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Let There Be False Light: Resisting the Growing Trend against an Important Tort

Nathan E. Ray

Note

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According to the traditional conception of the privacy torts, as described by Professor William L. Prosser,[1] there are four forms of invasion of privacy: intrusion upon seclusion or solitude,[2] publication of embarrassing private facts,[3] appropriation of name or likeness,[4] and publicity placing an individual in a false light before the public eye.[5] 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.*[6]

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1. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 398 (1960).

2. In recognizing a cause of action for intrusion upon seclusion, the Minnesota Supreme Court declared that an invasion of privacy 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.'" Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 233 (Minn. 1998) (citations omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977) [hereinafter RESTATEMENT]).

3. 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.'" *Id.* (quoting RESTATEMENT, *supra* note 2, § 652D).

4. The appropriation tort protects an individual's identity and is committed when one "appropriates to his own use or benefit the name or likeness of another." *Id.* (quoting RESTATEMENT, *supra* note 2, § 652C).

5. 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.

Id. (quoting RESTATEMENT, *supra* note 2, § 652E).

6. *See id.* at 234-35. The facts of the case provided an excellent opportunity to recognize the torts. On a vacation to Mexico, Melissa Weber's sister took a snapshot of her naked showering with fellow traveler Elli Lake. After

Yet Minnesota is in the vanguard when it comes to rejecting "false light," boldly joining only two other states.[7]

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,[8] the false light tort makes an easy target for criticism. This is due in large part to its "hazy philosophical underpinnings"[9] 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.[10] 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.

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attempting to have the five rolls of film from their trip developed at the local Wal-Mart, they received a notice that one or more of the photographs had not been printed due to their "nature." Within months, it appeared that the two young women were among the few people in town not to have seen the picture. Their sexual orientations were questioned, and a friend reported that a Wal-Mart employee had shown her a copy of the photograph. The supreme court reversed the lower court ruling that Minnesota did not recognize the common-law tort of invasion of privacy, creating a new cause of action. *See id.* at 235.

7. Texas and North Carolina have explicitly rejected false light. *See infra* Part I.B (discussing Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994), and Renwick v. News & Observer Publ'g Co., 312 S.E.2d 405 (N.C. 1984)).

8. *See generally* Prosser, *supra* note 1 (describing in detail the four branches of the privacy tort). An example of intrusion upon seclusion might be a hidden video camera in an area where a person would have a reasonable expectation of privacy, such as a bathroom or locker room. Since we expect to be alone and unobserved in such situations, the law will provide a remedy when our solitude is violated. Likewise, a cause of action for publication of private facts might exist where medical records of a person who is not a public figure are published. People generally agree that such information is entitled to confidentiality, and accordingly the law provides a remedy when the media or other entity crosses this line. Finally, a person's name or likeness might be misappropriated where he has established a reputation as a talented or noteworthy personality, and his image is used without his permission to endorse a product. The rationale often cited for this tort is a proprietary interest. Others should not be permitted to profit from the work an individual puts into creating a valuable persona or reputation. In contrast, there is little agreement about the interest protected by false light. *See infra* Part I.C. Prosser simply asserts that it protects an interest in reputation, the same interest defamation protects. *See infra* notes 73-79 and accompanying text.

9. Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 451 (1989).

10. *See infra* Part I.A (describing First Amendment concerns raised by false light); Part I.B (discussing rejections of the tort by state courts in part because of its similarity to defamation).

False light invasion of privacy involves exposing an otherwise private individual to unwanted and false publicity.[11] 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.[12] 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. For example, in *Braun v. Flynt*,[13] an amusement park entertainer whose act consisted of inducing "Ralph the Diving Pig" to jump into a tank with her by enticing it with a bottle of milk was featured without her consent in a pornographic magazine. The magazine obtained pictures of her act and published them alongside other pictures and cartoons having overtly sexual themes.[14] The performer won a jury verdict against the publication for false light invasion of privacy.

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

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11. *See* RESTATEMENT, *supra* note 2, § 652E.

> 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.

Id.

12. *See id.* § 558.

> 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) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Id. A "defamatory statement" is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* § 559. For analysis of the differing elements of defamation and false light, see *infra* Part II.B.

13. 726 F.2d 245 (5th Cir. 1984).

14. *See id.* at 247.

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.[15] In Minnesota, these plaintiffs and others[16] would have been without recourse.

In rejecting false light, the Minnesota Supreme Court relied on the reasoning of other state courts without a careful and critical examination. That reasoning does not withstand close analysis, and this Note will attempt to supply the considerations missing from these decisions and demonstrate the need for a false light tort. Part I traces the evolution of the tort in the United States and explains the origins of the criticism and confusion that currently surround it. Part II shows that false light neither overlaps with defamation nor threatens disputable First Amendment concerns, and attempts to clarify the interests the tort protects. This Note concludes that the false light tort serves a unique need and that other states should not follow Minnesota's lead in rejecting it.

I. BIRTH OF A MISUNDERSTOOD TORT

Professor Prosser has told the story that the famous 1890 Warren and Brandeis article[17] advocating a common-law tort of invasion of privacy was inspired by Boston journalists crashing the society wedding of Warren's daughter.[18] The story has often been repeated by other legal scholars.[19] One commentator,

15. *See* Spahn v. Julian Messner, Inc., 233 N.E.2d 840, 842-43, 843 n.* (N.Y. 1967). The case arose under the New York privacy statute, which state courts had construed to allow false light claims. *See infra* note 47.

16. *See infra* notes 176-80 and accompanying text.

17. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

18. *See* Prosser, *supra* note 1, at 383-84. Prosser wrote:

> It was the era of "yellow journalism," when the press had begun to resort to excesses in the way of prying that have become more or less commonplace today .... [T]he newspapers had a field day on the occasion of the wedding of [Warren's] 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.

Id. at 383 (citations omitted).

19. *See, e.g.*, Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 966 (1964); Hyman Gross, *Privacy and Autonomy, in* PRIVACY 169, 177 (J. Roland Pennock & John W.

however, points out that Warren's daughter, "the face that launched a thousand lawsuits,"[20] 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.[21] 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.[22] 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.[23]

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.[24] Apart from passing mention in an 1888 treatise on torts of the right "to be let alone,"[25] no coherent notion of privacy existed in American

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Chapman eds., 1971); Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 329 n.22 (1966); Alec M. Barinholtz, Note, *False Light Invasion of Privacy: False Tort?*, 17 SW. U. L. REV. 135, 137-38 (1987).

20. Prosser, *supra* note 1, at 423 ("One is tempted to surmise that [Warren's daughter] must have been a very beautiful girl . . . the face that launched a thousand lawsuits.").

21. *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1349. Gormley also debunks a different myth attributing Warren's ire to photographers snapping perambulator pictures of his children. Another author, however, notes that two newspapers in 1890 did run items in their gossip columns describing in "restrained" tones a wedding breakfast hosted by the Warrens for a cousin. *See* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 295-96 (1983).

22. *See, e.g.*, James H. Barron, *Warren and Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 876 (1979); Bloustein, *supra* note 19, at 971; Prosser, *supra* note 1, at 383; Diane Leenheer Zimmerman, *Musings on a Famous Law Review Article: The Shadow of Substance*, 41 CASE W. RES. L. REV. 823, 823 (1991); Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 147 (1996); Lucy Noble Inman, Comment, Hall v. Post*: North Carolina Rejects Claim of Invasion of Privacy by Truthful Publication of Embarrassing Facts*, 67 N.C. L. REV. 1474, 1478 (1988).

23. Only North Dakota and Wyoming still lack a cause of action for invasion of privacy. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234 (Minn. 1998).

24. *See* Warren & Brandeis, *supra* note 17, at 204-05. The authors' immediate concern was the mental distress caused by the "idle gossip" which had become a standard feature of major newspapers with the rise of yellow journalism. *See* Barinholtz, *supra* note 19, at 138. They urged protection for the sanctity of private life that went beyond the outward-looking protection of reputation provided by defamation. *See id.* at 138-39.

25. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed.

law.[26] Yet, they argued, courts had provided relief on other grounds in the absence of causes of action for invasion of privacy.[27] Few courts elected to recognize invasion of privacy in the beginning, but the tort slowly gained momentum.[28] With its appearance in the *Restatement of Torts* in 1939, the trend in favor of recognition spread quickly to the majority of American jurisdictions.[29] 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."[30]

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.[31] 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.[32] "False light"

1888).

26. *See* Gormley, *supra* note 21, at 1343.

27. *See* Prosser, *supra* note 1, at 384. Grounds for relief in the older cases included defamation, invasion of some property right, breach of confidence, and implied contract. *See id.* at 384 nn.4-5 (citing Woolsey v. Judd, 4 Duer (11 N.Y. Super.) 379, 11 How. Pr. 49 (N.Y. 1855); Gee v. Pritchard, 2 Swans. 402, 36 Eng. Rep. 670 (1818); Prince Albert v. Strange, 2 De G. & Sm. 652, 41 Eng. Rep. 1171, 1 Mac. & G. 25, 64 Eng. Rep. 293 (1849); Yovatt v. Winyard, 1 Jac. & W. 394, 37 Eng. Rep. 425 (1820); Abernethy v. Hutchinson, 3 L.J. Ch. 209 (1825); Pollard v. Photographic Co., 40 Ch. D. 345 (1888)).

28. According to Prosser, the only judicial approval for the tort in the first fifteen years after its proposal came from lower courts in New York and a Massachusetts federal court. *See* Prosser, *supra* note 1, at 384-85. The Michigan Supreme Court explicitly rejected invasion of privacy in *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 289 (Mich. 1899), followed with rejection in New York by *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902). Not until Georgia adopted the tort in *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905), was there precedent in favor of recognition. *See* Prosser, *supra* note 1, at 384-86.

29. *See* Prosser, *supra* note 1, at 386. By the late 1950s, the right to privacy was recognized in some form or other by "the overwhelming majority of American courts." *See id.*

30. RESTATEMENT OF THE LAW OF TORTS § 867 (1939). The editors seem to have recognized the tenuous existence of the new tort, since they sandwiched it somewhat ignominiously between the tort of Failure to Furnish Facilities to a Member of the Public (§ 866) and the tort of Interference with Dead Bodies (§ 868).

31. *See, e.g.*, Bloustein, *supra* note 19, at 963-64; J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 789 (1992); Barinholtz, *supra* note 19, at 141.

32. *See supra* notes 1-5 and accompanying text.

originated in this article. Prosser's classification ultimately was adopted by nearly every state recognizing invasion of privacy at common law,[33] and became the formulation for the *Restatement (Second) of Torts*.[34]

Prosser traced the origins of the false light theory of invasion of privacy back to a dispute in 1816 between Lord Byron and a publisher who attempted to circulate an inferior poem falsely attributed to him.[35] Other examples from the older cases not explicitly employing a false light theory included fictitious testimonials in advertising, spurious books and articles or ideas contained therein, unauthorized uses of names, and use of an individual's photograph to illustrate an unrelated point in a book or article.[36] Prosser cited numerous cases in which plaintiffs prevailed on a wide variety of theories, implying that courts sometimes awkwardly adapted available theories to provide relief for what was actually a false light invasion of privacy.[37] In addition, an article by Wigmore in 1916[38] argued for

33. *See, e.g.*, Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317, 1329 (Conn. 1982); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 287 (Idaho 1961); Geisberger v. Willuhn, 390 N.E.2d 945, 948 (Ill. App. Ct. 1979); Winegard v. Larson, 260 N.W.2d 816, 822 (Iowa 1977); Froelich v. Adair, 516 P.2d 993, 995 (Kan. 1973); Household Fin. Corp. v. Bridge, 250 A.2d 878, 882-83 (Md. 1969); McCormack v. Oklahoma Publ'g Co., 613 P.2d 737, 739 (Okla. 1980); Vogel v. W.T. Grant Co., 327 A.2d 133, 136 (Pa. 1974).

34. *See* RESTATEMENT, *supra* note 2, § 652; *infra* text accompanying note 52.

35. *See* Lord Byron v. Johnston, 2 Mer. 29, 35 Eng. Rep. 851, 851-52 (1816), *cited in* Prosser, *supra* note 1, at 398. No basis for the action is indicated in the case, but another commentator argues that the case does not stand for a theory of false attribution of opinion or utterance as Prosser asserts. The case actually involved "passing off," or attempting to sell goods under the false claim that they were manufactured by another, which is how subsequent cases treat it. *See* Kelso, *supra* note 31, at 791-92. Kelso contends that Prosser's discussion of this and other "false light" cases is misleading, because rather than admit that his analysis is simply a reinterpretation of older cases, Prosser characterizes them as already supporting his "new creation." *See id.* at 789-90.

36. *See* Prosser, *supra* note 1, at 398-99.

37. *See id.* at 398-99 nn.130-43 (citing, inter alia, Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905) (libel, breach of confidence); Manger v. Kree Inst. of Electrolysis, 233 F.2d 5 (2d Cir. 1956) (violation of New York's civil rights statute); Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. Ct. App. 1909) (slander); Fairfield v. American Photocopy Equip. Co., 291 P.2d 194 (Cal. Dist. Ct. App. 1955) (general right to privacy); Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. 314 (Pa. C.P. 1957) (unfair competition); Downs v. Swann, 73 A. 653 (Md. 1909) (violation of personal liberties and constitutional rights)).

38. John H. Wigmore, *The Right Against False Attribution of Belief or Utterance*, KY. L.J., May 1916, at 3. Wigmore states:

a right to privacy to protect against certain kinds of false statements.[39] It is a testimony to Prosser's influence that there are now more than six hundred cases mentioning the false light tort by name.[40] Although only a few of these cases have successfully raised false light as the sole claim, the tort is widely used and, in some situations, provides the only opportunity for recovery.

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[41] 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.'"[42] 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*

> I am entitled to be judged in public by my actual opinions and utterances. To have false ones ascribed to me is an injury to my feelings of self respect. And that is the injury against which I am entitled to be protected. The right of privacy is really a right to be protected against a certain kind of injury to feelings. And that is the feature common to that right and the present one. The right to be protected against defamation, i.e., against loss of repute and patronage among other persons, does not here reach the essence of the wrong.

Id. at 8 (emphasis omitted).

39. Aside from cases alleging defamation, none of the cases cited by Wigmore actually involved tort actions, however. *See* Harvey L. Zuckman, *Invasion of Privacy—Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253, 256 (1990).

40. *See* Kelso, *supra* note 31, at 819.

41. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

42. New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (second omission in original) (citations omitted).

York Times Co. v. Sullivan.[43] 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.[44] This "actual malice" rule was soon extended to public figures.[45]

In 1967, *Time, Inc. v. Hill*[46] examined the question of First Amendment limitations on liability in invasion of privacy cases.[47] *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.[48] 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

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43. *Id.*

44. *See id.* at 283.

45. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

46. 385 U.S. 374 (1967).

47. The case arose when *Life* magazine ran a story about a Broadway play based on a hostage ordeal suffered by the plaintiff's family. *See id.* at 376-77. The play depicted acts of violence and verbal sexual abuse, although in fact the escaped convicts who took the family hostage never harmed them, and treated them with courtesy. *See id.* The plaintiff sued the magazine under the New York privacy statute, alleging *Life* had created a false impression of the family's experiences by asserting that the play was based on a true story. *See id.* at 377-79. The statute actually dealt with what Prosser termed appropriation of name or likeness, but state courts had interpreted it broadly to allow recovery where the defendant publicized false information about a private individual for commercial gain. *See id.* at 381-83. This amounts to false light invasion of privacy, although that terminology was not used in the statute or the opinion. A distinction is unnecessary, however, because the Court addressed only the issue of constitutional requirements for damage awards, which would apply regardless of the particular privacy cause of action in a jurisdiction. In a later false light case, the Court characterized the cause of action in *Hill* as false light invasion of privacy. *See* Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 249 (1974).

