (1876 Ed.).

Given the First Amendment limitations placed upon defamation actions by *Sullivan* and upon false light invasion of privacy actions by *Hill,* we think that such additional remedies as we *might* be required to make available to plaintiffs should we recognize false light invasion of privacy claims are not sufficient to justify the recognition in this jurisdiction of such inherently constitutionally suspect claims for relief. Additionally, the recognition of claims for relief for false light invasions of privacy would reduce judicial efficiency by requiring our courts to consider two claims for the same relief which, if not identical, would not differ significantly.
We reject the notion of a claim for relief for false light invasion of privacy in this jurisdiction. The trial court correctly dismissed the plaintiff's claims based upon this ****414** theory for failure to state a claim upon which relief could be granted.

The opinion of the Court of Appeals, holding that the trial court erred in dismissing the plaintiff's claims for relief for failure to state a claim upon which relief could be granted within the meaning of Rule 12(b)(6), is reversed. The cases comprising this consolidated appeal are remanded to the Court of Appeals for further remand to the Superior Court, Orange County, for reinstatement of the judgments entered by the trial court dismissing the plaintiff's claims against these defendants.

REVERSED AND REMANDED.

330** EXUM, Justice, dissenting in part and concurring in part. [331**]

MEYER, Justice, concurring in part and dissenting in part.

At the outset I hasten to say that, for the reasons stated by the majority, I agree that the complaint fails to allege a libel of ***327** the first class-a libel *per se.* Nor does it allege a libel of the second class as plaintiff did not

allege that the editorial is susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made. The complaint likewise fails to allege a cause of action for a libel of the third class-libel *per quod*-since it was not alleged that the plaintiff suffered special damages. While certain allegations of the complaint might be interpreted to allege special damages, the complaint refers to those allegations as supporting only a libel *per se.* Further, plaintiff conceded during oral argument that the complaint alleges libel *per se, i.e.,* a libel of the first class, or no libel at all.

I dissent from that portion of the majority opinion which addresses the issue of the false light invasion of privacy cause of action.****415** Specifically, I do not agree with the majority opinion in its result on this issue-that no cause of action for false light invasion of privacy exists in this State, nor with the reasoning which guided the majority to that result. While there is indeed some overlapping in our existing action for libel *per quod* and false light invasion of privacy, they are not and should not be exclusive each of the other.

The distinctions between the defamation (libel and slander) and invasion of privacy torts are often blurred. While the interest protected in defamation actions is one's reputation or good name, the interest protected in invasion of privacy actions is often characterized as one's right to privacy or, simply stated, one's right to be let alone. In false light actions it is not necessary that the publication be defamatory or that special damages be alleged. Whereas truth is an absolute defense in the defamation actions, it is not in the invasion of privacy actions, except in the false light cases. This is so because, in privacy actions, it is not just the inaccuracy of the matter published which is of concern but the mere fact that the matter is published.

Our courts have long recognized a cause of action for invasion of privacy. [medium sized string citation]. While I cannot agree with the statement of the Court of Appeals that***328** these are "false light" cases, they are indeed invasion of privacy cases.

A number of state and federal courts have recognized actions for false light invasion of privacy. *See* [long string cite omitted].

The elements of a false light invasion of privacy claim though variously stated include (1) publication (2) of a false statement concerning the plaintiff which places plaintiff in a false light that would be offensive to a reasonable person in plaintiff's position. The essence of the term "false light" is a major misrepresentation of a person's character, history, activities or beliefs which places that person in an objectionable false position before the party or parties to whom it is communicated.

The Restatement has significantly tightened the elements by requiring that the false statement be "material," that the matter be "highly offensive" rather than simply "offensive," and that the actor know the material published is false or that the publication was made in reckless disregard as to the falsity of the material. *See* Restatement (Second) of Torts § 652E; *see also* False Light: Invasion of Privacy? 15 Tulsa Law Journal 113 (1979).

Plaintiff's claim is consistent with Restatement (Second) of Torts § 652E, entitled "Publicity Placing a Person In False Light," which provides:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or ***329** acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

The Court of Appeals in *Renwick* related the following concerning false light invasion of privacy:
For liability to attach under Section 652E, it is essential that the matter publicized be untrue, although it is not necessary for the matter to be defamatory. *****416*** Section 652E, Comment b. It is sufficient if the matter published attributes to the plaintiff characteristics, conduct or beliefs that are false so that he is portrayed before the public in a false position. *Id.; Brown v. Boney, supra,* [41 N.C.App.] at 648, 255 S.E.2d at 791. An action for defamation and a claim for false light invasion of privacy, however, are closely allied and the same considerations apply to each.*Cibenko v. Worth Publishers, Inc.,* 510 F.Supp. 761 (D.N.J.1981); Hill, Defamation and Privacy under the First

Amendment, 76 Colm.L.Rev. 1205, 1207 (1976). It is for the Court to determine whether the communication in question is capable of bearing a particular meaning which is highly offensive to a reasonable person. *Cibenko, supra* at 766.

63 N.C.App. at 240, 304 S.E.2d at 617.

I agree with the Court of Appeals that so much of the editorial as is contained in the complaint is reasonably capable of conveying the offensive meaning or the innuendo ascribed by the plaintiff as the basis for his invasion of privacy claim.

A cause of action for both false light invasion of privacy and libel may be joined in the same action. *See Varnish v. Best Medium Publishing Co.,* 405 F.2d 608 (2nd Cir.1968). However, there can be but one recovery for any particular publication. Restatement (Second) of Torts § 652E, Comment b. *See* 62 Am.Jur.2d Privacy § 5 (1972).

I do not share the majority's fear of conflict between our recognition of a false light invasion of privacy cause of action and the First Amendment limitations placed upon defamation actions by *Sullivan* and upon false light invasion of privacy actions by *Hill.* For an examination of this problem, *see* "Privacy: The Search for a Standard," 11 Wake Forest L.Rev. 659 (1975). The Court of Appeals has adequately and accurately addressed the issues relating to constitutional privilege in some thirty-three pages of its fifty-four page opinion in this case. The Court of Appeals' treatment of the constitutional issues is both scholarly and convincing. The First Amendment provides no absolute protection for any individual or member of the news media to make false material statements of fact and then to draw defamatory conclusions therefrom.

I agree with the Court of Appeals that the complaint states a valid claim for relief for false light invasion of privacy. 63 N.C.App. at 241, 304 S.E.2d at 617. I believe that such a cause of action should obtain in North Carolina. I would vote to modify and affirm the decision of the Court of Appeals.

***331** FRYE, Justice, dissenting.

In this case, the trial court dismissed the plaintiff's claims on the pleadings for failure to state a claim upon which relief could be granted. The Court of Appeals reversed, holding that the complaints give defendants sufficient notice of the nature and basis of plaintiff's claims to enable them to answer and to prepare for trial. I agree with that decision.

* * *

For the reasons stated in Justice Exum's dissenting and concurring opinion as to Part I, I believe that the complaints, taken in their entirety, state a claim for relief for libel *per se.* I also agree with that portion of Justice Meyer's dissenting and concurring opinion which concludes that the complaints state a valid claim for false light invasion of privacy and that such a cause of action should obtain in North Carolina. Accordingly, I would vote to affirm the decision of the Court of Appeals.

385 U.S. 374, 87 S.Ct. 534

Time v. Hill

Supreme Court of the United States

TIME, INC., Appellant,

v.

James J. HILL.

No. 22.
Reargued Oct. 18 and 19, 1966.
Decided Jan. 9, 1967.

Attorneys and Law Firms

****536 *375** Harold R. Medina, Jr., New York City, for appellant.

Richard M. Nixon, New York City, for appellee.

Opinion

***376** Mr. Justice BRENNAN delivered the opinion of the Court.

The question in this case is whether appellant, publisher of Life Magazine, was denied constitutional protections of speech and press by the application by the New York courts of ss 50-51 of the New York Civil Rights Law, McKinney's Consol. Laws, c. 6[FN1] to award appellee damages on allegations ***377** that Life falsely reported that a new play portrayed an experience suffered by appellee and his family.

[FN1] The complete text of the New York Civil Rights Law ss 50-51 is as follows:

's 50. Right of privacy

'A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.'

's 51. Action for injunction and for damages

'Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same in continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using

the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.'

The article appeared in Life in February 1955. It was entitled 'True Crime Inspires Tense Play,' with the subtitle, 'The ordeal of a family trapped by convicts gives Broadway a new thriller, 'The Desperate Hours.'' The text of the article reads as follows:

'Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in thier home outside Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes's novel, The Desperate Hours, inspired by the family's experience. Now they can see the story re-enacted in Hayes's Broadway play based on the book, and next year will see it in his movie, which has been filmed but is being held up until the play has a chance to pay off.

'The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. LIFE photographed the play during its Philadelphia tryout, transported some of the actors to the actual house where the Hills were besieged. On the next page ****537** scenes from the play are re-enacted on the site of the crime.'

The pictures on the ensuing two pages included an enactment of the son being 'roughed up' by one of the convicts, entitled 'brutish convict,' a picture of the ***378** daughter biting the hand of a convict to make him drop a gun, entitled 'daring daughter,' and one of the father throwing his gun through the door after a 'brave try' to save his family is foiled.

The James Hill referred to in the article is the appellee. He and his wife and five children involuntarily became the subjects of a front-page news story after being held hostage by three escaped convicts in their suburban, Whitemarsh, Pennsylvania, home for 19 hours on September 11-12, 1952. The family was released unharmed. In an interview with newsmen after the convicts departed, appellee stressed that the convicts had treated the family courteously, had not molested them, and had not been at all violent. The convicts were thereafter apprehended in a widely publicized encounter with the police which resulted in the killing of two of the convicts. Shortly thereafter the family moved to Connecticut. The appellee discouraged all efforts to keep them in the public spotlight through magazine articles or appearances on television.

In the spring of 1953, Joseph Hayes' novel, The Desperate Hours, was published. The story depicted the experience of a family of four held hostage by three escaped convicts in the family's suburban home. But, unlike Hill's experience, the family of the story suffer violence at the hands of the convicts; the father and son are beaten and the daughter subjected to a verbal sexual insult.

The book was made into a play, also entitled The Desperate Hours, and it is Life's article about the play which is the subject of appellee's action. The complaint sought damages under ss 50-51 on allegations that the Life article was intended, to, and did, give the impression that the play mirrored the Hill family's experience, which, to the knowledge of defendant '* * * was false and untrue.' Appellant's defense was that ***379** the article was 'a subject of legitimate news interest,' 'a subject of general interest and of value and concern to the public' at the time of publication, and that it was 'published in good faith without any malice whatsoever * * *.' A motion to dismiss the complaint for substantially these reasons was made at the close of the case and was denied by the trial judge on the ground that the proofs presented a jury question as to the truth of the article.

The jury awarded appellee $50,000 compensatory and $25,000 punitive damages. On appeal the Appellate Division of the Supreme Court ordered a new trial as to damages but sustained the jury verdict of liability. The court said as to liability:

'Although the play was fictionalized, Life's article portrayed it as a reenactment of the Hills' experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well. It is evident that the article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest.' 18 A.D.2d 485, 489, 240 N.Y.S.2d 286, 290.

At the new trial on damages, a jury was waived and the court awarded $30,000 compensatory damages without punitive damages.

****538** The New York Court of Appeals affirmed the Appellate Division 'on the majority and concurring opinions ***380** at the Appellate Division,' two judges dissenting. 15 N.Y.2d 986, 260 N.Y.S.2d 7, 207 N.E.2d 604. We noted probable jurisdiction of the appeal to consider the important constitutional questions of freedom of speech and press involved. 382 U.S. 936, 86 S.Ct. 392, 15 L.Ed.2d 348. After argument last Term, the case was restored to the docket for reargument, 384 U.S. 995, 86 S.Ct. 1911, 16 L.Ed.2d 1012. We reverse and remand the case to the Court of Appeals for further proceedings not inconsistent with this opinion.

I.

Since the reargument, we have had the advantage of an opinion of the Court of Appeals of New York which has materially aided us in our understanding of that court's construction of the statute. It is the opinion of Judge Keating for the court in Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543 (1966). The statute was enacted in 1903 following the decision of the Court of Appeals in 1902 in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478. Roberson was an action against defendants for adorning their flour bags with plaintiff's picture without her consent. It was grounded upon an alleged invasion of a 'right of privacy,' defined by the Court of Appeals to be 'the claim that a man has the right to pass through this world, if he wills, without having his picture published * * * or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers * * *.' 171 N.Y., at 544, 64 N.E., at 443. The Court of Appeals traced the theory to the celebrated article of Warren and Brandeis, entitled The Right to Privacy, published in 1890. 4 Harv.L.Rev. 193.3 The ***381** Court of Appeals, however, denied the existence of such a right at common law but observed that '(t)he legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent.' 171 N.Y., at 545, 64 N.E., at 443. The legislature enacted ss 50-51 in response to that observation.

Although 'Right of Privacy' is the caption of ss 50-51, the term nowhere appears in the text of the statute itself. The text of the statute appears to proscribe only conduct of the kind involved in Roberson, that is, the appropriation and use in advertising or to promote the sale of goods, of another's name, portrait or picture without his consent. An application of that limited scope would present different questions of violation of the constitutional protections for speech and press. Compare Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, with New York Times Co. v. Sullivan, 376 U.S. 254, 265-266, 84 S.Ct. 710, 718-719, 11 L.Ed.2d 686.

