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WHEN EVEN THE TRUTH ISN'T GOOD ENOUGH: JUDICIAL INCONSISTENCY IN FALSE LIGHT CASES THREATENS FREE SPEECH

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Journalists are taught that truthful reporting is the best defense to a lawsuit. However, Florida journalists who reported the truth lost a staggering $18-million false light invasion of privacy lawsuit. The verdict was ultimately overturned by the Florida Supreme Court, which repudiated the tort as duplicative of libel law without the First Amendment protections. However, an appellate court in Missouri specifically recognized the tort in a case involving technology and the Internet within two months of the Florida decision. Using the most recent appellate false light cases, the Article examines the potential for false light to stifle the media, especially when truthful news content is targeted. This article concludes that the tort of false light is inconsistent with First Amendment values and historic protections for journalists and must not be used to make an end-run around the First Amendment.

In 1988, an Oklahoma jury found Ronald Williamson and Dennis Fritz guilty of rape and murder, a conviction that was later overturned.[1] More than 20 years later, their story was the subject of a lawsuit alleging, among other claims, false light invasion of privacy.[2] The prosecutor and law enforcement officials involved in the initial

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

2. *Id.* at 727.

conviction sued author John Grisham, alleging that his novel THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN[3] defamed them and portrayed them in a false light.[4] False light invasion of privacy is a relatively new common law tort in many states that allows individuals aggrieved of their "right to be let alone" to sue. Oklahoma recognizes false light, but in 2010, a court held that Grisham could not be sued for false light because there was not a sufficient nexus between the plaintiff's allegations of harm and Grisham's assessment of the criminal justice system as one riddled with "bad police work, junk science, faulty eyewitness identifications, bad defense lawyers, lazy prosecutors, [and] arrogant prosecutors."[5]

While Oklahoma follows the *Restatement (Second) of Torts* and its definition of false light, several states have outright rejected the tort on grounds that it violates the First Amendment.[6] Since its inception, the tort has drawn criticism by Dean William Prosser in 1960[7] and subsequent analysis by various state supreme courts.[8] On one hand, the law provides a separate redress for injuries to one's right of privacy, which is theoretically distinct from reputational harm.[9] But on the other hand, false light can be duplicative of defamation and unnecessarily chill speech.[10] For example, what if a newspaper truthfully reports a story about a man accidentally shooting his wife, but he alleges the

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3. JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN (Doubleday 2006).

4. *Id.* Other defendants in the suit were Fritz himself (he wrote a book about his ordeal), Barry Scheck (anti-death penalty advocate who devoted a chapter in his 2003 book *Actual Innocence* to the story) (BARRY SCHECK, ACTUAL INNOCENCE (Doubleday 2000)), Robert Mayer (author of *Dreams of Ada*, a book about a similar case involving the same prosecutor and investigator) (ROBERT MAYER, DREAMS OF ADA (Broadway Books 1987)), and their publishers. Grisham's 2006 book, *The Innocent Man*, recounted Williamson's life story. *Id.* at 726.

5. *Id.* (quoting JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN 380 (Doubleday 2006)).

6. *Id.* at 730; *see infra* note 70.

7. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 398-401 (1960).

8. *See infra* note 70.

9. For a general overview of false light, see KENT R. MIDDLETON, WILLIAM E. LEE & BILL F. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION 207-14 (6th ed. 2004).

10. *Id.*

arrangement of sentences falsely portrayed him as a murderer?[11] In a later-overturned Florida jury verdict, a businessman was awarded $18.28 million for a newspaper's truthful coverage of his wife's death.[12] Had Florida not rejected false light as a cause of action, that verdict could still stand today. It is this type of false light scenario that illustrates how dangerous the tort can be for the press.

A brief comparison of false light and defamation is helpful in understanding the controversy surrounding the adoption of false light. According to the *Restatement (Second) of Torts*, the type of statement communicated in a successful false light action is "highly offensive to a reasonable person."[13] In a defamation action, the statement must be "false and defamatory."[14] False light is said to protect individual privacy and mental distress while defamation protects reputation.