48. Justice Brennan stated that it "serves no purpose to distinguish the facts here from those in *New York Times*." *Hill*, 385 U.S. at 391. Much future confusion was generated by this failure to distinguish between the legal principles governing false light and defamation. *See infra* notes 80-81 and accompanying text.

that the Supreme Court recognized the tort.[49] Subsequent to *Hill*, however, the Court has expressly declined to consider whether the actual malice standard applies to all false light cases.[50] 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.[51] 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.[52]

These elements have been adopted more or less verbatim in virtually every state recognizing this cause of action at common

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49. *See* Greg C. Wilkins, Comment, *The Night the Light Went Out in Texas—The Texas Supreme Court Rejects the Tort of False Light Invasion of Privacy:* Cain v. Hearst Corp., *878 S.W.2d 577 (Tex. 1994)*, 26 TEX. TECH. L. REV. 249, 251 (1995) ("In *Time, Inc. v. Hill*, without using the phrase 'false light,' the United States Supreme Court held that a plaintiff could recover in a false light action for invasion of privacy."); Zimmerman, *supra* note 9, at 385 ("[T]he Justices [in *Hill*] 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 . . . ."); *see also* Cain v. Hearst Corp., 878 S.W.2d 577, 588 (Tex. 1994) (Hightower, J., dissenting) ("[T]he court fails to address the United States Supreme Court's acceptance of false light invasion of privacy so long as the plaintiff proves that the defendant acted with actual malice . . . .").

50. *See Cantrell*, 419 U.S. at 250-51. *Cantrell* was the only other false light case to come before the Supreme Court. The actual malice standard was satisfied in that case, so the Court may have wanted to avoid the question, which had proved divisive in the area of defamation since *New York Times*. *See* Ruth Walden & Emile Netzhammer, *False Light Invasion of Privacy: Untangling the Web of Uncertainty*, 9 HASTINGS COMM. & ENT. L.J. 347, 352 (1987). Like *Hill*, the case dealt with a very narrow issue, whether the Sixth Circuit erred in setting aside the jury's verdict in a false light invasion of privacy case. *See Cantrell*, 419 U.S. at 251. As a result, *Cantrell* sheds little light on any constitutional issues raised by the false light tort.

51. There is currently a good deal of uncertainty surrounding this standard, however. *See* RESTATEMENT, *supra* note 2, § 652E cmt. d (pointing out that limits to First Amendment protections afforded the media in defamation cases since *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), may or may not apply to privacy cases as well).

52. RESTATEMENT, *supra* note 2, § 652E.

law.[53] 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.

B. LAND O'*LAKE*: REJECTING FALSE LIGHT IN THE STATE COURTS

Minnesota's rejection of false light invasion of privacy is the latest in a short series of state court decisions disapproving the tort. Beginning in 1984, the tide in favor of recognition began to turn with the North Carolina decision of *Renwick v. News & Observer Publishing Co.*,[54] the first of a small handful of cases to reject false light. The two themes in all of these decisions are the purported similarity between false light and defamation, and the false light tort's potential for First Amendment infringement.

The *Renwick* court, relying on Prosser's characterization of the interest protected by false light as "reputation" and his acknowledgment of significant overlap with defamation,[55] held that an action for false light invasion of privacy did not exist in North Carolina.[56] In addition, the court concluded that any such right of recovery would "add to the tension already existing between the First Amendment and the law of torts."[57] It also reasoned that because the excesses of "yellow journalism" which so irked Warren and Brandeis in 1890 were supposedly now greatly ameliorated by formal training in journalism and ethics, any additional remedies for plaintiffs did not justify burdening the press with "constitutionally suspect" claims for relief.[58] The court stated that "nothing in the First Amendment

53. For a sampling of state cases relying on the Restatement's formulation, see *supra* note 33. Because Prosser coined the term "false light" and served as the Reporter for the second Restatement, there is essentially no other authority from which these elements could have been derived.

54. 312 S.E.2d 405 (N.C. 1984). In *Renwick*, a newspaper reported that an associate dean at UNC Chapel Hill claimed 800 black students were denied admission in a three year period, even though race-based concessions allowed blacks to be admitted with SAT scores 20% lower than the class average and a projected grade point average of only 1.6. *See id.* at 407. The dean claimed that the newspaper incorrectly reported his statement and created a false impression that he was "an extremist, a liar, and . . . irresponsible in his profession." *Id.* at 409.

55. *See* Prosser, *supra* note 1, at 400. Prosser believed both torts protect the interest in reputation. *See id.*

56. *See Renwick*, 312 S.E.2d at 412.

57. *Id.*

58. *See id.* at 413.

mandates that members of the news media be responsible or professional."[59]

Similar reasoning led the Texas Supreme Court to reject the false light tort ten years later, when the Fifth Circuit certified the issue on a claim by a convicted killer who was unfavorably portrayed in the *Houston Chronicle*.[60] The court held:

> We reject the false light invasion of privacy tort for two reasons: 1) it largely duplicates other rights of recovery, particularly defamation; and 2) it 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.[61]

The court determined that because both false light and defamation claims generally involve false statements, false light recovery would be substantially duplicated by other established torts.[62] In addition, defamation actions are subject to numerous restrictions serving to safeguard freedom of speech.[63] Thus, "[p]ermitting plaintiffs to bring actions for false light without the limits established for defamation actions may inhibit free speech beyond the permissible range. On the other hand, no useful purpose would be served by the separate tort if these restrictions are imposed."[64] The court also included a final rationale raising the possibility of a chilling effect on speech if false light were recognized. The majority opined that the probable danger to freedom of the press outweighed the "marginal" benefits of adding another tort to protect plaintiffs against nondefamatory speech.[65]

Closely following the Texas court, Minnesota declined to recognize false light because of its purported similarity to defamation and conflict with the First Amendment.[66] The only significant difference it found between defamation and false light was that defamation protects reputation in the external world, whereas false light protects harm to one's inner self.[67] Because false light otherwise overlaps with defamation but lacks the same restrictions protecting free speech interests, the

59. *Id.*
60. *See* Cain v. Hearst Corp., 878 S.W.2d 577, 577 (Tex. 1994).
61. *Id.* at 579-80.
62. *See id.* at 580-81.
63. *See id.* at 581-82.
64. *Id.* at 582.
65. *See id.* at 584.
66. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998).
67. *See id.*

court concluded that any additional protection it provided to plaintiffs was insufficient to overcome possible danger to free speech.[68] Likewise, any untrue and hurtful publicity actionable under false light but not defamation would be too uncommon to outweigh the risk of chilling speech.[69] Although *Lake* briefly canvassed some of the history of the privacy tort, the interests protected by the right to privacy were not discussed in any detail.

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,[70] 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.[71] 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

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68. *See id.* at 236. Noting restrictions on defamation actions cited by the Texas court, including privileges for public meetings, good faith, and important public interest and mitigation factors, the court concluded that because most false light claims are actionable in defamation it did not make sense to recognize false light with similar restrictions. *See id.* at 236 & n.27.

69. *See id.*

70. Some jurisdictions that recognize invasion of privacy under common law declare that false light simply has never existed there, but have not gone so far as to foreclose the possibility that it might eventually be allowed. *See, e.g.*, Sullivan v. Pulitzer Broad. Co., 709 S.W.2d 475, 480 (Mo. 1986) ("It may be possible that in the future Missouri courts will be presented with an appropriate case justifying our recognition of the tort.... [But] we hesitate under the facts of this case to decide whether or not to denominate a separate tort for 'false light invasion of privacy.'"); Elm Med. Lab, Inc. v. RKO Gen., Inc., 532 N.E.2d 675, 681 (Mass. 1989) ("This court has not recognized [false light invasion of privacy] and does not choose to do so now."); Yeager v. Local 20, Int'l Bhd. of Teamsters, 453 N.E.2d 666, 670 (Ohio 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."); Brown v. Pearson, 483 S.E.2d 477, 484 (S.C. 1997) ("[N]o South Carolina case has recognized this tort."). In addition, California appears to have gutted the tort without explicitly rejecting it. *See* Kenneth Franklin, Comment, *Invasion of Privacy: False Light Offers False Hope*, 8 LOY. L.A. ENT. L.J. 411, 415 (1988) (arguing that Fellows v. National Enquirer, Inc., 721 P.2d 97 (Cal. 1986), by holding that false light claims are subject to the same special damage requirements as defamation, effectively terminated the tort because the interests it protects are emotional or mental and thus not readily quantifiable).