****539** The New York courts have, however, construed the statute to operate much more broadly. In Spahn the Court of Appeals stated that 'Over the years since the statute's enactment in 1903, its social desirability and remedial nature have led to its being given a liberal construction consonant with its over-all purpose * * *.' 18 N.Y.2d, at 327, 274 N.Y.S.2d, at 879, 221 N.E.2d, at 544. Specifically, ***382** it has been held in some circumstances to authorize a remedy against the press and other communications media which publish the names, pictures, or portraits of people without their consent. Reflecting the fact, however, that such applications may raise serious questions of conflict with the constitutional protections for speech and press, decisions under the statute have tended to limit the statute's application. '(E)ver mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.' Id., 18 N.Y.2d, at 328, 274 N.Y.S.2d, at 879, 221 N.E.2d, at 544-545.

In the light of questions that counsel were asked to argue on reargument,]FN6]

[FN6] 'Upon reargument, counsel are requested to discuss in their further briefs and oral arguments, in addition to the other issues, the following questions:

'(1) Is the truthful presentation of a newsworthy item ever actionable under the New York statute as construed or on its face? If so, does appellant have standing to challenge that aspect of the statute?

'(2) Should the per curiam opinion of the New York Court of Appeals be read as adopting the following portion of the concurring opinion in the Appellate Division?

> "However, if it can be clearly demonstrated that the newsworthy item is presented, not for the purpose of disseminating news, but rather for the sole purpose of increasing circulation, then the rationale for exemption from section 51 no longer exists and the exemption should not apply. In such circumstances the privilege to use one's name should not be granted even though a true account of the event be given-let alone when the account is sensationalized and fictionalized." 384 U.S. 995, 86 S.Ct. 1911, 16 L.Ed.2d 1012.

it is particularly relevant that the ***383** Court of Appeals made crystal clear in the Spahn opinion that truth is a complete defense in actions under the statute based upon reports of newsworthy people or events. The opinion states: 'The factual reporting of newsworthy persons and events is in the public interest and is protected.' 18 N.Y.2d, at 328, 274 N.Y.S.2d, at 879, 221 N.E.2d, at 545.[FN7]

> [FN7] This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where 'Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.' Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (C.A.2d Cir.), cert. denied, 311 U.S. 711, 61 S.Ct. 393, 85 L.Ed. 462 (1940). Cf. Garner v. Triangle Pubs., Inc., 97 F.Supp. 546, 550 (D.C.S.D.N.Y.1951); Restatement, Torts, s 867 comment d (1939). See Id., illust. 6. This case presents no question whether truthful publication of such matter could be constitutionally proscribed.
>
> It has been said that a 'right of privacy' has been recognized at common law in 30 States plus the District of Columbia and by statute in four States. See Prosser, Law of Torts 831-832 (3d ed. 1964). Professor Kalven notes, however, that since Warren and Brandeis championed an action against the press for public disclosure of truthful but private details about the individual which caused emotional upset to him, 'it has been agreed that there is a generous privilege to serve the public interest in news. * * * What is at issue, it seems to me, is whether the claim of privilege is not so overpowering as virtually to swallow the tort. What can be left of the vaunted new right after the claims of privilege have been confronted?' Kalven, 'Privacy in Tort Law-Were Warren and Brandeis Wrong?' 31 Law & Contemp.Prob. 326, 335-336 (1966). Some representative cases in which the State 'right of privacy' was held to give way to the right of the press to publish matters of public interest are . . . [exceedingly long string citation omitted].

Constitutional questions ****540** which might ***384** arise if truth were not a defense are therefore of no concern. Cf. Garrison v. State of Louisiana, 379 U.S. 64, 72-75, 85 S.Ct. 209, 214-216, 13 L.Ed.2d 125.

But although the New York statute affords 'little protection' to the 'privacy' of a newsworthy person, 'whether he be such by choice or involuntarily'[FN8] the statute gives him a right of action when his name, picture, or portrait is the subject of a 'fictitious' report or article.[FN9]

> [FN8] One of the clearest exceptions to the statutory prohibition is the rule that a public figure, whether he be such by choice or involuntarily, is subject to the often searching beam of publicity and that, in balance with the legitimate public interest, the law affords his privacy little protection,' Spahn, supra, at 18 N.Y.2d, at 328, 274 N.Y.S.2d, at 879, 221 N.E.2d, at 545.
>
> [FN9] . . . Although not usually thought of in terms of 'right of privacy,' all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the 'right of privacy' [i.e. false light] cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage. See Wade, supra, at 1124. Moreover, as Spahn illustrates, the published matter need not be defamatory, on its face or otherwise, and might even be laudatory and still warrant recovery. Our decision today is not to be taken to decide any constitutional questions which may be raised in 'libel per quod' actions involving publication of matters of public interest, or in libel actions where the plaintiff is not a public official. Nor do we intimate any view whether the Constitution limits state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices.

***385** Spahn points up the distinction. Spahn was an action under the statute brought by the well-known ****541**

professional baseball pitcher, Warren Spahn. He sought an injunction and damages against the unauthorized publication of what purported to be a biography of his life. The trial judge had found that 'the record unequivocally establishes ***386** that the book publicizes areas of Warren Spahn's personal and private life, albeit inaccurate and distorted, and consists of a host, a preponderant percentage, of factual errors, distortions and fanciful passages * * *.' 43 Misc.2d 219, 232, 250 N.Y.S.2d 529, 542. The Court of Appeals sustained the holding that in these circumstances the publication was proscribed by s 51 of the Civil Rights Law and was not within the exceptions and restrictions for newsworthy events engrafted onto the statute. The Court of Appeals said:

'But it is erroneous to confuse privacy with 'personality' or to assume that privacy, though lost for a certain time or in a certain context, goes forever unprotected * * *. Thus it may be appropriate to say that the plaintiff here, Warren Spahn, is a public personality and that, insofar as his professional career is involved, he is substantially without a right to privacy. That is not to say, however, that his 'personality' may be fictionalized and that, as fictionalized, it may be exploited for the defendants' commercial benefit through the medium of an unauthorized biography.' Spahn, supra, 18 N.Y.2d, at 328, 274 N.Y.S.2d, at 879, 221 N.E.2d, at 545.

As the instant case went to the jury, appellee, too, was regarded to be a newsworthy person 'substantially without a right to privacy' insofar as his hostage experience was involved, but to be entitled to his action insofar as that experience was 'fictionalized' and 'exploited for the defendants' commercial benefit.' 'Fictionalization,' the Spahn opinion states, 'is the heart of the cases in point.' 18 N.Y.2d, at 328, 274 N.Y.S.2d, at 879, 221 N.E.2d, at 545.

The opinion goes on to say that the 'establishment of minor errors in an otherwise accurate' report does not prove 'fictionalization.' Material and substantial falsification is the test. However, it is not clear whether ***387** proof of knowledge of the falsity or that the article was prepared with reckless disregard for the truth is also required. In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, we held that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Factual error, content defamatory of official reputation, or both, are insufficient for an award of damages for false statements unless actual malice-knowledge that the statements are false or in reckless disregard of the truth-is alleged and proved. The Spahn opinion reveals ****542** that the defendant in that case relied on New York Times as the basis of an argument that application of the statute to the publication of a substantially fictitious biography would run afoul of the constitutional guarantees. The Court of Appeals held that New York Times had no application. The court, after distinguishing the cases on the ground that Spahn did not deal with public officials or official conduct, then says, 'The free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual's attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter. We perceive no constitutional infirmities in this respect.' 18 N.Y.2d at 329, 274 N.Y.S.2d, at 880, 221 N.E.2d, at 546.

If this is meant to imply that proof of knowing or reckless falsity is not essential to a constitutional application of the statute in these cases, we disagree with the Court of Appeals. We hold that the constitutional protections for speech and press preclude the application ***388** of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' Thornhill v. State of Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093. 'No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.' Bridges v. State of California, 314 U.S. 252, 269, 62 S.Ct. 190, 196, 86 L.Ed. 192. We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. 'The line between the informing and the entertaining is too elusive for the protection of * * * (freedom of the press).' Winters v. People of State of New York, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840. Erroneous statement is no less inevitable in such a case

than in the case of comment upon public affairs, and in both, if innocent or merely negligent, '* * * it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive' * * *.' New York Times Co. v. Sullivan, supra, 376 U.S., at 271-272, 84 S.Ct., at 721, 11 L.Ed.2d 686. As James Madison said, 'Some degree of abuse is inseparable from **389** the proper use of every thing, and in no instance is this more true than in that of the press.' 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.). We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated ****543** in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer * * * wider of the unlawful zone,' New York Times Co. v. Sullivan, 376 U.S., at 279, 84 S.Ct., at 725, 11 L.Ed.2d 686; see also Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460; Smith v. People of State of California, 361 U.S. 147, 153-154, 80 S.Ct. 215, 218-219, 4 L.Ed.2d 205; and thus 'create the danger that the legitimate utterance will be penalized.' Speiser v. Randall, supra, 357 U.S., at 526, 78 S.Ct., at 1342.

But the constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function. We held in New York Times that calculated falsehood enjoyed no immunity ***390** in the case of alleged defamation of a public official concerning his official conduct. Similarly, calculated falsehood should enjoy no immunity in the situation here presented us. What we said in Garrison v. State of Louisiana, supra, 379 U.S., at 75, 85 S.Ct., at 216, 13 L.Ed.2d 125, is equally applicable:

'The use of calculated falsehood * * * would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published * * * should enjoy a like immunity. * * * For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. * * *' Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.'

We find applicable here the standard of knowing or reckless falsehood, not through blind application of New York Times Co. v. Sullivan, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in New York Times guide our conclusion, ***391** we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in New York Times. Were this a libel action, the distinction which has been suggested between the relative opportunities ****544** of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Cf. Rosenblatt v. Baer, 383 U.S. 75, 91, 86 S.Ct. 669, 679, 15 L.Ed.2d 724 (Stewart, J., concurring). Moreover, a different test might be required in a statutory action by a public official, as opposed to a libel action by a public official or a statutory action by a private individual. Different considerations might arise concerning the degree of 'waiver' of the protection the State might afford. But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us.

II.

Turning to the facts of the present case, the proofs reasonably would support either a jury finding of innocent or merely negligent misstatement by Life, or a finding that Life portrayed the play as a reenactment of the Hill family's experience reckless of the truth or with actual knowledge that the portrayal was false. The relevant testimony is as follows:

Joseph Hayes, author of the book, also wrote the play. The story theme was inspired by the desire to write about 'true crime' and for years before writing the book, he collected newspaper clippings of stories of hostage incidents. His story was not shaped by any single incident, but by several, including incidents which occurred in California, New York, and Detroit. He said that he did not consciously portray any member of the Hill family, ***392** or the Hill family's experience, although admitting that 'in a very direct way' the Hill experience 'triggered' the writing of the book and the play.

The Life article was prepared at the direction and under the supervision of its entertainment editor, Prideaux. He learned of the production of the play from a news story. The play's director, Robert Montgomery, later suggested to him that its interesting stage setting would make the play a worthwhile subject for an article in Life. At about the same time, Prideaux ran into a friend of author Hayes, a free-lance photographer, who told Prideaux in casual conversation that the play had a 'substantial connection with a true-life incident of a family being held by escaped convicts near Philadelphia.' As the play was trying out in Philadelphia, Prideaux decided to contact the author. Hayes confirmed that an incident somewhat similar to the play had occurred in Philadelphia, and agreed with Prideaux to find out whether the former Hill residence would be available for the shooting of pictures for a Life article. Prideaux then met with Hayes in Philadelphia where he saw the play and drove with Hayes to the former Hill residence to test its suitability for a picture story. Neither then nor thereafter did Prideaux question Hayes about the extent to which the play was based on the Hill incident. 'A specific question of that nature was never asked, but a discussion of the play itself, what the play was about, in the light of my own knowledge of what the true incident was about, confirmed in my mind beyond any doubt that there was a relationship, and Mr. Hayes' presence at this whole negotiation was tacit proof of that.'

Prideaux sent photographers to the Hill residence for location photographs of scenes of the play enacted in the home, and proceeded to construct the text of the article. ***393** In his 'story file' were several news clippings about the Hill incident which revealed its nonviolent character, and a New York Times article by Hayes in which he stated that the play 'was based on various news stories,' mentioning incidents in New York, California, Detroit and Philadelphia.

Prideaux's first draft made no mention of the Hill name except for the caption ****545** of one of the photographs. The text related that a true story of a suburban Philadelphia family had 'sparked off' Hayes to write the novel, that the play was a 'somewhat fictionalized' account of the family's heroism in time of crisis. Prideaux's research assistant, whose task it was to check the draft for accuracy, put a question mark over the words 'somewhat fictionalized.' Prideaux testified that the question mark 'must have been' brought to his attention, although he did not recollect having seen it. The draft was also brought before the copy editor, who, in the presence of Prideaux, made several changes in emphasis and substance. The first sentence was changed to focus on the Hill incident, using the family's name; the novel was said to have been 'inspired' by that incident, and the play was referred to as a 're-enactment.' The words 'somewhat fictionalized' were deleted.