Defamation allows for variable standards of fault on the part of the publisher depending upon the status of the plaintiff. For example, in *New York Times Co. v. Sullivan*, the Supreme Court held that public official plaintiffs must prove "actual malice" on the part of the defendant in order to protect the First Amendment rights of the media.[15] The Court expounded on this concept in *Gertz v. Welch*, deciding that a variable

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

12. *Anderson I*, 947 So. 2d at 2.

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

14. *Id.* at § 558 (1977).

15. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

fault standard — such as only requiring proof of negligence where the subject of the alleged defamatory statement is a private figure — was within the confines of the First Amendment.[16]

While the *Restatement* definition of false light includes an actual malice standard (requiring proof that the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed"),[17] the Supreme Court in *Cantrell v. Forest City Publishing* specifically declined to address whether a variable fault standard in false light cases would pass constitutional muster.[18] Prior to *Cantrell*, the Supreme Court had already considered its first false light case in *Time, Inc. v. Hill*, where it recognized false light but required an actual malice fault requirement for matters of public interest.[19]

Cantrell and *Hill* have been the only discussions of false light invasion of privacy by the U.S. Supreme Court. However, as consistent court attention to defamation has resulted in an erosion of that tort, litigants have increasingly turned to false light.[20] For example, false light has appeared in published opinions 60 times more often from 2000-2010

16. 418 U.S. 323, 332 (1974) (holding that "a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted").

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

18. 419 U.S. 245, 250-51 (1974) ("[T]his case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases."). *Cantrell* was decided approximately six months after the Court's decision in *Gertz*.

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

20. James B. Lake, *Restraining False Light: Constitutional and Common Law Limits on a "Troublesome Tort"*, 61 FED. COMM. L.J. 625, 626 (2008).

than in the 1960s.[21] The 2000-2010 decade saw nearly twice as many false light-related opinions as the 1990s (1,025 versus 1,982).[22] And within the most recent decade, the number of opinions mentioning false light doubled with 123 in 2000 and 312 in 2010.[23]

In light of the significant increase in false light issues faced by the courts (and the press), this Article addresses the past, present, and future of the false light invasion of privacy tort, looking at its inception in a law review article, current adoption by a majority of states, and the potential for a widespread, negative effect if truthful reporting continues to be subject to false light lawsuits. Part I examines the evolution of false light from the recognition of a right of privacy in a law review article[24] through state court adoptions of the four privacy torts — appropriation, intrusion, public disclosure of private facts, and false light — following their inclusion in the *Restatement (Second) of Torts*.[25] Part II assesses the current state of false light law by presenting the landscape of the law across the nation with a focus on three recent appellate decisions that present both sides of the controversy. The danger for truthful reporting and the existence of other appropriate remedies are discussed in further detail in Part III. Finally, Part IV concludes that although the majority of states have adopted false light, the story does not end there — recent cases illustrate the danger of recognizing false light for truthful

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21. This figure was arrived at by searching the "Federal and State Cases Combined" database provided by LexisNexis using the Boolean search term "false light" between January 1, 1960, and January 1, 1970, and comparing that result (33) to the results of the same search but with date restrictions of January 1, 2000, to January 1, 2010 (1,982). Thus, there has been a large increase in the *mention* of false light in published opinions. One could reasonably infer that such a large increase in references to the claim might correlate with an increase in such claims. However, the authors recognize that this does not mean that the number of false light claims has increased 60-fold since the 1960s, and a calculation of the actual number of false light claims is beyond the scope of this article.

22. Using the Boolean search term "false light", the "Federal and State Cases Combined" LexisNexis database was searched using the date restrictions of January 1, 1990, to January 1, 2000, and January 1, 2000, to January 1, 2010.

23. Using the Boolean search term "false light" the "Federal and State Cases Combined" LexisNexis database was searched using the date restrictions of January 1, 2000, to January 1, 2001, and so on for the 2000-2010 decade.

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

25. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

reportage. Those states still undecided about adopting the tort, as well as those who have already given their blessing to the false light cause of action, must take into account the hazards posed by false light or else protected speech will be needlessly silenced.