71. Ettore v. Philco Television Broad. Co., 229 F.2d 481, 485 (3d Cir. 1956), *cited in* Bloustein, *supra* note 19, at 962.

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.[72]

The disarray has been partly attributed to Prosser in spite of his acclaimed contribution to the law of invasion of privacy.[73] Professor Edward J. Bloustein noted with surprise and disapproval that the four privacy torts identified by Prosser protect four distinct interests, none of which is actually an interest in privacy.[74] 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."[75] 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.[76] 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.[77] Moreover, because false light publicity can technically be favorable to the subject of the publicity,[78] it is

72. *See* Barinholtz, *supra* note 19, at 152.

73. *See* Bloustein, *supra* note 19, at 964-65.

74. *See id.* at 965. Bloustein states that Prosser's innovation is in effect a repudiation of Warren and Brandeis because it suggests that privacy is not an independent value but "a composite of the interests in reputation, emotional tranquility and intangible property." *Id.* at 962.

75. Prosser, *supra* note 1, at 400.

76. *See* Bloustein, *supra* note 19, at 965-66; Bruce A. McKenna, Note, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113, 119 (1985).

77. *See* McKenna, *supra* note 76, at 119 ("Protection of a reputation interest is inconsistent with the concept of privacy. Privacy law is designed to protect an individual's mental tranquility.").

78. *See supra* text accompanying note 15; *infra* note 121 and accompanying text.

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.[79] 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,[80] it created a presumption that defamation and false light are intimately connected and protect the same personal interest.[81]

In addition, despite recognition that an analysis of the interests at stake is vital for the continued existence of the tort,[82] 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.[83] 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.[84] These interests may be vague and abstract, but few people dispute the desirability of privacy protections in our so-

79. *Cf., e.g.*, BRUCE W. SANFORD, LIBEL AND PRIVACY 569 (2d ed. Supp. 1999) ("Legally, placing someone in a false light amounts to little more than defamation. Ostensibly, the tort purports to allow recovery for misrepresentations and inaccuracies that do not rise to the level of libel or slander."). Whatever might be the interest protected by false light, defamation obviously protects the interest in reputation.

80. *See supra* notes 43-48 and accompanying text.

81. *See* Walden & Netzhammer, *supra* note 50, at 356.

82. *See* Bloustein, *supra* note 19, at 963 ("The need for [a general theory of privacy] is pressing [because] the conceptual disarray has had untoward effects on the courts; lacking a clear sense of what interest or interests are involved in privacy cases has made it difficult to arrive at a judicial consensus concerning the elements of the wrong or the nature of the defenses to it.").

83. "The long search for a 'definition' of 'privacy' has produced a continuing debate that is often sterile and, ultimately, futile." Zimmerman, *supra* note 21, at 294 n.9 (quoting Raymond Wacks, *The Poverty of "Privacy,"* 96 LAW Q. REV. 73, 75 (1980)).

84. *See* Gormley, *supra* note 21, at 1337-38. Authors cited include Roscoe Pound, Paul A. Freund, Tom Gerety, J. Braxton Craven, Jr., Jeffrey Reiman, Joseph W. Rebone, Laurence H. Tribe, and Jed Rubenfeld.

ciety.[85] 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.[86]

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.[87] 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.[88]

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85. A notable exception is Zimmerman, *supra* note 21, at 332-33 (arguing that gossip about the private affairs of others has traditionally served the beneficial purpose of preserving and enforcing social norms, and that today the press might perform this function).

86. *See generally* Kelso, *supra* note 31; Zimmerman, *supra* note 9; Zuckman, *supra* note 39; Barinholtz, *supra* note 19; McKenna, *supra* note 76. One commentator points out:

> [T]orts work well only when fairly broad-based and particularized agreement exists about what society wishes to protect, deter, and compensate plaintiffs for. Tort law fails when there is disagreement on these issues. This society is comfortable with protecting bodily integrity, with the notion that reputation is a valuable good, and with the idea that property owners have a largely unassailable interest in exclusive control.... [J]udges and juries share a reasonably consistent understanding of these values.
>
> In contrast, privacy is not so well-defined.... [P]rivacy is rich in symbolic value but has little particularized meaning.

Zimmerman, *supra* note 22, at 826.

87. For analysis of some scholarly treatments of the false light protected interest, see *infra* Part II.C.1.

88. *See* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422 (1980) (arguing that much of the scholarly literature on privacy amounts to some form of reductionism, which denies the utility of thinking and talking about privacy as a legal concept); *id.* at 438 ("[W]e must reject Edward Bloustein's suggestion that the coherence of privacy lies in the fact that all invasions are violations of human dignity.... [T]here are ways to offend dignity and personality that have nothing to do with privacy." (footnote omitted)); Gormley, *supra* note 21, at 1339 ("Commentators have stumbled over privacy, and have failed to agree upon an acceptable definition, because they have generally focused on privacy as a philosophical or moral concept—which allows for multiplicitous definitions, as seen above—while wholly ignoring privacy as a legal concept."); Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885, 897 (1991) ("Bloustein's suggestion ... is unsatisfactory. Human dignity can be called into question by a wide variety of practices in society that have nothing to do with privacy and for which the law makes no effort to provide a remedy."); Zimmerman, *supra* note 21, at 336 n.242. Zimmerman states:

> Bloustein has attempted to establish a philosophical foundation on which to rest the legal protection of privacy.... Although highly in-

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.[89] *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.[90] 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.

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fluential, [his] position has not succeeded in eliminating serious questions about the value of and justification for [the tort of invasion of privacy]. Indeed, Bloustein admits that identifying a moral foundation for privacy does not necessarily tell us whether the law should enforce the right.

Id. (citations omitted).

89. *See, e.g.*, Zuckman, *supra* note 39, at 256-57 ("Neither the appellate cases nor the decisions explain why the tort is needed, the interest or interests protected, how it can be harmonized with defamation, and how it might be harmonized with the protections accorded freedom of expression."). *See generally* Zimmerman, *supra* note 9; Barinholtz, *supra* note 19; Kelso, *supra* note 31.

90. *See* Victor A. Kovner, et al., *Recent Developments in Newsgathering, Invasion of Privacy and Related Torts, in* 3 COMMUNICATIONS LAW 1998, at 445, 479-80 (P.L.I. Intellectual Property Course Handbook Series No. G-540, 1998) (calling *Lake* a "remarkable decision," and "perhaps the most significant setback to those who argue that false light should be cognizable").

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,[91] 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]."[92] 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,[93] actual malice on the part of defendants,[94] and disclosure to the public at large.[95] In addition, some courts hold that the shorter statute of limitations for defamation applies to false light actions.[96]

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 defama-

91. *See* Kelso, *supra* note 31, at 787 ("False light . . . was created by Dean Prosser and sanctioned by the American Law Institute. . . . [The tort] existed only in Prosser's mind."); Zimmerman, *supra* note 9, at 382 ("[I]n a real sense [Prosser] 'invented' the false light tort by singling out previously unacknowledged features common to most of the nonadvertising appropriation cases.").

92. Prosser, *supra* note 1, at 422.

93. *See infra* note 124 and accompanying text.

94. *See supra* notes 43-53 and accompanying text.

95. *See infra* note 117.