Prideaux labeled as 'emphatically untrue' defense counsel's suggestion during redirect examination that from the beginning he knew that the play had no relationship to the Hill incident apart from being a hostage incident. Prideaux admitted that he knew the play was 'between a little bit and moderately factionalized,' but stated that he thought beyond doubt that the important quality, the 'heart and soul' of the play, was the Hill incident.

The jury might reasonably conclude from this evidence-particularly that the New York Times article ***394** was in the story file, that the copy editor deleted 'somewhat fictionalized' after the research assistant questioned its accuracy, and that Prideaux admitted that he knew the play was 'between a little bit and moderately fictionalized'-that Life knew the falsity of, or was reckless of the truth in, stating in the article that 'the story reenacted' the Hill family's experience. On the other hand, the jury might reasonably predicate a finding of innocent or only negligent misstatement on the testimony that a statement was made to Prideaux by the free-lance photographer that linked the play to an incident in Philadelphia, that the author Hayes cooperated in arranging for the availability of the former Hill home, and that Prideaux thought beyond doubt that the 'heart and soul' of the play was the Hill incident.

* * *

[*397 **547] IV.

The appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity. Such a declaration would not be warranted even if it were entirely clear that this had previously been the view of the New York courts. The New York Court of Appeals, as the Spahn opinion demonstrates, has been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press. We, therefore, confidently except that the New York courts will apply the statute consistently with the constitutional command. Any possible difference with us as to the thrust of the constitutional command is narrowly limited in this case to the failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article.

***398** The judgment of the Court of Appeals is set aside and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins, concurring.

I concur in reversal of the judgment in this case based on the grounds and reasons stated in the Court's opinion. I do this, however, in order for the Court to be able at this time to agree on an opinion in this important case based on the prevailing constitutional doctrine expressed in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686. The Court's opinion decides the case in accordance with this doctrine, to which the majority adhere. In agreeing to the Court's opinion, I do not recede from any of the views I have previously expressed about the much wider press and speech freedoms I think the First and Fourteenth Amendments were designed to grant to the people of the Nation. See, e.g., New York Times Co. v. Sullivan, 376 U.S., at 293, 84 S.Ct., at 733 (concurring opinion); Rosenblatt v. Baer, 383 U.S. 75, 94, 86 S.Ct. 669, 680, 15 L.Ed.2d 597 (concurring and dissenting opinion).

I.

I acquiesce in the application here of the narrower constitutional view of New York Times with the belief that this doctrine too is bound to pass away as its application to new cases proves its inadequacy to protect freedom of the press from destruction in libel cases and other cases like this one. The words 'malicious' and particularly 'reckless disregard of the truth' can never serve as effective substitutes for the First Amendment words: '* * * make no law * * * abridging the freedom of speech, or of the press * * *.' Experience, I think, is bound to prove that First Amendment freedoms can ***399** no more be permanently diluted or abridged by this Court's action than could the Sixth Amendment's guarantee of right to counsel. I think the fate that befell Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (cf. ****548** Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799), is already foreseeable, even if only dimly, for the New York Times' dilution of First Amendment rights.

II.

I think it not inappropriate to add that it would be difficult, if not impossible, for the Court ever to sustain a judgment against Time in this case without using the recently popularized weighing and balancing formula. Some of us have pointed out from time to time that the First Amendment freedoms could not possibly live with the adoption of that Constitution - ignoring - and - destroying technique, when there are, as here, palpable penalties imposed on speech or press specifically because of the views that are spoken or printed. The prohibitions of the Constitution were written to prohibit certain specific things, and one of the specific things prohibited is a law which abridges freedom of the press. That freedom was written into the Constitution and that Constitution is or should be binding on judges as well as other public officers. The 'weighing' doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press. Though the Constitution requires that judges swear to obey and

enforce it, it is not altogether strange that all judges are not always ***400** dead set against constitutional interpretations that expand their powers, and that when power is once claimed by some, others are loath to give it up.

Finally, if the judicial balancing choice of constitutional changes is to be adopted by this Court, I could wish it had not started on the First Amendment. The freedoms guaranteed by that Amendment are essential freedoms in a government like ours. That Amendment was deliberately written in language designed to put its freedoms beyond the reach of government to change while it remained unrepealed.[FN2]

> [FN2] Jefferson wrote that the purpose of the First Amendment is '* * * guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals.' 8 Jefferson, Works 464-465 (Ford ed. 1904).

If judges have, however, by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms. If there is any one thing that could strongly indicate that the Founders were wrong in reposing so much trust in a free press, I would suggest that it would be for the press itself not to wake up to the grave danger to its freedom, inherent and certain in this 'weighing process.' Life's conduct here was at most a mere understandable and incidental error of fact in reporting a newsworthy event. One does not have to be a prophet to foresee that judgments like the one we here reverse can frighten and punish the press so much that publishers will cease trying to report news in a lively and readable fashion as long as there is-and there always will be-doubt as to the complete accuracy ***401** of the newsworthy facts. Such ****549** a consummation hardly seems consistent with the clearly expressed purpose of the Founders to guarantee the press a favored spot in our free society.

Mr. Justice DOUGLAS, concurring.

As intimated in my separate opinion in Rosenblatt v. Baer, 383 U.S. 75, 88, 86 S.Ct. 669, 15 L.Ed.2d 597 and in the opinion of my Brother BLACK in the same case, id., at 94, 86 S.Ct., at 680, state action to abridge freedom of the press is barred by the First and Fourteenth Amendments where the discussion concerns matters in the public domain. The episode around which this book was written had been news of the day for some time. The most that can be said is that the novel, the play, and the magazine article revived that interest. A fictionalized treatment of the event is, in my view, as much in the public domain as would be a water color of the assassination of a public official. It seems to me irrelevant to talk of any right of privacy in this context. Here a private person is catapulted into the news by events over which he had no control. He and his activities are then in the public domain as fully as the matters at issue in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686. Such privacy as a person normally has ceases when his life has ceased to be private.

Once we narrow the ambit of the First Amendment, creative writing is imperiled and the 'chilling effect' on free expression which we feared in ***402** Dombrowski v. Pfister, 380 U.S. 479, 487, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22,* is almost sure to take place. That is, I fear, the result once we allow an exception for 'knowing or reckless falsity.' Such an elusive exception gives the jury, the finder of the facts, broad scope and almost unfettered discretion. A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances, for emotions and prejudices often do carry the day. The exception for 'knowing or reckless falsity' is therefore, in my view, an abridgment of speech that is barred by the First and Fourteenth Amendments. But as indicated in my Brother BLACK'S opinion I have joined the Court's opinion in order to make possible an adjudication that controls this litigation. Cf. Mr. Justice Rutledge, concurring, Screws v. United States, 325 U.S. 91, 113, 134, 65 S.Ct. 1031, 1041, 1051, 89 L.Ed. 1495.

Mr. Justice HARLAN, concurring in part and dissenting in part.

While I find much with which I agree in the opinion of the Court, I am constrained to express my disagreement with its view of the proper standard of liability to be applied on remand. Were the jury on retrial to find negligent rather than, as the Court requires, reckless or knowing 'fictionalization,' I think that federal constitutional requirements would be met.

I.

*** * ***

[550 *404]** Like the Court, I consider that only a narrow problem is presented by these facts. To me this is not 'privacy' litigation in its truest sense. See Prosser, Law of Torts s 112; Silver, Privacy and the First Amendment, 34 Ford.L.Rev. 553; but see Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L.Rev. 962. No claim is made that there was any intrusion upon the Hills' solitude or private affairs in order to obtain information for publication. The power of a State to control and remedy such intrusion for newsgathering purposes cannot be denied, cf. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, but is not here asserted. Similarly it may be strongly contended that certain facts are of such limited public interest and so intimate and potentially embarrassing to an individual that the State may exercise its power to deter publication. Feeney v. Young, 191 App.Div. 501, 181 N.Y.S. 481; see Sidis v. F-R Pub. Corp., 2 Cir., 113 F.2d 806, 808, 138 A.L.R. 15. But the instructions to the jury, the opinions in the New York appellate courts, and indeed the arguments advanced by both sides before this Court all recognize that the theme of the article in question was a perfectly proper one and that an article of this type could have been prepared without liability. Winters v. People of State of New York, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840. The record is replete with articles commenting on the genesis of The Desperate Hours, one of which was prepared ***405** by the author himself and used by appellee to demonstrate ****551** the supposed falsity of the Life piece. Finally no claim is made that appellant published the article to advance a commercial interest in the play. There is no evidence to show that Time, Inc., had any financial interest in the production or even that the article was published as an advertisement. Thus the question whether a State may apply more stringent limitations to the use of the personality in 'purely commercial advertising' is not before the Court. See Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262.

II.

Having come this far in step with the Court's opinion, I must part company with its sweeping extension of the principles of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686. It was established in Times that mere falsity will not suffice to remove constitutional protection from published matter relating to the conduct of a public official that is of public concern. But that decision and those in which the Court has developed its doctrine, Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597; Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125, have never found independent value in false publications[FN2]

> [FN2] The passage from Garrison v. State of Louisiana, supra, quoted in the opinion of the Court makes clear that the only interest in protecting falsehood is to give added 'breathing space' to truth. It is undeniable that falsity may be published, especially in the political arena, with what may be considered 'good' motives-for example a good-faith belief in the absolute necessity of defeating an 'evil' candidate. But the Court does not remove state power to control such conduct, thus underlining the strong social interest in discouraging false publication.

nor any reason for their protection except to add to the protection of truthful communication. And the Court has been quick to note that where private actions are involved the social interest in individual protection from falsity may be substantial. ***406** Rosenblatt v. Baer, supra, 383 U.S., at 86-87, n. 13, 86 S.Ct., at 676. Thus I believe that rigorous scrutiny of the principles underlying the rejection of the mere falsity criterion and the imposition of ancillary safeguards, as well as the interest which the State seeks to protect, is necessary to reach a proper resolution of this case.

Two essential principles seem to underlie the Court's rejection of the mere falsity criterion in New York Times. The first is the inevitability of some error in the situation presented in free debate especially when abstract matters are under consideration. Certainly that is illustrated here in the difficulty to be encountered in making a precise description of the relationship between the Hill incident and The Desperate Hours. The second is the Court's recognition that in many areas which are at the center of public debate 'truth' is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship. Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity. See Cantwell v. State of Connecticut, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213. 'The marketplace of ideas' where it functions still remains the best testing ground for truth.

But these arguments against suppressing what is found to be 'false' on that ground alone do not negative a State's interest in encouraging the publication of well researched materials more likely to be true. Certainly it is within the power of the State to use positive means-the provision of facilities[FN3] and training ****552** of students[FN4]- ***407** to further this end.

> [FN3] Thus the State may take land for the construction of library facilities. E.g., Hayford v. Municipal Officers of City of Bangor, 102 Me. 340, 66 A. 731, 11 L.R.A.,N.S., 940; Laird v. Pittsburg, 205 Pa. 1, 54 A. 324, 61 L.R.A. 332.
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> [FN4] Thus many state universities have professional schools of journalism. See 3 Department of Health, Educ. & Welfare, Education Directory-Higher Education.

The issue presented in this case is the constitutionality of a State's employment of sanctions to accomplish that same goal. The Court acknowledges that sanctions may be employed against knowing or reckless falsehoods but would seem to grant a 'talismanic immunity' to all unintentional errors. However, the distinction between the facts presented to us here and the situation at issue in the New York Times case and its progeny casts serious doubt on that grant of immunity and calls for a more limited 'breathing space' than that granted in criticism of public officials.

First, we cannot avoid recognizing that we have entered an area where the 'marketplace of ideas' does not function and where conclusions premised on the existence of that exchange are apt to be suspect. In Rosenblatt v. Baer, supra, the Court made the New York Times rationale operative where 'the public has an independent interest in the qualifications and performance of the person who holds it (government position), beyond the general public interest in the qualifications and performance of all government employees * * *.' Id., 383 U.S. at 86, 86 S.Ct., at 676. In elaboration the Court said: 'The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.' Id., at 87, n. 13, 86 S.Ct., at 676. To me this seems a clear recognition of the fact that falsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas. Here such competition is extremely unlikely for the scrutiny and discussion of the relationship of the Hill incident and the play is 'occasioned by the particular charges in controversy' and the matter is not one in which the public has an 'independent interest.' It would be unreasonable to assume that Mr. Hill could find a forum for ***408** making a successful refutation of the Life material or that the public's interest in it would be sufficient for the truth to win out by comparison as it might in that area of discussion central to a free society. Thus the state interest in encouraging careful checking and preparation of published material is far stronger than in New York Times. The dangers of unchallengeable untruth are far too well documented to be summarily dismissed.[FN5]

> [FN5] See Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col.L.Rev. 1085; Beauharnais v. People of State of Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919; State v. Klapprott, 127 N.J.L. 395, 22 A.2d 877. And despite the Court's denial that the opportunity for rebuttal is germane, it must be the circulation of falsity and the harm stemming from it which lead the Court to allow the imposition of liability at all. For the Court finds the subject of the Life article 'a matter of public interest.' And it states that '(e)xposure of the self to others in varying degrees is a concomitant of life in a civilized community.' Thus it could not permit New York to allow compensation for mere exposure unless it is holding, as I am sure it is not, that the presence of some reckless falsehood in written material strips it of all constitutional protection. The Court's suggestion that Mr. Hill might not be anxious to rebut the falsehood because it might increase his harm from exposure is equally applicable to libel actions where the opportunity to rebut may be limited by fear of reiterating the libel. And this factor emphasizes, rather than lessens, the state interest in discouraging falsehood for it increases the likelihood that falsity will continue to circulate to the detriment of some when truth should be encouraged 'for the benefit of all of us.'

Second, there is a vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official. In New York Times we acknowledged ****553** public officials to be a breed from whom hardiness to exposure to charges, innuendoes, and criticisms might be demanded and who voltarily assumed the risk of such things by entry into the public arena. ***409** 376 U.S., at 273, 84 S.Ct., at 722. But Mr. Hill came to public attention through an unfortunate circumstance not of his making rather than his voluntary actions and he can in no sense be considered to have 'waived' any

protection the State might justifiably afford him from irresponsible publicity. Not being inured to the vicissitudes of journalistic scrutiny such an individual is more easily injured and his means of self-defense are more limited. The public is less likely to view with normal skepticism what is written about him because it is not accustomed to seeing his name in the press and expects only a disinterested report.

The coincidence of these factors in this situation leads me to the view that a State should be free to hold the press to a duty of making a reasonable investigation of the underlying facts and limiting itself to 'fair comment'[FN6]

> [FN6] A negligence standard has been applied in libel actions both where the underlying facts are alleged to be libelous, Layne v. Tribune Co., 108 Fla. 177, 146 So. 234, 86 A.L.R. 466, and where comment is the subject of the action, Clancy v. Daily News Corp., 202 Minn. 1, 277 N.W. 264. Similarly the press should not be constitutionally insulated from privacy actions brought by parties in the position of Mr. Hill when reasonable care has not been taken in ascertaining or communicating the underlying facts or where the publisher has not kept within the traditional boundaries of 'fair comment' with relation to underlying facts and honest opinion. See Prosser, Law of Torts s 110, at 815-816. Similar standards of reasonable investigation and presentation have long been applied in misrepresentation cases. See, e.g., International Products Co. v. Erie R. Co., 244 N.Y. 331, 155 N.E. 662, 56 A.L.R. 1377; Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 40 N.E. 1039, 28 L.R.A. 753. Under such a standard the fact that the publication involved in this case was not defamatory would enter into a determination of the amount of care which would have been reasonable in the preparation of the article.

on the materials so gathered. Theoretically, of course, such a rule might slightly limit press discussion of matters touching individuals like Mr. Hill. But, from a pragmatic standpoint, until now the press, at least in ***410** New York, labored under the more exacting handicap of the existing New York privacy law and has certainly remained robust. Other professional activity of great social value is carried on under a duty of reasonable care and there is no reason to suspect the press would be less hardy than medical practitioners or attorneys for example. The 'freedom of the press' guaranteed by the First Amendment, and as reflected in the Fourteenth, cannot be thought to insulate all press conduct from review and responsibility for harm inflicted.[FN8]

> [FN8] This Court has never held that the press has an absolute privilege to publish falsity. There is nothing in the history of the First Amendment, or the Fourteenth, to indicate that the authors contemplated restrictions on the ability of private persons to seek legal redress for press-inflicted injury. See generally Levy, Legacy of Suppression; Duniway, The Development of Freedom of the Press in Massachusetts. The Founders rejected an attempt by Madison to add to Art. I, s 10, a guarantee of freedom of the press against state action. The main argument advanced against it was that it would unduly interfere with the proper powers of the States. See 5 Madison's Writings 378 (Hunt ed.); 1 Annals of Cong. 756.

The majority would allow sanctions against such conduct only when it is morally culpable. I insist that it can also be reached when it creates a severe risk of irremediable harm to individuals involuntarily exposed to it and powerless ****554** to protect themselves against it. I would remand the case to the New York courts for possible retrial under that principle.

A constitutional doctrine which relieves the press of even this minimal responsibility in cases of this sort seems to me unnecessary and ultimately harmful to the permanent good health of the press itself. If the ***411** New York Times case has ushered in such a trend it will prove in its long-range impact to have done a disservice to the true values encompassed in the freedoms of speech and press.

Mr. Justice FORTAS, with whom THE CHIEF JUSTICE and Mr. Justice CLARK join, dissenting.

The Court's holding here is exceedingly narrow. It declines to hold that the New York 'Right of Privacy' statute is unconstitutional. I agree. The Court concludes, however, that the instructions to the jury in this case were fatally defective because they failed to advise the jury that a verdict for the plaintiffs could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article. Presumably, the appellee is entitled to a

new trial. If he can stand the emotional and financial burden, there is reason to hope that he will recover damages for the reckless and irresponsible assault upon himself and his family which this article represents. But he has litigated this case for 11 years. He should not be subjected to the burden of a new trial without significant cause. This does not exist. Perhaps the purpose of the decision here is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults provided they are in print, and even though they are totally divorced from fact. If so, I should think that the Court would cast its decision in constitutional terms. Short of that purpose, with which I would strongly disagree, there is no reason here to order a new trial. The instructions in this case are acceptable even within the principles today announced by the Court.

I fully agree with the views of my Brethren who have stressed the need for a generous construction of the First Amendment. I, too, believe that freedom of the press, of ***412** speech, assembly, and religion, and the freedom to petition are of the essence of our liberty and fundamental to our values. See, e.g., Brown v. State of Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). I agree with the statement of my Brother Brennan, speaking for the Court in N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), that 'These freedoms are delicate and vulnerable, as well as supremely precious in our society.' But I do not believe that whatever is in words, however much of an aggression it may be upon individual rights, is beyond the reach of the law, no matter how heedless of others' rights-how remote from public purpose, how reckless, irresponsible, and untrue it may be. I do not believe that the First Amendment precludes effective protection of the right of privacy-or, for that matter, an effective law of libel. I do not believe that we must or should, in deference to those whose views are absolute as to the scope of the First Amendment, be ingenious to strike down all state action, however circumspect, which penalizes the use of words as instruments of aggression and personal assault. There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy, which has been eloquently extolled by scholars and members of this Court. Judge Cooley long ago referred to this right as the right 'to be let alone.'[FN1]

[FN1] Cooley, Law of Torts 29 (2d ed. 1888).

In 1890, Warren and Brandeis published their famous article 'The ****555** Right to Privacy,' in which they eloquently argued that the 'excesses' of the press in 'overstepping in every direction the obvious bounds of propriety and of decency' made it essential that the law recognize a right to privacy, distinct from traditional remedies for defamation, to protect private individuals against the unjustifiable infliction of mental pain and ***413** distress. A distinct right of privacy is now recognized, either as a 'commonlaw' right or by statute, in at least 35 States. Its exact scope varies in the respective jurisdictions. It is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law. As Mr. Justice Brandeis said in his famous dissent in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928), the right of privacy is 'the most comprehensive of rights and the right most valued by civilized men.'

This Court has repeatedly recognized this principle. As early as 1886, in Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, this Court held that the doctrines of the Fourth and Fifth Amendments 'apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property * * *.'

In 1949, the Court, in Wolf v. People of State of Colorado, 338 U.S. 25, 28-29, 69 S.Ct. 1359, 1361-1362, 93 L.Ed. 1782, described the immunity from unreasonable search and seizure in terms of 'the right of privacy.'

Then, in the landmark case of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), this Court referred to 'the right to privacy,' no less important than any other right carefully and particularly reserved to the people,' as 'basic to a free society.' Id., at 656, 81 S.Ct. at 1692. Mr. Justice Clark, speaking for the Court, referred to 'the freedom from ***414** unconscionable invasions of privacy' as intimately related to the freedom from convictions based upon coerced confessions. He said that both served the cause of perpetuating 'principles of humanity and civil liberty (secured) * * * only after years of struggle.' Id., at 657, 81 S.Ct. at 1692, quoting from Bran v. United States, 168 U.S. 532, 544, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897). He said that they express 'supplementing phases of the same constitutional purpose-to maintain inviolate large areas of personal privacy.'

Ibid., quoting from Feldman v. United States, 322 U.S. 487, 489-490, 64 S.Ct. 1082, 1083, 88 L.Ed. 1408 (1944).

In Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Court held unconstitutional a state law under which petitioners were prosecuted for giving married persons information and medical advice on the use of contraceptives. The holding was squarely based upon the right of privacy which the Court derived by implication from the specific guarantees of the Bill of Rights. Citing a number of prior cases, the Court (per Douglas, J.) held that 'These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.' Id., at 485, 85 S.Ct. at 1682. As stated in the concurring ****556** opinion of Mr. Justice Goldberg, with whom The Chief Justice and Mr. Justice Brennan joined: 'the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'' Id., at 494, 85 S.Ct. at 1687.[FN5]

> [FN5] Last Term, in Rosenblatt v. Baer, 383 U.S. 75, 92, 86 S.Ct. 669, 679, 15 L.Ed.2d 597 (1966), Mr. Justice Stewart, concurring, referred to the 'right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt' as reflecting 'our basic concept of the essential dignity and worth of every human being-a concept at the root of any decent system of ordered liberty.' He referred to the 'protection of private personality, like the protection of life itself,' as entitled to 'recognition by this Court as a basic of our constitutional system.' See also Mr. Justice Douglas, dissenting, in Poe v. Ullman, 367 U.S. 497, 521, 81 S.Ct. 1752, 1765, 6 L.Ed.2d 989 (1961).

***415** Privacy, then, is a basic right. The States may, by appropriate legislation and within proper bounds, enact laws to vindicate that right. Cf. Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949), sustaining a local ordinance regulating the use of sound trucks; and Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951), sustaining a state law restricting solicitation in private homes of magazine subscriptions. Difficulty presents itself because the application of such state legislation may impinge upon conflicting rights of those accused of invading the privacy of others. But this is not automatically a fatal objection.[FN6]

> [FN6] Cf. Breard, supra, at 625-626, 71 S.Ct. at 923:
>
> '* * * There is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose.'

Particularly where the right of privacy is invaded by words-by the press or in a book or pamphlet-the most careful and sensitive appraisal of the total impact of the claimed tort upon the congeries of rights is required. I have no hesitancy to say, for example, that where political personalities or issues are involved or where the event as to which the alleged invasion of privacy occurred is in itself a matter of current public interest, First Amendment values are supreme and are entitled to at least the types of protection that this Court extended in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). But I certainly concur with the Court that the greatest solicitude for the First Amendment does not compel us to deny to a State the right to provide a remedy for reckless falsity in writing and publishing an article which irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal. My difficulty is that while the Court gives lip service to this ***416** principle, its decision, which it claims to be based on erroneous instructions, discloses hesitancy to go beyond the verbal acknowledgment.

The Court today does not repeat the ringing words of so many of its members on so many occasions in exaltation of the right of privacy. Instead, it reverses a decision under the New York 'Right of Privacy' statute because of the 'failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article.' In my opinion, the jury instructions, although they were not a textbook model, satisfied this standard.

In the first place, the Court does not adequately deal with the fact that the jury returned a verdict for exemplary or punitive damages, under special instructions dealing with them, as well as for compensatory damages. As to exemplary damages, the jury was specifically instructed that these might be awarded ****557** 'only' if the jury found from the evidence that the defendant 'falsely connected plaintiffs with The Desperate Hours, and that this was

done knowingly or through failure to make a reasonable investigation.' The jury was then informed that 'You do not need to find that there was any actual ill will or personal malice toward the plaintiffs if you find a reckless or wanton disregard of the plaintiffs' rights.' (Emphasis supplied.).

* * *

[558 *420]**

The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above **559 the reach of the law-that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press-whether forthrightly or by subtle indirection-in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility to that freedom. This Court cannot and should not refuse to permit under state law the private citizen who is aggrieved by the type of assault which we have here and which is not within the specially protected core of the First Amendment to recover compensatory damages for recklessly inflicted invasion of his rights.

Accordingly, I would affirm.

866 N.E.2d 1051, 35 Media L. Rep. 1979, 113 Ohio St.3d 464

Welling v. Weinfeld

Supreme Court of Ohio.

WELLING et al., Appellants,

v.

WEINFELD, Appellee.

No. 2005–1964.
Submitted Oct. 4, 2006.
Decided June 6, 2007.

Opinion

PFEIFER, J.

Factual and Procedural Background

{ ¶ 1} From neighborhood friction that spiraled into dueling litigation has emerged a significant question for this court: Does Ohio recognize the "false light" theory of the tort of invasion of privacy? Today we recognize that theory of recovery.

{ ¶ 2} The plaintiff-appellee, Lauri Weinfeld, and defendants-appellants, Robert and Katherine Welling, are neighbors in Perry Township in Stark County. Weinfeld owns and operates a party center next to her home, which hosts banquets, parties, and outdoor weddings. The Wellings live next to the party center. Weinfeld and the Wellings each alleged on a number of theories that the activities of the other interfered with their legitimate use of their own property.