96. *See, e.g.*, Eastwood v. Cascade Broad. Co., 722 P.2d 1295, 1299 (Wash. 1986) (en banc) (holding that the statute of limitations in libel and slander cases also applies to false light invasion of privacy). Interestingly, a few scholars actually welcomed the initial lack of restrictions on false light invasion of privacy. Dean Wade went so far as to argue that the ancient and abstruse rules that have evolved in defamation law make false light a better alternative: "[C]ourts should not hesitate to proceed . . . toward the further development of the law of privacy. If the law of privacy then absorbs the law of defamation, it will merely afford a complete 'unfolding' of the idea or principle behind that law." John W. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1124 (1962). False light thus offered "a splendid opportunity for reform." *Id.* at 1122; *cf.* Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1133 (7th Cir. 1985) (calling many defamation restrictions "fossil remnants of the tort's prehistory in the discredited practices of Star Chamber and the discredited concept of seditious libel," and welcoming attempts by plaintiffs to get around them by pleading invasion of privacy). Such views have not caught on, and the Restatement actually suggests that false light plaintiffs should not be allowed to evade the long-standing limitations on defamation actions if the actionable publicity is also defamatory. *See* RESTATEMENT, *supra* note 2, § 652E cmt. e.

tion-type restrictions that prevent the tort from "unacceptably derogat[ing] constitutional free speech."[97] 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.[98]

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.[99] 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.

In addition, false light claims do not endanger any fundamental values of free speech. The Supreme Court has declared that "there is no constitutional value in false statements of fact."[100] "Neither the intentional lie nor the careless error ma-

97. Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998).

98. As another commentator puts it, "[o]ne 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." Bryan R. Lasswell, Note, *In Defense of False Light: Why False Light Must Remain a Viable Cause of Action*, 34 S. TEX. L. REV. 149, 174 (1993).

99. *See* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("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 in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter."); *see also* Zuckman, *supra* note 39, at 257 (arguing that defamatory injury to reputation provides a red flag to editors regarding legal risks of publication, whereas false light sometimes carries no advance notice of risk because the misrepresentation can be laudatory).

100. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1987) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the market place of ideas . . . ."); Herbert v. Lando, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."). Of course, a plaintiff could be subjected to false light publicity without the use of speech, but speech is the main source of harm, and the main focus of those who believe the tort is inconsistent with the First Amendment.

terially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."[101] Indeed, false statements can actually thwart constitutional interests because the self-government purposes of the First Amendment[102] are frustrated by misinformed citizens. Courts that eliminate false light protect only constitutionally disapproved intentional and reckless misrepresentations.

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."[103] Indeed, the privacy tort was expressly created to curb abuses by the press.[104] "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 . . . ."[105] 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,[106] there is little chance that false light will

101. *Gertz*, 418 U.S. at 340.

102. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (declaring that the First Amendment safeguard of free expression "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," and that "free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system" (citations omitted)).

103. RESTATEMENT, *supra* note 2, § 652E cmt. a (cross-referencing § 652D cmt. a); *see* Zimmerman, *supra* note 21, at 300.

104. *See* Franklin, *supra* note 70, at 424; *see also supra* notes 17-23 and accompanying text.

105. Buckley v. New York Post Corp., 373 F.2d 175, 182 (2d Cir. 1967).

106. The North Carolina Supreme Court discounted entirely the existence of such misrepresentations. In rejecting the false light tort, it opined that unlike the press of Warren and Brandeis's day, "journalists simply are more responsible and professional today." Renwick v. News & Observer Publ'g Co., 312 S.E.2d 405, 413 (N.C. 1984); *see generally supra* text accompanying notes 54-59. If the court is correct, a lively imagination is needed to conceive of the

curtail the willingness or ability of the press to make information available to the public, even with a rise in litigation.[107]

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."[108]

The false light tort may even promote freedom of speech.[109] 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.[110] Under this view, a cause of action for false light would actually pro-

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staggering sensationalism and scandal that must have daily overwhelmed the nineteenth-century public.

107. It is true that lawsuits against the press are becoming more common, but this could be as much a result of the increasing intrusiveness of the media as the general litigiousness of our society and the availability of multiple causes of action for torts committed by journalists. *See* SANFORD, *supra* note 79, at 1 (noting the rise in libel lawsuits in the past 25 years). Lawsuits against the media reflect the "uneasiness, even anger that the public feels toward the expanded role that the communications media have assumed in ordering our lives and defining the public agenda. [Such lawsuits serve] as a soapbox . . . for diatribes about the unaccountability and unfairness of the press." *Id.* False light actions, however, are less dangerous to the press than defamation actions. *See id.* at 523 ("[P]rivacy issues . . . certainly do not even approach, numerically or qualitatively, the threat [to the press] posed by libel lawsuits."). It is therefore difficult to see any significant danger in retaining false light.

108. Mark Weidemaier, Note, *Balancing, Press Immunity, and the Compatibility of Tort Law with the First Amendment*, 82 MINN. L. REV. 1695, 1717 (1998).

109. *See, e.g.*, Suzanne Reynolds Greenwood, Comment, *Privacy: The Search for a Standard*, 11 WAKE FOREST L. REV. 659, 689 (1975) ("'Any society sincerely interested in protecting the right of privacy is hardly likely to be at the same time hostile to the right of free expression. Both interests tend to have the same friends and the same enemies.'") (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 928 (1963)).

110. *See* Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 713 (1996).

mote freedom of speech by encouraging the expression of ideas and participation in public affairs, with less fear of media distortion and public embarrassment.[111]

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.[112] As previously noted,[113] a prima facie cause of action for defamation exists under the Restatement when there has been: (1) a false and defamatory statement; (2) concerning the plaintiff; (3) published to a third person; (4) with fault, amounting to at least negligence; and (5) which causes special harm when required.[114] A "defamatory statement" is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[115] False light, on the other hand, does not require a defamatory statement. It requires intentional or reckless disclosure to the public at large of statements or facts that are false and highly offensive[116] and is meant to safeguard an individual's privacy rather than reputation.

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111. *See id.*

112. *See supra* notes 11-12 (setting out the differing elements of the two torts); *infra* Part II.C (discussing the unique interest protected by false light).

113. *See supra* note 12 (quoting the Restatement's definition of defamation).

114. *See* RESTATEMENT, *supra* note 2, § 558.

115. *Id.* § 559.

116. *See id.* § 652E.

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.[117] On the other hand, defamation requires only "publication," meaning the defamatory statement must be communicated to at least one person other than the plaintiff.[118] 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.[119] 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.[120] 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.[121] 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,[122] whereas false light carries the more demanding requirement of actual malice.[123]

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117. *Compare id.* § 652E cmt. a (cross-referencing § 652D cmt. a) (defining publicity as communication "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"), *with supra* note 12 and accompanying text (stating the elements of defamation under § 558).

118. *See, e.g.*, Montgomery v. Big B, Inc., 460 So. 2d 1286, 1287 (Ala. 1984) (noting that publication occurs if the statement is made to one or more third parties); *see also* Bloustein, *supra* note 19, at 981 (pointing out that while a single publication is sufficient to defame, because reputation can be damaged in the mind of only one person, invasion of privacy is founded on insult to individuality, which requires a disclosure to the public). This suggests that the two torts protect separate interests. *See infra* note 127 (quoting Bloustein at greater length); *supra* Part I.C (reviewing attempts to define the interests protected by the false light tort).

119. *See supra* note 12 and accompanying text.

120. *See* Lasswell, *supra* note 98, at 175.

121. *See* Schwartz, *supra* note 88, at 894-96 & nn.50-61 (describing numerous situations taken from case law in which false light claims were based on non-disparaging statements).

122. *See supra* text accompanying notes 43-53. At common law, before the U.S. Supreme Court began "tinkering" with defamation, it carried strict liability. *See* Brown v. Kelly Broad. Co., 771 P.2d 406, 414 (Cal. 1989).

123. *See supra* text accompanying notes 43-53.

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.[124] 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.

As for other forms of invasion of privacy, there is little overlap with false light.[125] 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. If a Minnesota resident has the misfortune to be cast in a false light before the public eye without an additional and separate violation of privacy, Minnesota courts leave that resident without recourse.

False light is meant to protect a distinct interest as well.[126] 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.[127] Even the com-

124. *See* Cordell v. Detective Publications, Inc., 307 F. Supp. 1212, 1220 (E.D. Tenn. 1968) (concluding "reasonably factual" statements cannot place individuals in a false light); Winegard v. Larsen, 260 N.W.2d 816, 823 (Iowa 1977) (determining that there is no cause of action for false light unless the defendant's statements are "materially and substantially false"). *But see* Larsen v. Philadelphia Newspapers, Inc., 543 A.2d 1181, 1189 (Pa. Super. Ct. 1988) (holding that the element of falsity can be satisfied if a defendant creates a substantially false impression by juxtaposing true facts); Moore v. Sun Publ'g Corp., 881 P.2d 735, 744 (N.M. App. 1994). By contrast, defamation plaintiffs at common law do not have the burden of proving that the defendant's statement was false, as long as the plaintiff is not a public figure or official. The plaintiff must simply allege falsity, which is presumed unless the defendant raises truth as an affirmative defense. *See* Melaleuca, Inc. v. Clark, 78 Cal. Rptr. 2d 627, 637 (Ct. App. 1998) (citing RESTATEMENT, *supra* note 2, § 623A cmt. g); *see also* RESTATEMENT, *supra* note 2, § 581A cmt. b.

125. *See supra* note 8 and accompanying text (providing examples of invasions of privacy other than false light and noting rationales for the corresponding causes of action).

126. For a brief discussion of interests protected by the other privacy torts, see *supra* note 8.

127. *See supra* Part I.C. Bloustein, for example, cites the publicity re-

peting 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.[128] 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.

If *Lake v. Wal-Mart Stores, Inc.* is part of a growing trend, it may be that the future of the false light tort depends on a convincing articulation of its purpose. Yet the interest it protects is poorly understood. The remainder of this Note will therefore attempt to discover this interest and give a clear account of it.

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,[129] 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.

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quirement of the privacy torts as evidence that a different interest is protected:

> The right to sue for defamation has ancient origins because reputation could be put in peril by simple word of mouth or turn of the pen. The right to privacy in the form we know it, however, had to await the advent of the urbanization of our way of life including, as an instance, the institutionalization of mass publicity, because only then was a significant and everyday threat to personal dignity and individuality realized.

Bloustein, *supra* note 19, at 984.

128. *See* Greenwood, *supra* note 109, at 670.

129. *See supra* text accompanying notes 73-81.

1. Previous Attempts To Define the Interest False Light Protects Have Been Inadequate

Many legal thinkers have tried to interpret the interests underlying the right to privacy, but the interest protected by false light remains largely unexplored aside from laconic treatments in the course of broader discussions. Warren and Brandeis clearly believed that the "right to privacy" was a sufficient description of the interests protected by the new tort they proposed, but courts and scholars evidently need more.[130] Courts have provided a variety of justifications for false light,[131] but these attempts have tended to be cursory or flat. A handful of scholars have tried to expand on the interests at stake with the right to privacy, but for the most part these accounts do not address false light and are unsatisfactory for a variety of reasons.

Bloustein made the most notable effort by arguing that the true interest protected by the right to privacy generally is human dignity, and that while the interest protected by false light includes reputation (as Prosser asserted), it really protects individual integrity from violation.[132] Bloustein argues that the law already protects individuality from interference in various forms, including assault, battery, false imprisonment and the like.[133] Invasion of privacy merely redresses interference of a non-physical kind when "techniques of publicity [are used] to make a public spectacle of an otherwise private life."[134] Such an interference is no less important when the information publicized about the individual is false. Privacy interests are thus distinct from those protected by defamation law because a victim of defamation is robbed of his reputation, whereas one whose privacy is invaded has lost his individuality and dig-

130. *See* Bloustein, *supra* note 19, at 970.

131. *See supra* text accompanying note 72.

132. *See* Bloustein, *supra* note 19, at 991, 1003.

133. *See id.* at 1002-03.

134. *Id.* at 1003. Bloustein writes:

> The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. . . . Such a being, although sentient, is fungible; he is not an individual.

Id.

nity.[135] "The damage is to an individual's self-respect in being made a public spectacle."[136]

"Human dignity," however, fails to support false light sufficiently. The phrase may be compelling, but it is too indefinite to create a consensus among legal thinkers as to why this interest requires further protection from the law in the form of a privacy tort. As Bloustein notes, established torts already protect individuals from other affronts to human dignity.[137] False light cases comprise too small a percentage of the "dignitary" torts to merit a separate cause of action without some unique interest at stake. If false light invasion of privacy violates human dignity, this does not necessarily mean that the law should provide a remedy. Indeed, the law fails to protect individuals from many violations of human dignity.[138] Bloustein's attempts to expand on the concept of "human dignity" by using such terms as "individual[] independence" or "integrity,"[139] "man's essence as a unique and self-determining being,"[140] or "self-respect,"[141] are no more sharply focused than the concept itself. Like "human dignity," these phrases are likely to have varying meanings to different people, who may or may not find them convincing. Bloustein maintains that this is inescapable when we attempt to identify and describe basic human values, which are "necessarily vague and ill-defined."[142] Nonetheless, a legal justification requires readily comprehensible concepts that invite assent,[143] especially when a new cause of action must be defended without the benefits of strong tradition or precedent.

Other writers have taken issue with Bloustein's view as well. Professor Ruth Gavison contends that Bloustein and other scholars merely attempted to analyze privacy in terms of some underlying "real" interest, when in fact privacy itself is a

135. *See id.* at 981.
136. *Id.*
137. *See supra* note 133 and accompanying text.
138. *See* Schwartz, *supra* note 88, at 897.
139. Bloustein, *supra* note 19, at 971.
140. *Id.*
141. *Id.* at 981.
142. *Id.* at 1001 ("Compounded of profound human hopes and longings on the one side and elusive aspects of human psychology and experience on the other, our social goals are more fit to be pronounced by prophets and poets than by professors.").
143. On the importance of consensus regarding interests protected by tort law, see *supra* note 86.

distinct and coherent concept that is useful only when recognized as such.[144] Gavison states:

> Our interest in privacy, I argue, is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention. This concept of privacy as a concern for limited accessibility enables us to identify when losses of privacy occur. Furthermore, the reasons for which we claim privacy in different situations are similar. They are related to the functions privacy has in our lives: the promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society.[145]

Gavison's concern is that because privacy is seldom protected in the absence of some other interest, we might conclude that it is not an important value. She therefore calls for an affirmative and explicit commitment to privacy.[146]

Gavison's central point, that "privacy" itself is a distinct and coherent concept which should not be reduced to any underlying "real" interest, is well taken. Yet she describes the concept "privacy" in terms sounding very much like underlying interests, such as "our concern over accessibility to others," "the extent to which we are the subject of others' attention," "autonomy," "selfhood," and more.[147] Although she qualifies these characterizations by saying only that they "relate" to our concept of privacy, or are "functions" of privacy,[148] she does not actually explicate the concept itself. Scholars who have attempted to explain the concept engage in "[r]eductionist analyses," she argues.[149] Yet her "concept of privacy as a concern for limited accessibility"[150] is difficult to distinguish from the "reductionist" theses she attacks. It is undoubtedly true that privacy is an important concept deserving recognition in its own right, if only to avoid a perception that privacy interests are trivial or really comprised of other interests already pro-

144. *See* Gavison, *supra* note 88, at 422.

145. *Id.* at 423.

146. *See id.* at 424.

147. *Id.* at 423.

148. *Id.*

149. *Id.*

150. *Id.* Gavison is at pains to point out that this concept only shows the contribution of privacy to other goals and that therefore her logic is not merely another form of reductionism. *See id.* at n.11. This virtually makes privacy inaccessible to any kind of explanation at all, however, because the same can be said of *any* statement explicating the concept of privacy. Any purported explanation of privacy would then either be "reductionism" or not be any explanation at all.

tected by law. Nevertheless, "autonomous control over our accessibility to others" is no more a sharply defined concept for legal purposes than the suggestions made by Bloustein, which Gavison attacks.