{ ¶ 3} Weinfeld sued, alleging that the Wellings' use of yard and farm equipment during party center events constituted nuisance, trespass, invasion of privacy, interference with business relations, and intentional infliction of emotional ***465** distress. It is one of the Wellings' counterclaims, invasion of privacy, that is the focus of this case.

{ ¶ 4} At trial, the Wellings alleged two sets of facts supporting their invasion-of-privacy claim. First, they alleged that Weinfeld had focused floodlights on and had conducted videotape surveillance of their property.

{ ¶ 5} The second set of facts forms the basis of the issue in this case. During the spring of 2000, someone threw a rock through a plate-glass window at Weinfeld's party center. Weinfeld suspected that the culprit was the Wellings' son, Robert. Weinfeld created handbills, printed on 8 ½–by–11–inch paper, offering a reward for information regarding the perpetrator. The handbill read:

$500.00

REWARD

for any information which leads to the conviction of the person(s) responsible for throwing a rock through the window of Lakeside Center Banquet Hall (also known as the "Party Center") in the Dee Mar Allotment, in Perry Township, on Monday, May 8th or Tuesday, May 9th, 2000.

**Any tips will be kept confidential.
Call the Perry Township Police
Department's Detective Bureau at
478–5121.
Reward will be paid in cash.**

{ ¶ 6} Weinfeld admitted that she had no proof that the Wellings were responsible for the damage. She further admitted that she distributed the handbills at two locations outside the neighborhood that were of special significance to the Wellings: at the Pepsi bottling plant where Robert Welling and his son worked and at the school the Welling children attended.

{ ¶ 7} The Wellings allege that Weinfeld's distribution of the handbills spread wrongful publicity about them that unreasonably placed them in a false light before the public.

{ ¶ 8} On November 22, 2002, a jury entered a defense verdict in favor of the Wellings on Weinfeld's claims and further found that Weinfeld had invaded the ***466** Wellings' privacy. The jury interrogatory on the invasion-of-privacy claim did not delineate the facts upon which the jury based its verdict. The jury awarded the ****1053** Wellings $5,412.38 in compensatory damages and $250,000 in punitive damages. Attorney fees were stipulated to be $10,000.

{ ¶ 9} On December 6, 2002, Weinfeld moved for judgment notwithstanding the verdict or in the alternative for a new trial or remittitur. On June 5, 2003, the trial court overruled the plaintiff's motion for judgment notwithstanding the verdict, but granted a remittitur of the punitive damages award to $35,000, subject to acceptance by the Wellings. The Wellings did not accept the remittitur. The trial court therefore granted a new trial on the Wellings' invasion-of-privacy claim.

{ ¶ 10} Weinfeld and the Wellings both appealed the trial court's decision. Weinfeld argued that the trial court should have granted her motion for judgment notwithstanding the verdict on the Wellings' invasion-of-privacy claim. The appellate court held that the trial court did not abuse its discretion in denying the motion, holding that an invasion-of-privacy action could lie based upon Weinfeld's use of the video camera and floodlights. However, as to false-light invasion of privacy based upon the distribution of the handbill, the appellate court made no determination, noting that this court had not yet adopted the false-light invasion-of-privacy theory of recovery. The court wrote:

{ ¶ 11} "[I]t remains an open question, rather than an absolute rejection whether such theory would be recognized. We do not choose to decide what constitutes an appropriate case wherein the Ohio Supreme Court would finalize such issue as we are not required in this case to reach such a decision and would be reluctant, in any event, to do so without affirmative guidance from the Supreme Court." *Weinfeld v. Welling*, Stark App. No. 2004CA00340, 2005-Ohio-4721, 2005 WL 2175141, ¶ 57.

{ ¶ 12} The appellate court thus removed the issue of false-light invasion of privacy from this case, limiting the retrial to the issue of invasion of privacy based upon Weinfeld's intrusion upon the Wellings' seclusion. The Wellings appealed, urging this court to recognize that a cause of action exists under Ohio law for false-light invasion of privacy.

{ ¶ 13} The cause is before this court upon the acceptance of a discretionary appeal. 108 Ohio St.3d 1435, 2006-Ohio-421, 842 N.E.2d 61.

Law and Analysis

{ ¶ 14} In *Housh v. Peth* (1956), 165 Ohio St. 35, 59 O.O. 60, 133 N.E.2d 340, this court first recognized a cause of

action for invasion of privacy. The court listed three instances in which the claim could be brought:

***467** { ¶ 15} "An actionable invasion of the right of privacy is [1] the unwarranted appropriation or exploitation of one's personality, [2] the publicizing of one's private affairs with which the public has no legitimate concern, or [3] the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." Id. at paragraph two of the syllabus.

{ ¶ 16} Noticeably absent from *Housh* is the recognition of a cause of action based upon publicity that places a person in a false light before the public. But *Housh* was decided before the 1960 publication of Dean William L. Prosser's influential law review article, Privacy (1960), 48 Cal.L.Rev. 383, wherein Prosser described four distinct types of invasion of privacy:

{ ¶ 17} "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

****1054** { ¶ 18} "2. Public disclosure of embarrassing private facts about the plaintiff.

{ ¶ 19} "3. Publicity which places the plaintiff in a false light in the public eye.

{ ¶ 20} "4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." Id. at 389.

{ ¶ 21} The Restatement of the Law 2d, Torts (1977), Section 652A incorporated the false-light theory as one of the four causes of action included under the umbrella of invasion of privacy. Restatement of the Law 2d, Torts, Section 652E sets forth the elements of false-light invasion of privacy:

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

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

{ ¶ 24} "(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

{ ¶ 25} This court has not addressed head-on the viability of a cause of action in Ohio for false-light invasion of privacy, although it referred to the claim in a footnote in *Sustin v. Fee* (1982), 69 Ohio St.2d 143, 23 O.O.3d 182, 431 N.E.2d 992. *Sustin* was an invasion-of-seclusion claim, not a false-light claim; the plaintiffs complained that a village zoning inspector was conducting surveillance of their property with binoculars. The court wrote that *Housh* had established the tort of invasion of privacy in Ohio and quoted that case's second syllabus paragraph, which set forth three actionable types of invasion of privacy. Id. at 145, 23 O.O.3d 182, 431 N.E.2d 992. In a footnote, the court wrote that there were *four* separate recognized branches of invasion of privacy, including false light:

***468** { ¶ 26} "Today the intrusion into a person's seclusion is recognized as but one of four separate branches of tortious invasion of privacy. These are set out in Section 652A of the Restatement of Torts 2d, at page 376, as follows:

{ ¶ 27} " '(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

{ ¶ 28} " '(2) The right of privacy is invaded by

{ ¶ 29} " '(a) unreasonable intrusion upon the seclusion of another * * *

{ ¶ 30} " '(b) appropriation of the other's name or likeness * * *

{ ¶ 31} " '(c) unreasonable publicity given to the other's private life * * *

{ ¶ 32} " '(d) publicity that unreasonably places the other in a false light before the public * * *.' See, also, Prosser

on Torts (4 Ed.), 802, Sec. 117." (Ellipses sic.) *Sustin*, 69 Ohio St.2d at 145, 23 O.O.3d 182, 431 N.E.2d 992, fn. 4.

{ ¶ 33} The court's affirmative acknowledgement of false-light invasion of privacy indicated an inclination toward recognizing it as a separate cause of action. However, in *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.* (1983), 6 Ohio St.3d 369, 6 OBR 421, 453 N.E.2d 666, this court made clear that whatever it had said in *Sustin* did not constitute a holding on the issue:

{ ¶ 34} "[T]his court has not recognized a cause of action for invasion of privacy under a 'false light' theory of recovery. Under the facts of the instant case, we find no rationale which compels us to adopt the 'false light' theory of recovery in Ohio at ****1055** this time." Id. at 372, 6 OBR 421, 453 N.E.2d 666.

{ ¶ 35} In *M.J. DiCorpo, Inc. v. Sweeney* (1994), 69 Ohio St.3d 497, 634 N.E.2d 203, an appellant again asked the court to recognize false-light invasion of privacy, but the court held that the statements at issue were made in an affidavit pursuant to a legal proceeding and were thus privileged and not actionable: "Given our determination that the statements contained in [the] affidavit cannot form the basis for civil liability, this case (like *Yeager*) is obviously not the appropriate case to consider adopting, or rejecting, the false light theory of recovery." Id. at 507, 634 N.E.2d 203.

{ ¶ 36} A majority of jurisdictions in the United States have recognized false-light invasion of privacy as a distinct, actionable tort. See *West v. Media Gen. Convergence, Inc.* (Tenn.2001), 53 S.W.3d 640, 644; Elder, Privacy Torts (2006), Section 4:1. However, the two most recent state supreme courts to address the issue, Tennessee and Colorado, have made divergent holdings. In *West*, the Tennessee Supreme Court recognized false-light invasion of privacy as a cause of action. *West* at 645. In *Denver Publishing Co. v. Bueno* (Colo.2002), 54 P.3d 893, however, the Colorado Supreme Court, in "a deliberate exercise of caution," ruled that false light "is too amorphous a tort for Colorado, and it risks inflicting ***469** an unacceptable chill on those in the media seeking to avoid liability." Id. at 904. Those two cases mark well the boundaries of the opposing viewpoints on the issue.

{ ¶ 37} *Bueno* points to the central concern of the cases and commentary against false light—that there is an unacceptable overlap between false light and defamation. The four-to-three majority in *Bueno* writes, "Courts that recognize false light view one's reputation in the community and one's personal sense of offense as separate interests. * * * But even those states that accept as important the difference between these two interests, reputation and personal feelings, recognize an 'affinity' between them." Id. at 901–902. *Bueno* describes the interest protected in a false-light claim as the "individual's peace of mind, *i.e.*, his or her interest 'in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is,' " while the action for defamation is to protect a person's interest in a good reputation. Id., quoting Restatement of the Law 2d, Torts, Section 652E, Comment *b*.

{ ¶ 38} While conceding the distinction of those interests, *Bueno* held that "recognition of the different interests protected rests primarily on parsing a too subtle distinction between an individual's personal sensibilities and his or her reputation in the community." Id. at 902. But *Bueno* acknowledges that there are scenarios in which false light fits and defamation fails:

{ ¶ 39} "The first involves cases where the defendant reveals intimate and personal, but false, details of plaintiff's private life, for example, portraying plaintiff as the victim of sexual harassment, *Crump* [*v. Beckley Newspapers, Inc.*, 173 W.Va. 699], 320 S.E.2d [70] 80 [(1984)], or as being poverty-stricken, *Cantrell v. Forest City Publ'g Co.,* 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974), or as having a terminal illness or suffering from depression. These depictions are not necessarily defamatory, but are potentially highly offensive. The second category encompasses portrayals of the plaintiff in a *more positive* light than he deserves. *See, e.g., Spahn v. Julian Messner, Inc.*, 43 Misc.2d 219, 250 N.Y.S.2d 529, 538–40, 543 (N.Y.Sup.Ct.1964), *aff'd,* 260 N.Y.S.2d 451, 23 A.D.2d 216 (1965), *aff'd,* ****1056** 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543 (1966), *vacated,* 387 U.S. 239, 87 S.Ct. 1706, 18 L.Ed.2d 744 (1967) (trial court finding invasion of privacy where plaintiff was depicted in book as a war hero who earned Bronze Star and 'raced out into the teeth of the enemy barrage'—two of a multitude of characterizations that were utterly false and embarrassing to plaintiff)." *Bueno*, 54 P.3d at 902–903.

{ ¶ 40} Ultimately, *Bueno* characterized potential false-light claims as encompassing "a decidedly narrow band of cases" and held that such plaintiffs would be ***470** protected by the existing remedies of defamation, appropriation,

and intentional infliction of emotional distress. Id. at 903.

{ ¶ 41} Beyond *Bueno*'s reluctance to recognize new torts was its determination that a false-light tort would have negative implications on First Amendment principles. The court reasoned that the theory of false-light invasion of privacy fails the test of providing a clear identification of wrongful conduct:

{ ¶ 42} "The sole area in which it differs from defamation is an area fraught with ambiguity and subjectivity. Recognizing 'highly offensive' information, even framed within the context of what a reasonable person would find highly offensive, necessarily involves a subjective component. The publication of highly offensive material is more difficult to avoid than the publication of defamatory information that damages a person's reputation in the community. In order to prevent liability under a false light tort, the media would need to anticipate whether statements are 'highly offensive' to a reasonable person of ordinary sensibilities even though their publication does no harm to the individual's reputation. To the contrary, defamatory statements are more easily recognizable by an author or publisher because such statements are those that would damage someone's reputation in the community. In other words, defamation is measured by its results; whereas false light invasion of privacy is measured by perception. It is even possible that what would be highly offensive in one location would not be in another; or what would have been highly offensive in 1962 would not be highly offensive in 2002. In other words, the standard is difficult to quantify, and shifts based upon the subjective perceptions of a community." *Bueno,* 54 P.3d at 903–904.

{ ¶ 43} *Bueno* concludes that the ambiguity and subjectivity surrounding false-light invasion of privacy would "invariably chill open and robust reporting." Id. Other states rejecting false light as a theory of recovery have also pointed to First Amendment implications in their reasoning. *Cain v. Hearst Corp.* (Tex.1994), 878 S.W.2d 577, 579–580; *Lake v. Wal–Mart Stores, Inc.* (Minn.1998), 582 N.W.2d 231, 235–236; *Renwick v. News & Observer Publishing Co.* (1984), 310 N.C. 312, 325–326, 312 S.E.2d 405.

{ ¶ 44} In *West,* 53 S.W.3d 640, the Tennessee Supreme Court held that a cause of action for false-light invasion of privacy protects an important individual right complementary to other privacy rights and that there are adequate protections guaranteeing the First Amendment rights of potential defendants. We agree.

{ ¶ 45} The court wrote in *West*:

{ ¶ 46} "While the law of defamation and false light invasion of privacy conceivably overlap in some ways, we conclude that the differences between the two torts warrant their separate recognition. The Supreme Court of West Virginia noted the following differences in *Crump v. Beckley Newspapers, Inc.:*

***471** { ¶ 47} " ' "In defamation law only statements that are false are actionable[;] ****1057** truth is, almost universally, a defense. In privacy law, other than in false light cases, the facts published are true; indeed it is the very truth of the facts that creates the claimed invasion of privacy. Secondly, in defamation cases the interest sought to be protected is the objective one of reputation, either economic, political, or personal, in the outside world. In privacy cases the interest affected is the subjective one of injury to [the] inner person. Thirdly, where the issue is truth or falsity, the marketplace of ideas furnishes a forum in which the battle can be fought. In privacy cases, resort to the marketplace simply accentuates the injury." ' 173 W.Va. 699 [711], 320 S.E.2d 70, 83 (1984) (quoting Thomas Emerson, *The Right of Privacy and Freedom of the Press,* 14 Harv. C.R.-C.L. L.Rev. 329, 333 (1979))." *West,* 53 S.W.3d at 645–646.

{ ¶ 48} We agree with *West* that the viability of a false-light claim maintains the integrity of the right to privacy, complementing the other right-to-privacy torts. In Ohio, we have already recognized that a claim for invasion of privacy can arise when *true* private details of a person's life are publicized. The right to privacy naturally extends to the ability to control false statements made about oneself.

{ ¶ 49} Without false light, the right to privacy is not whole, as it is not fully protected by defamation laws:

{ ¶ 50} "Certainly situations may exist in which persons have had attributed to them certain qualities, characteristics, or beliefs that, while not injurious to their reputation, place those persons in an undesirable false light. However, in situations such as these, victims of invasion of privacy would be without recourse under defamation law. False light therefore provides a viable, and we believe necessary, action for relief apart from

defamation." *West,* 53 S.W.3d at 646.

{ ¶ 51} Will a recognition of false-light invasion of privacy result in a parade of persons with hurt feelings clogging our courthouses? There is no indication that that scenario is the case in the states that already recognize false-light claims. The requirements imposed by the Restatement make a false-light claim difficult to prove.

{ ¶ 52} First, the statement made must be untrue. Second, the information must be "publicized," which is different from "published":

{ ¶ 53} " 'Publicity,' as it is used in this Section, differs from 'publication,' as that term is used * * *in connection with liability for defamation. 'Publication,' in that sense, is a word of art, which includes any communication by the defendant to a third person. 'Publicity,' on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication ***472** that reaches, or is sure to reach, the public." Restatement of the Law 2d, Torts, Section 652D, Comment *a.*

{ ¶ 54} Another element of a successful false-light claim is that the misrepresentation made must be serious enough to be highly offensive to a reasonable person:

{ ¶ 55} "The rule stated in this Section applies only when the publicity given to the plaintiff has placed him in a false light before the public, of a kind that would be highly offensive to a reasonable person. In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. * * * The plaintiff's privacy is not invaded ****1058** when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy." Restatement of the Law 2d, Torts, Section 652E, Comment *c.*

{ ¶ 56} The Restatement also accounts for multiple claims arising under the same set of facts.

{ ¶ 57} " The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander * * *. In such a case the action for invasion of 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." Restatement of the Law 2d, Torts, Section 652E, Comment *b.*

{ ¶ 58} Like the court in *West,* we believe that the First Amendment concerns that some courts have raised in regard to false-light claims are overblown. False-light defendants enjoy protections at least as extensive as defamation defendants. *West* makes the standard of fault identical for defamation and false-light claims: a negligence standard in regard to statements made about private citizens and an actual-malice standard for statements made about public figures. We choose to follow the Restatement standard, requiring that the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed," in cases of both private and public figures. Restatement of the Law 2d, Torts, Section 652E(b). In part, this heightened requirement is a recognition that a statement that is not defamatory is less apt to be a red flag for editors and checked for accuracy:

{ ¶ 59} "It is undoubtedly true that misrepresentations putting plaintiffs in a false light but not amounting to libel or slander are more difficult for an editor to ***473** notice and prevent. The false-light actual-malice requirement, however, is meant to address this concern. Negligent reporters and editors who merely fail to observe an error or to use reasonable care in averting misrepresentations will be protected. There can only be liability if a plaintiff can show that the publication knew of the falsity or acted with reckless disregard for the truth." Ray, Let There Be False Light: Resisting the Growing Trend Against an Important Tort (2000), 84 Minn.L.Rev. 713, 731.

{ ¶ 60} Adequate First Amendment protections are in place in regard to a cause of action for false-light invasion of

privacy. The world has changed since *Renwick*, one of the early decisions in which the court refused to recognize false-light claims due in part to First Amendment concerns. In *Renwick*, 310 N.C. 312, 312 S.E.2d 405, the court stated that the right to privacy had first been developed during the period of the excesses of yellow journalism and that formal training in journalism and ethics had ameliorated the concerns of the early leading legal lights as to the damage that could be done to individuals by the press. Id. at 325, 312 S.E.2d 405. At the time of *Renwick* in 1984, Greener's law—"Never argue with a man who buys ink by the barrel"—still applied. Today, thanks to the accessibility of the Internet, the barriers to generating publicity are slight, and the ethical standards regarding the acceptability ****1059** of certain discourse have been lowered. As the ability to do harm has grown, so must the law's ability to protect the innocent.

{ ¶ 61} We therefore recognize the tort of false-light invasion of privacy and adopt Restatement of the Law 2d, Torts, Section 652E. In Ohio, one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

{ ¶ 62} Accordingly, we reverse the court of appeals and remand the cause.
Judgment reversed and cause remanded.

MOYER, C.J., SWEENEY, LUNDBERG STRATTON and O'DONNELL, JJ., concur.

O'CONNOR and LANZINGER, JJ., dissent and would dismiss the cause as having been improvidently accepted.

JAMES J. SWEENEY, J., of the Eighth Appellate District, was assigned to sit for RESNICK, J., whose term ended on January 1, 2007.

CUPP, J., whose term began on January 2, 2007, did not participate in the consideration or decision of this case.

53 S.W.3d 640, 29 Media L. Rep. 2454

West v. Media General Convergence, Inc.

Supreme Court of Tennessee,
at Nashville.

Charmaine WEST, et al.

v.

MEDIA GENERAL CONVERGENCE, INC, et al.

No. M2001-00141-SC-R23-CQ.

Aug. 23, 2001.

***641**

Opinion

OPINION

FRANK F. DROWOTA, III, J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J., ADOLPHO A. BIRCH, JR., JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined.

FRANK F. DROWOTA, III, J.

Pursuant to Rule 23 of the Rules of the Supreme Court of Tennessee, this Court accepted certification of the following question from the United States District Court for the Eastern District of Tennessee:

> Do the courts of Tennessee recognize the tort of false light invasion of privacy, and if so, what are the parameters and elements of that tort?

We conclude that Tennessee recognizes the tort of false light invasion of privacy and that Section 652E of the Restatement (Second) of Torts (1977), as modified by our discussion below, is an accurate statement of the elements of this tort in Tennessee. We further conclude that the parameters of the doctrine are illustrated by the Comments to Sections 652A and 652E–I, and by this Court's decision in Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn.1978), as it applies to the First Amendment standard for private plaintiffs and the pleading of damages.

I. Factual and Procedural Background

The facts from which this case arose were adequately provided in the Certification Order to this Court. As described in that Order, the relevant facts are as follows:

> This suit arises out of a multi-part investigative news report aired by WDEF–TV 12 in Chattanooga about the relationship between the plaintiffs [Charmaine West and First Alternative Probation Counseling, Inc.] and the Hamilton County General Sessions Court, and in particular, one of the general sessions court judges. Plaintiffs operated a private probation services business, and were referred this business by the general sessions courts. Plaintiffs claim that WDEF–TV defamed them by broadcasting false statements that the plaintiffs' business is illegal. Plaintiff West, in particular, claims that the defendant invaded her privacy by implying that she had a sexual relationship with one of the general session judges; and that the general sessions judges and the

plaintiffs otherwise had a "cozy," and hence improper, relationship.

Media General filed a motion to dismiss the plaintiffs' false light invasion of privacy claim. Thereafter, the District Court for the Eastern District of Tennessee certified to this Court the following question of law: Do the courts of Tennessee recognize the tort of false light invasion of privacy, and if so, what are the parameters and elements of that tort? We accepted certification of this question, and, for the reasons stated ***642** below, we conclude that the tort of false light is recognized under Tennessee law. The elements of this tort are adequately stated in Section 652E of the *Restatement (Second) of Torts* (1977), as modified below, while Sections 652F–I and the comments to Sections 652A and 652E–I accurately reflect the parameters of the tort in Tennessee.

II. Analysis

A. The Right to Privacy

In the seminal article, *The Right to Privacy*, 4 Harv. L.Rev. 193 (1891), Samuel Warren and Louis Brandeis, expressing disdain for the "gossip-mongers" of their time, established the concept of the right to privacy in the common law. The article expressed contempt for the manner in which technological advancement undermined one's ability to keep private matters from the public eye:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Warren & Brandeis, *The Right to Privacy* at 196. Setting out to "define anew ... the right to enjoy life,—the right to be let alone," Warren and Brandeis positioned the right to privacy apart from traditional tort recovery requirements of physical injury or infringement upon property interests. 4 Harv. L.Rev. at 193.[FN2]

> [FN2] In their 1891 article, Warren and Brandeis articulated several maxims on the limitations of the right to privacy that generally hold true today and help with an understanding of the right to privacy and the tort of false light:
>
> 1. The right to privacy does not prohibit any publication of matter which is of public or general interest.
>
> 2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.
>
> 3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.
>
> 4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.
>
> 5. The truth of the matter published does not afford a defence.
>
> 6. The absence of "malice" * in the publisher does not afford a defence.
>
> *The Right to Privacy* at 214–19.
>
> * "Malice" as used here is defined as "personal ill-will," and should not be confused with the standard of actual malice discussed below.

The protection of privacy rights are still reflected in current law, owing much to the efforts of Dean William L. Prosser, whose analysis of invasion of privacy resulted in the classification of that tort into four separate

causes of action. *See* William L. Prosser, *Privacy*, 48 Calif. L.Rev. 383 (1960); William L. Prosser, *Law of Torts* § 117 (4th ed. 1971). "To date the law of privacy comprises four distinct interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone.' " Prosser, *Law of Torts* § 117, at 804. Prosser's four categories consist of the appropriation of one's name or likeness, intrusion upon the seclusion of another, public disclosure of private facts, and placing another in a false light before the public. *Id.*, § 117.

***643** Section 652A of the *Restatement (Second) of Torts* (1977) incorporated Dean Prosser's four categories of invasion of privacy:

> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right of privacy is invaded by:
>
> (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
>
> (b) appropriation of the other's name or likeness, as stated in § 652C; or
>
> (c) unreasonable publicity given to the other's private life, as stated in § 652D; or
>
> (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

This Court first encountered the issue of invasion of privacy in *Langford v. Vanderbilt University*, 199 Tenn. 389, 287 S.W.2d 32 (1956). Assuming that invasion of privacy existed as a cause of action in Tennessee, this Court recognized the right to privacy as "the right to be let alone; the right of a person to be free from unwarranted publicity." *Langford*, 287 S.W.2d at 38. In *Martin v. Senators, Inc.*, 220 Tenn. 465, 418 S.W.2d 660 (1967), we revisited the issue of invasion of privacy, looking to the *Restatement (First) of Torts* (1939) for insight into the nature of the tort:

> A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.... Liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues.

Martin, 418 S.W.2d at 663 (citing to *Restatement (First) of Torts* § 867 & cmt. d (1939)). In more recent years, the federal courts have applied the *Restatement (Second) of Torts* when analyzing the right to privacy in Tennessee. In *Scarbrough v. Brown Group, Inc.*, the United States District Court for the Western District of Tennessee held that "[a]lthough no Tennessee state court has recognized the [Restatement (Second)] distinctions, federal courts applying Tennessee law have used these categories in analyzing invasion of privacy claims." 935 F.Supp. 954, 963–64 (W.D.Tenn.1995).

B. False Light and Recognition of the Tort

Specifically at issue in this case is whether Tennessee recognizes the separate tort of false light invasion of privacy. Section 652E of the *Restatement (Second) of Torts* (1977) defines the tort of false light:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject ***644** to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

A majority of jurisdictions addressing false light claims have chosen to recognize false light as a separate actionable

tort. Most of these jurisdictions have adopted either the analysis of the tort given by Dean Prosser or the definition provided by the *Restatement (Second) of Torts.* [Exceedingly long string citation omitted]. Among these jurisdictions, Virginia, New York, and Wisconsin refused to recognize the common law tort of false light because their state legislatures adopted privacy statutes that do not expressly include the tort.