Unlike Gavison and Bloustein, Professor Gary T. Schwartz deals specifically with the interest protected by the false light tort, briefly proposing an interest somewhat akin to the reputation interest first advanced by Prosser. According to Schwartz, when an individual is placed in a false light before the public, his identity in society is confounded or impugned because conveying seemingly essential information about him brings about an offensive or disorienting mismatch between his actual identity and his identity in the minds of others.[151] This can be said to affect "reputation,"[152] and implicates privacy concerns because the information will often relate to very private portions of the individual's life.[153]

Schwartz's treatment of the interest protected by false light is short and unsatisfactory. He concludes that states should retain a false light cause of action in a form even more restricted than currently exists.[154] As already discussed, reputation is not a privacy interest,[155] and the same objections that can be made about Prosser's view apply with equal force to this argument. Expanding on "reputation" to include such imponderables as a "conflict between the plaintiff's actual identity and his identity in the minds of others"[156] only raises again the problems of vagueness and subjectivity inherent in suggestions from other scholars. Schwartz's only argument addressing why this reputation interest implicates privacy is that "false light statements often relate to very private portions of the subject's life."[157] This is merely an incidental connection to privacy, however, and leaves open to dispute the assertion that false light protects any privacy interest at all. Moreover, reputation is already protected under defamation law.

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151. *See* Schwartz, *supra* note 88, at 897-98.

152. *Id.*

153. *See id.* at 898.

154. Schwartz argues that when a defamatory statement is the subject of a false light claim, this only renders defamation litigation more complex and expensive, making false light "little more than an administrative annoyance." *Id.* at 892. Eliminating the false light claim in these situations, however, precludes recovery for any injury other than to reputation.

155. *See supra* note 77 and accompanying text.

156. Schwartz, *supra* note 88, at 898.

157. *Id.*

None of these efforts at uncovering or explicating the interests at stake in a right to privacy deals at length, if at all, with the specific interest protected by the false light tort.[158] The legal system needs a clear account of the privacy interest at stake specifically in false light claims. This account should be consistent with the various interests courts have actually identified, should not depend on nebulous or subjective concepts, and an ordinary person should be able to recognize the interest as important and worth protecting. Such a foundation for the false light tort is necessary to safeguard its uncertain future against further judicial contraction in the aftermath of *Lake*. In the remainder of this discussion, a distinct false light interest will be proposed and supported, first by considering issues of public policy and next by justifying the interest independently.

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.[159] Indeed, "privacy" may be the name of numerous concepts without a central, reducible meaning.[160] 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.[161] In the next one

158. Gavison does at least raise the question, "Does dissemination of false information about X mean that he has lost privacy?" Gavison, *supra* note 88, at 431. She concludes that there has been a loss of privacy in that case, because others believe they know more about him, resulting in a loss of anonymity to that person, who has become the subject of other people's attention. *See id.* at 431-32. Her reasoning applies whether or not the information was true or false, however.

159. For a useful survey of sociological, psychological and anthropological studies attempting to clarify the concept of privacy, see Dennis J. Trooien, Note, *Tortious Invasion of Privacy: Minnesota as a Model*, 4 WM. MITCHELL L. REV. 163, 170-75 (1978) (applying multidisciplinary studies of privacy to a proposal for an alternative legal definition of the concept).

160. *See generally* Paul A. Freund, *Privacy: One Concept or Many?*, *in* PRIVACY, *supra* note 19, at 182.

161. *See* Gormley, *supra* note 21, at 1340-41. Gormley writes:

> [The meaning of privacy] is heavily driven by the events of history. What constitutes an engine of privacy in the year 1890, is not neces-

hundred years, we will want privacy law to protect us from harms different than those that concern us today.[162] 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."[163] 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 pri-

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sarily the same thing which formulates a societal notion of privacy in the United States in 1939, or 1968 or 1973. . . .

. . . [I]t is impossible to predict with any precision new permutations of this right, any more than one can predict the events of American history itself.

Id.

162. *See id.* at 1342.

163. *Id.* at 1353. Gormley interprets Warren and Brandeis's article to say that the undermining of individuality threatens a civilized society, without which democracy is weakened. *See id.* at 1352-53. Privacy protects "institutions and freedoms which lie at the core of American democracy . . . [including] family, work, religious expression, home life, contemplative thought, citizenship and community." *Id.* at 1434. An unsympathetic commentator makes the interesting acknowledgment that "a major tactic for the dictator is to subjugate by eliminating privacy." Kalven, *supra* note 19, at 326. *See generally* GEORGE ORWELL, 1984 (1949); EDVARD RADZINSKY, STALIN (1996).

vacy [in 1890], somebody else would have had to invent a similar legal concept, by whatever name, in short order."[164]

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."[165] Empirical studies have been interpreted to support this.[166] 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

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164. Gormley, *supra* note 21, at 1353. *But see* Kalven, *supra* note 19, at 329 ("[T]here is a curious nineteenth century quaintness about the grievance, an air of injured gentility.... One may perhaps wonder if the tort is not an anachronism, a nineteenth century response to the mass press which is hardly in keeping with the more robust tastes or mores of today.") Tastes today may be more robust, but so is the technology of surveillance, instant publicity, data collection, and so on. Hardly antiquated, the privacy torts are closely connected to contemporary social issues, leading Gormley to describe privacy as the defining issue of the 1990s. *See* Gormley, *supra* note 21, at 1342 ("Abortion issues, the right-to-die, drug testing in the workplace, AIDS, homosexuality, drunk-driving roadblocks, all of these issues central to our society involve, at least in part, an investigation of the legal concept of privacy.").

165. Greenwood, *supra* note 109, at 688.

166. *See* Scott, *supra* note 110, at 717 (citing studies that indicate adverse publicity not only reduces the likelihood that an individual will express dissenting views, but even curtails the willingness to hold such views privately). The author argues that:

> [P]rivacy encourages [participation in a democratic, pluralistic society], and enhances its quality, by allowing individuals the space within which to formulate their individual thoughts and opinions.... We are committed to a society that encourages pluralism and independent judgment. We expect individuals to bring those independent judgments to bear in the political arena. Thus, privacy is necessary to actualize our vision of ourselves as a nation.

Id. (citations omitted); *see also* Gavison, *supra* note 88, at 449 (noting that "[a]utonomy is another value that is linked to the function of privacy in promoting liberty. Moral autonomy is the reflective and critical acceptance of social norms, with obedience based on an independent moral evaluation of their worth").

the media "spotlight" so disagreeable as to outweigh even a desire for the highest office in the land.[167] 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.[168] 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.[169]

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167. *See* Gavison, *supra* note 88, at 456. Gavison states that "[p]ersons interested in government service must consider the loss of virtually all claims and expectations of privacy in calculating the costs of running for public office. Respect for privacy might reduce these costs." *Id.*

168. As previously noted, these have included human dignity, control over accessibility to others, freedom from scorn, ridicule, embarrassment, humiliation, harassment, personal outrage, injury to feelings, mental anguish, or contempt and disgrace, and the right to be let alone. *See supra* text accompanying note 72; *supra* Part II.C.1.

169. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 384-85 n.9 (1967) ("In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view . . . ."); Reed v. Real Detective Publ'g Co., 162 P.2d 133, 139 (Ariz. 1945) ("[U]nder the law, recovery may be had for an invasion of the right of privacy for injured feelings alone . . . ."); Froelich v. Adair, 516 P.2d 993, 996 (Kan. 1973) ("[Invasion of privacy] is a cause of action based upon injury to plaintiff's emotions and his mental suffering . . . ."); Sullivan v. Pulitzer Broad. Co., 709 S.W.2d 475, 479 (Mo. 1986) ("[T]he interest affected is the subjective one of injury to [the] inner person.") (citation omitted); Brink v. Griffith, 396 P.2d 793, 796 (Wash. 1964) ("[A]n invasion of privacy action is

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.[170] 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.[171] It must simply

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primarily concerned with compensation for injured feelings or mental suffering") (citing Themo v. New England Newspaper Publ'g Co., 27 N.E.2d 753 (Mass. 1940)).

170. *See supra* note 168.

171. For example, mental anguish damages are available in suits for medical malpractice, some violations of the Deceptive Trade Practices Act, and personal injury, not to mention intentional infliction of emotional distress. *See* Cain v. Hearst Corp., 878 S.W.2d 577, 587 (Tex. 1994) (Hightower, J., dissenting).

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.[172] 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.[173]

Self-determination is not a new, undiscovered interest, but rather one that has already been acknowledged by scholars and courts.[174] 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.[175] Because self-

172. *See supra* note 121 and accompanying text; *see also supra* note 15 and accompanying text (providing an example of a situation where no other torts would apply). *See generally* Part II.B (distinguishing defamation and other forms of invasion of privacy).

173. *See* Part II.C.2.a.

174. For example, as the California Supreme Court stated in a well-known case involving publication of private facts:

> [people] fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy—to choose who shall see beneath the quotidian mask. Loss of control over which "face" one puts on may result in a literal loss of self-identity, and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.

Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 37 (Cal. 1971) (en banc) (citations omitted).

175. For a First Amendment example, see *Stanley v. Georgia* stating that:

> [i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

394 U.S. 557, 565 (1969). For Fourteenth Amendment examples, consider *Roe*

determination 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.

The plaintiffs described in the introduction to this Note, with a few additional examples, will help to illustrate the self-determination interest protected by the false light tort. The amusement park entertainer whose picture was published in a pornographic magazine had recourse for her injuries because the tort was available to provide a remedy for offensive publicity representing one's livelihood in a salacious and inaccurate manner.[176] The humiliation and outrage that an individual can be expected to experience in such a position could have significantly influenced her behavior, for example, by causing her to restrict her encounters with others. Her ability to make private decisions without the undue effects of offensive and false publicity was sharply curtailed.

Much the same can be said for a former newspaper publisher whose successors allegedly blamed his incompetence, in a letter to subscribers, for a decline in business.[177] It is not difficult to imagine how an interest in self-determination might be

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v. Wade, Loving v. Virginia and *Griswold v. Connecticut.* Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . [or] in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding unconstitutional a Virginia statute restricting inter-racial marriages); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (concluding that a fundamental right of privacy implicit in the Constitution was broad enough to protect decisions made by married couples in their own bedrooms).

176. *See* Braun v. Flynt, 726 F.2d 245, 258 (5th Cir. 1984); *supra* text accompanying notes 13-14.

177. *See* Moore v. Sun Publ'g Co., 881 P.2d 735 (N.M. 1994). While working for the newspaper, the plaintiff attempted to increase revenues by charging an unpopular fee for affidavits of publication for legal notices, a service previously conducted free of charge. *See id.* at 737. The owners fired him and mailed letters to every attorney in the county in an attempt to regain lost business. *See id.* The letters explained the former publisher's actions in a way that made him look incompetent, but cited only facts that were technically true, defeating his defamation claim in the absence of "provably false factual assertions." *Id.* at 742. The court decided that as a matter of law the plaintiff did not state a claim for defamation, but because the letters permitted inferences about his judgment and management abilities that he claimed were not legitimate, it remanded the case so his false light claim could be tried. *See id.* at 743-44.

undermined in the professional setting by public statements that force an individual to suspect his own ineptitude. Likewise, an elderly newspaper carrier falsely portrayed as having gotten pregnant by a wealthy client on her route[178] might have felt that her options for interacting with her community were severely limited because of that publicity.

Moreover, undeserved positive or neutral portrayals might inflict a reputational injury not addressed by defamation in addition to violating the interest in self-determination. The athlete credited with wartime heroics that he never performed[179] might be forced to endure the enmity of his comrades, the embarrassment of having to admit details of his undistinguished service, and self-imposed withdrawal from feelings of guilt or shame. Similarly, a noted musician impersonated for a television broadcast[180] may not have been defamed, but the misrepresentation could have mislead the public about his artistry or competence at interpreting music. The impersonation thereby violated his interest in self-determination by publicly injuring his self-respect and interfering with his ability to define himself. As with each of the other plaintiffs, the false light tort allowed him to exercise a legitimate right to be shown to the public as he is.

In light of the above discussion, a few criticisms of false light should be addressed. The first concerns a supposed incon-

178. *See* Peoples Bank & Trust Co. v. Globe Int'l Publ'g, Inc., 978 F.2d 1065 (8th Cir. 1992). A tabloid had published a photograph of an elderly local legend in Arkansas who delivered newspapers for more than fifty years alongside a story about a 101-year-old "granny" forced to quit when a millionaire subscriber got her pregnant. *See id.* at 1067. While the court allowed the jury to consider a defamation claim, the jury did not find the story to be defamatory but found for the woman's estate on her false light claim. *See id.* False light may best address certain kinds of injury even when other causes of action are available.

179. *See* Spahn v. Julian Messner, Inc., 233 N.E.2d 840, 842-43, 843 n.* (N.Y. 1967); *supra* text accompanying note 15.

180. *See* Kitt v. Pathmakers, Inc., 672 A.2d 76 (D.C. Ct. App. 1996). The principal clarinetist for the National Symphony Orchestra was impersonated by an actor during a Fourth of July concert on the National Mall, because the concert promoter wanted television viewers to think he was performing on the west porch of the Capitol. *See id.* at 78. The court remanded the case, *see id.* at 80, but the defendants successfully moved for summary judgment. *See* Kitt v. Capital Concerts, Inc., No. 97-CV-780, 1999 WL 604088, at *1 (D.C. Ct. App. Aug. 5, 1999). In reviewing the latter decision, the court noted that the impersonation was not understood to be "of and concerning" the clarinetist, because the actor did not resemble him. *Id.* at *3. Also, the performance failed to rise to the level of being "highly offensive." *Id.*

sistency between a false statement or impression and the concept of privacy. According to this view, one cannot intend to keep private something that is false.[181] This view assumes that the basis of the tort is the publicizing of information, when in fact it is an offensive false impression and harm to inward interests. The privacy surrounds the emotions and decisions of the aggrieved person; the falsity is merely the means by which privacy is violated in particular situations.[182]

A second criticism is supplied by Professor Kelso's powerful attack on the false light tort, relied upon by the *Lake* court in asserting that "a case has rarely succeeded squarely on a false light claim."[183] Kelso's article purported to find only two "true" decisions nationwide that stood for a successful false light invasion of privacy claim prior to 1992.[184] This assessment is misleading, however, because Kelso limited his search to appellate decisions in state courts that affirmed damage awards on the basis of false light in the absence of other causes of action.[185] He excluded federal cases using state law, unappealed victories for false light plaintiffs, successes on multiple theories, and claims that survive summary judgment but settle before trial. This is a highly restrictive class of cases. It is no wonder there would be few examples fitting Kelso's restrictions for a tort that covers an uncommon situation and has elements difficult to prove. Even if it is correct that the number of "true" false light decisions is small, this may be because courts are reluctant to protect a poorly-understood interest, not because actual claims are weak. Moreover, a small number of successful claims should not be an argument for eliminating legal protections.

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181. *See* McKenna, *supra* note 76, at 139. Another author has gone so far as to describe the false light interest as being the presentation of "a false or incomplete image to others." Zuckman, *supra* note 39, at 260.

182. A commentator points out that in comparing defamation with invasion of privacy, "the veracity of the defamatory statement is central in determining whether one's reputation has been damaged," whereas falsity is "only peripheral in measuring the damage wrought on one's sensibilities by unwanted publicity." Greenwood, *supra* note 109, at 682.

183. Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 236 (Minn. 1998) (citing Kelso, *supra* note 31, at 785-86).

184. *See* Kelso, *supra* note 31, at 886.

185. *See id.* at 880.

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.