Perhaps the most significant case upholding the minority view is *Renwick v. News and Observer Publishing Co.*, 310 N.C. 312, 312 S.E.2d 405 (1984). In *Renwick*, the Supreme Court of North Carolina expressed two main arguments for not recognizing the tort of false light invasion of privacy in North Carolina. First, the protection provided by false light either duplicates or overlaps the interests already protected by the defamation torts of libel and slander. 312 S.E.2d at 412. Second, "to the extent it would allow recovery beyond that permitted in actions for libel or slander, [recognition of false light] would tend to add to the tension already existing between the First Amendment and the law of torts in cases of this nature." *Id.* After analyzing the standards of constitutional protection provided by *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), the North Carolina Supreme Court was unwilling to extend protection to plaintiffs under false light partly because of a concern that recognition of the tort "would reduce judicial efficiency by requiring our courts to consider two claims for the same relief which, if not identical, would not differ significantly." *Id.* at 413. Further, the court asserted that "such additional remedies as we *might* be required to make available to plaintiffs should we recognize false light invasion of privacy claims are not sufficient to justify the recognition in this jurisdiction of such inherently constitutionally suspect claims for relief." *Id.* (emphasis in original).

After considering the relevant authorities, we agree with the majority of jurisdictions that false light should be recognized as a distinct, actionable tort. While the law of defamation and false light invasion of privacy conceivably overlap in some ways, we conclude that the differences between the two torts warrant their separate recognition. The Supreme Court of West Virginia noted the following differences in *Crump v. Beckley Newspapers, Inc.:*

> In defamation law only statements that are false are actionable, truth is, almost universally, a defense. In privacy law, other than in false light cases, the facts published are true; indeed it is the very truth of the facts that creates the claimed invasion of privacy.[FN5] Secondly, in defamation cases the interest sought to be protected is the objective one of reputation, either economic, political, or personal, in the outside world. In privacy cases the interest affected is the subjective ***646** one of injury to [the] inner person. Thirdly, where the issue is truth or falsity, the marketplace of ideas furnishes a forum in which the battle can be fought. In privacy cases, resort to the marketplace simply accentuates the injury.

173 W.Va. 699, 320 S.E.2d 70, 83 (1984) (quoting Thomas Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv. C.R.-C.L. L.Rev. 329, 333 (1979)).

> [FN5] The facts may be true in a false light claim. However, the angle from which the facts are presented, or the omission of certain material facts, results in placing the plaintiff in a false light. " 'Literal accuracy of separate statements will not render a communication "true" where the implication of the communication as a whole was false.' ... The question is whether [the defendant] made "discrete presentations of information in a fashion which rendered the publication *susceptible to inferences* casting [the plaintiff] in a false light.' " *Santillo v. Reedel*, 430 Pa.Super. 290, 634 A.2d 264, 267 (1993)(citing *Larsen v. Philadelphia Newspapers, Inc.*, 375 Pa.Super. 66, 543 A.2d 1181 (1988)) (emphasis added). Therefore, the literal truth of the publicized facts is not a defense in a false light case.

With respect to the judicial economy concern expressed by the North Carolina Supreme Court, we find that such concerns are outweighed in this instance by the need to maintain the integrity of the right to privacy in this State. Dean Prosser's analysis identifies the nature of invasion of privacy, and we believe false light complements the remaining invasion of privacy torts. Certainly situations may exist in which persons have had attributed to them certain qualities, characteristics, or beliefs that, while not injurious to their reputation, place those persons in an undesirable false light. [FN6]

> [FN6] Comment b, Illustration 4 to Section 652E provides such an example:

> A is a democrat. B induces him to sign a petition nominating C for office. A discovers that C is a Republican and demands that B remove his name from the petition. B refuses to do so and continues public circulation of the petition, bearing A's name. B is subject to liability to A for invasion of privacy.

However, in situations such as these, victims of invasion of privacy would be without recourse under defamation law. False light therefore provides a viable, and we believe necessary, action for relief apart from defamation.

The Appellant, and likewise the minority view, predict that recognition of the tort will result in unnecessary litigation, even in situations where "positive" or laudatory characteristics are attributed to individuals. We disagree. Such needless litigation is foreclosed by Section 652E (a) of the *Restatement (Second) of Torts* which imposes liability for false light only if the publicity is highly offensive to a reasonable person. Comment c to Section 652E notes that the hypersensitive plaintiff cannot recover under a false light claim where the publicized matter attributed to the plaintiff was, even if intentionally falsified, not a seriously offensive misstatement.

> Complete and perfect accuracy in published reports concerning any individual is seldom attainable by any reasonable effort, and most minor errors, such as a wrong address for his home, or a mistake in the date when he entered his employment or similar unimportant details of his career, would not in the absence of special circumstances give any serious offense to a reasonable person.

Restatement (Second) of Torts, § 652E cmt. c (1977). Thus, the "highly offensive to a reasonable person" prong of Section 652E deters needless litigation.[FN7]

> [FN7] Illustrations provided in Section 652E of the *Restatement (Second) of Torts*, (1977), are helpful in understanding the limits of protection provided by false light. Illustration 9 reads:
>
> A is the pilot of an airplane flying across the Pacific. The plane develops motor trouble, and A succeeds in landing it after harrowing hours in the air. B Company broadcasts over television a dramatization of the flight, which enacts it in most respects in an accurate manner. Included in the broadcast, however, are scenes, known to B to be false, in which an actor representing A is shown as praying, reassuring passengers, and otherwise conducting himself in a fictitious manner that does not defame him or in any way reflect upon him. Whether this is an invasion of A's privacy depends on whether it is found by the jury that the scenes would be highly objectionable to a reasonable man in A's position.

***647** Comment b to Section 652E of the *Restatement (Second) of Torts* addresses the concern that one publication may result in multiple recoveries. If, in addition to false light, a plaintiff also asserts an alternative theory of recovery under libel, "the plaintiff can proceed upon either theory, or both, *although he can have but one recovery for a single instance of publicity.*" *Id.* (emphasis added).[FN8]

> [FN8] Comment d to Section 652A of the *Restatement (Second) of Torts* also provides that, in instances where more than one invasion of privacy is claimed based upon a single act or series of acts, the injured party may "have only one recovery of his damages upon one or all of the different grounds."

We must also disagree with the North Carolina Supreme Court that recognition of false light would destabilize current First Amendment protections of speech. In our view, the "actual malice" standard adequately protects First Amendment rights when the plaintiff is a public official, a public figure, or the publicity is a matter of public interest. This standard was first adopted in a defamation case, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), in which the Court held that public officials may not recover damages for defamatory statements relating to their official duties unless the statement was made with actual malice—knowledge of the falsity of the statement or reckless disregard for the truth of the statement. In *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), the Court extended the actual malice standard to alleged defamatory statements about matters of public interest.[FN9]

> [FN9] "[T]he constitutional protections for speech and press preclude the application of the New

> York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Time, Inc. v. Hill*, 385 U.S. at 387–88, 87 S.Ct. at 542.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court held that negligence is a sufficient constitutional standard for defamation claims asserted by a private individual about matters of private concern, but the Court has not yet decided which standard applies to false light claims. *See Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974).

In light of the uncertain position of the United States Supreme Court with respect to the constitutional standard for false light claims brought by private individuals about matters of private interest, many courts and Section 652E of the *Restatement (Second) of Torts* adopt actual malice as the standard for all false light claims. *See Goodrich v. Waterbury Republican–American, Inc.*, 188 Conn. 107, 448 A.2d 1317, 1330 (1982); *Lovgren v. Citizens First Nat'l Bank of Princeton,* 126 Ill.2d 411, 128 Ill.Dec. 542, 534 N.E.2d 987, 991(1989); *McCall v. Courier–Journal & Louisville Times Co.*, 623 S.W.2d 882, 888 (Ky.1981) ("Until the Supreme Court has spoken, we must comply with the ruling in *Hill* .... In the event the *Gertz* rule is applied, we believe the desirable standard of fault is that of simple negligence which we have adopted in this opinion for libel cases."); *Dean v. Guard Publ'g Co., Inc.*, 73 Or.App. 656, 699 P.2d 1158, 1161 (1985). We hold that actual malice is the appropriate standard for false light claims when the plaintiff is a public official or public figure, or when the claim is asserted by a private individual about a matter of public concern. We do not, however, adopt the actual malice standard for false light claims brought by private plaintiffs about matters of private concern. In *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn.1978), this Court adopted negligence as the standard for ***648** defamation claims asserted by private individuals about matters of private concern. Our decision to adopt a simple negligence standard in private plaintiff/private matter false light claims is the result of our conclusion that private plaintiffs in false light claims deserve the same heightened protection that private plaintiffs receive in defamation cases. Therefore, when false light invasion of privacy claims are asserted by a private plaintiff regarding a matter of private concern, the plaintiff need only prove that the defendant publisher was negligent in placing the plaintiff in a false light. For all other false light claims, we believe that the actual malice standard achieves the appropriate balance between First Amendment guarantees and privacy interests.

With respect to the parameters of the tort of false light, we conclude that Sections 652F–I of the *Restatement (Second) of Torts* adequately address its limits. Sections 652F and 652G note that absolute and conditional privileges apply to the invasion of privacy torts, and we hereby affirm that such privileges previously recognized in Tennessee apply to false light claims. Damages are addressed in Section 652H of the *Restatement (Second) of Torts* (1977), which provides:

> One who has established a cause of action for invasion of his privacy is entitled to recover damages for
>
> (a) the harm to his interest in privacy resulting from the invasion;
>
> (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
>
> (c) special damage of which the invasion is a legal cause.

Consistent with defamation, we emphasize that plaintiffs seeking to recover on false light claims must specifically plead and prove damages allegedly suffered from the invasion of their privacy. *See Memphis Publishing*, 569 S.W.2d at 419. As with defamation, there must be proof of actual damages. *See Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152 (Tenn.Ct.App.1997). The plaintiff need not prove special damages or out of pocket losses necessarily, as evidence of injury to standing in the community, humiliation, or emotional distress is sufficient. 959 S.W.2d at 164.

In addition, for purposes of clarification, this Court adopts Section 652I of the *Restatement (Second) of Torts* (1977) which recognizes that the right to privacy is a personal right. As such, the right cannot attach to corporations or other business entities, may not be assigned to another, nor may it be asserted by a member of the individual's family, even if brought after the death of the individual. *Restatement (Second) of Torts* § 652I cmt. a-c

(1977). Therefore, only those persons who have been placed in a false light may recover for invasion of their privacy.

Finally, we recognize that application of different statutes of limitation for false light and defamation cases could undermine the effectiveness of limitations on defamation claims. Therefore, we hold that false light claims are subject to the statutes of limitation that apply to libel and slander, as stated in *Tenn.Code Ann.* §§ 28–3–103 and 28–3–104(a)(1), depending on the form of the publicity, whether in spoken or fixed form.

III. Conclusion

In response to the certified question, we conclude that the courts of Tennessee recognize the tort of false light invasion of privacy, and that Section 652E of the *Restatement (Second) of Torts* (1977), as modified by the discussion above, is an accurate statement of the tort. The parameters of false light in Tennessee are adequately explained by the Comments to Sections 652A and 652E–I, as well as the ***649** pleading of damages requirement provided in *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn.1978).

Having answered the certified question, the Clerk is directed to transmit a copy of this opinion in accordance with Tennessee Supreme Court Rule 23(8). Costs in this Court are taxed to the petitioner, Media General Convergence, Inc.

6 Ohio St.3d 369, 453 N.E.2d 666, 116 Lab.Cas. P 56,408, 6 O.B.R. 421

Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen and Helpers of America

Supreme Court of Ohio.

YEAGER, Appellant,

v.

LOCAL UNION 20, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, et al., Appellees.

No. 82-1424.
Aug. 31, 1983.

****667** ***Syllabus by the Court***

***369** One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. (*Bartow v. Smith,* 149 Ohio St. 301, 78 N.E.2d 735 [37 O.O. 10], overruled.)

Plaintiff-appellant, David M. Yeager, was employed as a vice-president and general manager of Browning-Ferris Industries ("BFI") in Toledo, Ohio. His responsibilities included oversight and supervision of BFI employees and operations. Throughout the period relevant to this action, defendant-appellee, Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America, was the exclusive collective bargaining representative for certain BFI employees. Toledo Area PROD ("TAP"), also a defendant-appellee, is the Toledo area chapter of a national organization of dissident Teamsters known as PROD. The national organization of PROD is also a defendant-appellee herein. The individual defendants-appellees named in plaintiff's amended complaint are officers, agents, members and/or representatives of Local Union 20, TAP and/or PROD.

Plaintiff alleges that on March 31, 1978, a group from Local 20 entered his office, threatening him with injury, threatening to shut BFI down; made menacing remarks concerning plaintiff and his family; and threatened to "get" plaintiff. As a result, plaintiff alleges that this incident caused him ***370** great anxiety for his welfare and that of his family, and led to deleterious physical consequences (*i.e.,* severe stomach pain and discomfort caused by an ulcer or aggravation of a pre-existing ulcerous condition, necessitating a week long hospital stay in May 1978, with medical expenses of nearly $5,000).

Plaintiff also alleges that on June 5, 1979, a picketing and handbilling incident took place outside the confines of the BFI plant. The picket signs and handbills described plaintiff as being a "Little Hitler"; accused him of operating "a Nazi concentration camp" at BFI; alleged that plaintiff did ****668** not support the Constitution of the United States; used "Gestapo" tactics; and cheated his employees.

On October 26, 1979, plaintiff brought this action against the above-named defendants in the Court of Common Pleas of Lucas County. Plaintiff filed an amended complaint on April 4, 1980 seeking compensatory and punitive damages from the defendants under separate counts for defamation, tortious interference with his employment relationship, invasion of privacy under a "false light" theory of recovery, and intentional infliction of mental and emotional distress.

Following the filing of answers and the completion of extensive discovery, defendants filed motions for summary judgment pursuant to Civ.R. 56. The trial court granted the defendants' motions on December 21, 1981.

Upon appeal, the court of appeals affirmed, with one judge dissenting in part. The majority held that defendants were entitled to summary judgment because plaintiff had failed to establish that there was a genuine

issue of material fact, especially since plaintiff relied primarily upon his own affidavit. In addition, the court held that even if summary judgment was improperly granted in favor of TAP and the individual defendants, PROD and Local Union 20 were entitled to summary judgment because the undisputed evidence made it clear that they played no role whatsoever in the events of June 5, 1979. It was also held that the picketing incident was not actionable by plaintiff because it took place in the context of a "labor dispute," and that therefore, any defamation alleged is protected, so long as it was done without "actual malice." *Linn v. United Plant Guard Workers* (1966), 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582. It was also held that Ohio does not recognize the tort of intentional infliction of emotional distress absent a contemporaneous physical injury, or unless it was the result of an assault pursuant to *Bartow v. Smith* (1948), 149 Ohio St. 301, 78 N.E.2d 735. [37 O.O. 10].

The cause is now before this court upon the allowance of a motion to certify the record.

* * *

[*371] Opinion

SWEENEY, Justice.

The first issue before this court is whether summary judgment was properly granted upon the trial court's determination that the defendants-appellees' actions were conducted within the context of a labor dispute.

*** * ***

[669]** Once it has been determined that concerted activity constitutes a labor dispute, the United States Supreme Court has held that an action for defamation within this context must be adjudicated under the *New York Times Co. v. Sullivan* "actual malice" standard. *Linn, supra.* In this regard, the plaintiff must prove that the defendants did not merely fail to investigate the truth of their publication, but that they actually entertained serious doubts about its truth before publishing it. *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 88 S.Ct. 1323, 1325-1326, 20 L.Ed.2d 262.

In addition to his other arguments, appellant submits that the lower courts erred in finding that the statements published on the handbills were ***372** not actionable, and that the court of appeals erred in applying an "innocent construction rule" on the alleged defamatory statements.

With respect to these contentions, we find that this court has stated that it is for the court to decide as a matter of law whether certain statements alleged to be defamatory are actionable or not. *Bigelow v. Brumley* (1941), 138 Ohio St. 574, 590, 37 N.E.2d 584 [21 O.O. 471].

In relation to this, the court of appeals below followed the reasoning of several federal diversity opinions in Ohio which adopted the "innocent construction rule." According to this rule, if allegedly defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted. See, *e.g., England v. Automatic Canteen Co.* (C.A.6, 1965), 349 F.2d 989. In this regard, we note that various courts have had occasion to examine language similar to that allegedly used by appellees in the instant action, and have found that such language is protected as a matter of law when used in a labor dispute or in a case involving a public figure. Thus, words such as "gestapo-like," "Gestapo tactics," and "fascist" have been found to be protected. See *Cafeteria Employees Union Local 302 v. Angelos* (1943), 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58; *Buckley v. Littell* (C.A.2, 1976), 539 F.2d 882, certiorari denied (1977), 429 U.S. 1062, 97 S.Ct. 785, 50 L.Ed.2d 777; and *Schy v. Hearst Publishing Co.* (C.A.7, 1953), 205 F.2d 750. It is our view that even if we were to assume that the incidents in the case *sub judice* did not constitute a labor dispute, the language used is capable of different meanings; is mere hyperbole or rhetoric, and is an expression of opinion, not fact; and is protected. As was stated by the court of appeals below, " * * * [i]t is unreasonable to assume that any person reading the handbill or the signs would really believe that the [appellant] was literally a member of the Nazi Party, the Gestapo, the SS or was like Hitler in condoning or practicing genocide or other atrocities." Therefore, we affirm the court of appeals with respect to appellant's defamation cause of action.

In his next argument, appellant contends that the picketing and handbilling incident invaded his privacy by impugning his character under a "false light."

This court has recognized a cause of action for invasion of privacy in *Housh v. Peth* (1956), 165 Ohio St. 35, 133 N.E.2d 340 [59 O.O. 60]. However, this court has not recognized a cause of action for invasion of ****670** privacy under a "false light" theory of recovery. Under the facts of the instant case, we find no rationale which compels us to adopt the "false light" theory of recovery in Ohio at this time. As stated before, it is our view that the complained about language constitutes expressions of opinions, not facts. Even if appellant had styled his cause of action as an invasion of privacy alone, we find that the *Housh* syllabus does not support a theory of recovery such as this, under the facts of the case at bar.[FN1]

[FN1] The second paragraph of the *Housh v. Peth* syllabus provides as follows:

"An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

From this, we believe it is clear the appellant's cause of action does not encompass an actionable invasion of the right of privacy

***373** Appellant next argues that the appellees intentionally interfered with his employment relationship by engaging in the conduct which brought about this present action. Appellant cites the fact that he was terminated by BFI during the pendency of this appeal as supporting evidence for this contention. Appellees, on the other hand, argue that appellant has failed to establish any causal connection between the alleged incidents and his eventual dismissal from BFI, and we agree. As the court of appeals correctly pointed out, appellant's affidavit in this regard deals in conjecture and speculation. Additionally, there is no other independent evidence to show that appellant's fears or suspicions in this regard are well-founded. Accordingly, we affirm the appellate court's decision with respect to this cause of action.

Finally, appellant argues that the appellees' conduct caused him severe emotional distress, and that therefore, he should be permitted to state a cause of action for the intentional infliction of emotional distress. Appellees counter that the *Bartow* case precludes an action in Ohio for the intentional infliction of emotional distress; and that even if appellant suffered emotional distress, he cannot recover unless the conduct amounted to an assault, trespass, or invasion of privacy. It is the appellees' contention that even assuming that the incidents in question amounted to an assault, appellant is precluded from recovery because the applicable statute of limitations had expired prior to the commencement of the instant action.

Until today, Ohio was the only jurisdiction in this country that refused to recognize the independent tort of the intentional infliction of serious emotional distress. The reasoning behind this refusal to recognize this cause of action was that " '[t]he damages sought to be recovered are too remote and speculative. The injury is more sentimental than substantial. Being easily simulated and hard to disprove, there is no standard by which it can be justly, or even approximately, compensated.' " *Bartow v. Smith, supra,* 149 Ohio St. at 311, 78 N.E.2d 735.

In *Schultz v. Barberton Glass Co.* (1983), 4 Ohio St.3d 131, 447 N.E.2d 109, this court held that a cause of action may be stated for the *negligent* infliction of serious emotional distress. Certainly, if protection must be afforded to individuals who are seriously injured emotionally through the negligence of another, there is no doubt that the case is stronger to allow recovery by one who is ***374** similarly injured intentionally by another. We believe that the time is now appropriate for this court to recognize ****671** a cause of action for the intentional infliction of serious emotional distress, and therefore, *Bartow v. Smith, supra,* is expressly overruled.

Our prior decisions in *Schultz, supra,* and *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 451 N.E.2d 759, have explored the reasoning behind the unwillingness of courts to recognize the validity of an action grounded on invasion of emotional tranquillity alone, along with the apprehensions of courts concerning the consequences in allowing recovery for emotional distress. Suffice it to say that we have rejected the skeptical approach embodied in the past cases in favor of conforming the law to the realities of modern medical and psychiatric advancements. *Paugh, supra.*

Our approach in identifying the scope of a cause of action pleading intentional infliction of emotional distress is similar in some respects to that which we set forth in *Paugh, supra.* Thus, we hold that in order to state a

claim alleging the intentional infliction of emotional distress, the emotional distress alleged must be serious. As Dean Prosser reasoned in his learned treatise, "[i]t would be absurd for the law to seek to secure universal peace of mind, and many interferences with it must of necessity be left to other agencies of social control. 'Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.' But this is a poor reason for denying recovery for any genuine, serious mental injury." Prosser, Law of Torts (4 Ed.1971) 51, Section 12 (quoting Magruder, Mental and Emotional Disturbance in the Law of Torts [1936], 49 Harv.L.Rev. 1033, 1035).

The standard we adopt in our recognition of the tort of intentional infliction of serious emotional distress is succinctly spelled out in the Restatement as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Restatement of the Law 2d, Torts (1965) 71, Section 46(1).

This approach discards the requirement that intentionally inflicted emotional distress be "parasitic" to an already recognized tort cause of action as in *Bartow*. It also rejects any requirement that the emotional distress manifest itself in the form of some physical injury. This approach is in accord with the well-reasoned analysis of a substantial number of jurisdictions throughout the nation. See Prosser, *supra*, at 59, footnote 20.

With respect to the requirement that the conduct alleged be "extreme and outrageous," we find comment *d* to Section 46 of the Restatement, *supra*, at 73, to be instructive in describing this standard:

" * * * It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a ***375** degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

"The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must ****672** still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. See Magruder, Mental and Emotional Disturbance in the Law of Torts, [49] Harvard Law Review 1033, 1053 (1936). * * * "

Our recognition of the tort of intentional infliction of serious emotional distress compels us to reject the appellees' argument that appellant's action is barred by the applicable statute of limitations.

R.C. 2305.09 provides in part:

"An action for any of the following causes shall be brought within four years after the cause thereof accrued:

" * * *

"(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code. * * * "

Since the tort of intentional infliction of serious emotional distress is not listed in any of the sections referred to in R.C. 2305.09, the applicable statute of limitations for this cause of action will be four years. Under the facts of the instant case, we find that appellant's action has been timely brought.

In reversing the court of appeals on the grounds that a cause of action may be stated for the intentional infliction of serious emotional distress, we believe that appellant's action is not precluded because the events alleged took place within the context of a "labor dispute." The United States Supreme Court has unanimously held that the

National Labor Relations Act does not preempt a state's recognition of a cause of action for intentional infliction of emotional distress. *Farmer v. United Brotherhood of Carpenters and Joiners of America* (1977), 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338.

Based upon all of the foregoing, we affirm the judgment of the court of appeals in part with respect to appellant's causes of action for defamation, invasion of privacy and intentional interference with an employment relationship. We reverse the court of appeals in part and remand the cause to the trial court for further proceedings on the cause of action for intentional infliction ***376** of emotional distress arising from the alleged incident in appellant's office on March 31, 1978.

Judgment accordingly.

FRANK D. CELEBREZZE, C.J., and WILLIAM B. BROWN, LOCHER, CLIFFORD F. BROWN and JAMES P. CELEBREZZE, JJ., concur.

HOLMES, J., concurs in part.

HOLMES, Justice, concurring.

I concur in that part of the syllabus which states that:

"One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

However, I do not agree with the need to overrule *Bartow v. Smith* (1948), 149 Ohio St. 301, 78 N.E.2d 735 [37 O.O. 10], in that, when analyzed, *Bartow* would in essence be in agreement with the opinion *sub judice*. I so noted in my concurrence in *Baker v. Shymkiv* (1983), 6 Ohio St.3d 151, 451 N.E.2d 811. My position here is in accord with my commentary in *Baker v. Shymkiv*, which was as follows:

"This court, in *Bartow v. Smith* (1948), 149 Ohio St. 301, 78 N.E.2d 735 [37 O.O. 10], although denying recovery for emotional shock occasioned by the use of vile language against the plaintiff which was found to be mere nonactionable words in the absence of threat, recognized that where certain protected rights were intentionally violated, a recovery for mental shock and resulting injury could be had. The protected rights set forth in the syllabus of *Bartow v. Smith* were the right not to be slandered, and not to be subject to words or action constituting an assault or threat, or which put a person in fear and terror."

Accordingly, I agree that the law has countenanced actions for emotional shock ****673** occasioned by intentional and malicious words or actions which constitute an assault or threat which put a person in fear and terror.

Here, the record shows that there was evidence that the defendants did intentionally and maliciously express certain threats which put the plaintiff in fear and terror. There was evidence not only to the effect that the defendants had threatened the plaintiff with injury, but also that the safety of the plaintiff's family had been maliciously threatened by these defendants. All of such evidence would present a cause of action against these defendants and, if proven, would be the basis for a recovery for serious emotional distress. Therefore, the defendants' motions for summary judgment should not have been granted by the trial court on this phase of the case. The judgment of the court of appeals as to this should be reversed. I also join in the affirmance of the judgment of the court of appeals as to the other issues.