I. PROSSER'S PRIVACY POSTULATE: FALSE LIGHT IS BORN

The common law invasion of privacy torts stem from the seminal work by Samuel Warren and Louis Brandeis, *The Right to Privacy*.[26] The article, published in an 1890 issue of *Harvard Law Review*, was a reaction to the "yellow journalism" of the time and the extreme tactics journalists used to write sensational stories.[27] In particular, the press had a "field day" with the wedding of Warren's daughter.[28] In their article, published shortly after the wedding, Warren and Brandeis proposed a new principle upon which aggrieved individuals could seek relief: the right to privacy. The authors contended this "right to be let alone" offers individuals protection against mental distress caused by the excessive prying of the press.[29] For several decades after the article was first published, legal scholars continued to debate whether a right of privacy even existed.[30] However, since the 1930s and the publication of the first *Restatement of Torts*, the majority of American courts have recognized a right of privacy in some form.[31]

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26. Warren & Brandeis, *supra* note 24.

27. Prosser, *supra* note 7, at 383. Prosser described it as "the era of 'yellow journalism,' when the press had begun to resort to excesses in the way of prying . . . ." *Id.*

28. *Id.*

29. *See* Warren & Brandeis, *supra* note 24.

30. *See, e.g.*, Prosser, *supra* note 7, at 386-87 (discussing how the recognition of a right to privacy varies from state to state).

31. *Id. But cf.*, Harry Kalven Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 328 (1966). Kalven opines that

> fascination with the great Brandeis trade mark, [sic] excitement over the law at a point of growth, and appreciation of privacy as a key value have combined to dull the normal critical senses of judges and commentators and have caused them not to see the pettiness of the tort they have sponsored.

Id.

This trend toward the recognition of privacy rights was well-established in 1960, when William Prosser, Dean of the University of California at Berkeley Law School, wrote a law review article that examined case law since Warren and Brandeis first articulated a right to privacy.[32] Prosser set forth four distinct invasion of privacy torts based on his interpretation of cases since 1890:

Intrusion
Public disclosure of private facts
False light in the public eye
Appropriation[34]

This classification of invasion of privacy torts was adopted in the *Restatement (Second) of Torts,* for which Prosser was a reporter.[33] As one court aptly stated:

> The law relating to a protectable "right to privacy" is an American invention, developing over a period of approximately the last one hundred years. The law in its present form was conceived almost entirely by Professor William Prosser, who, in a 1960 law review article in the *California Law Review*, expounded that the right of privacy gave rise not to one but to four different tort actions, sometimes called "Prosser's Four Torts of Privacy."
>
> These four torts found their way into the *Restatement* — perhaps because Prosser was the American Law Institute Reporter who drafted the language — and have been adopted, often verbatim, by the vast majority of American jurisdictions.[34]

False light, Prosser admitted, was not an invasion of privacy tort envisioned by Warren and Brandeis.[35] Prosser recognized the overlap

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32. Prosser, *supra* note 7, at 389.

33. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977); see *infra* note 35 (Prosser was the American Law Institute Reporter who drafted the language.).

34. People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1277-78 (Nev. 1995) (footnotes omitted).

35. Prosser, *supra* note 7, at 398.

between defamation and false light, noting that both claims will often lie in one case.[36] He described false light as "a needed remedy" that goes beyond the narrow confines of defamation.[37] Prosser concluded his discussion of false light with a series of questions rather than answers: Would false light engulf the law of defamation? If so, how valuable are the restrictions imposed on defamation claims in the name of a free press?[38]

It has been argued that courts accepted Prosser's articulation of false light and its subsequent inclusion in the *Restatement (Second) of Torts* with few attempts to rationalize or justify the existence of the tort.[39] Legal commentators have, however, scrutinized the rationale behind false light, and many have concluded courts should not recognize the tort. The major arguments levied against recognition of the false light invasion of privacy tort are that it is in tension with the constitutional guarantees of free speech, is duplicative of defamation, and contributes to judicial inefficiency.

Professor Diane Leenheer Zimmerman argues that false light's chilling effect on speech renders the tort "unworkable" and

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36. Prosser, *supra* note 7, at 400.

37. Prosser, *supra* note 7, at 401.

38. *Id.* Prosser stated:

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

Id.

39. *See, e.g.*, Harvey L. Zuckman, *Invasion of Privacy — Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253, 255 (1990) (arguing that the tort of false light is unlikely to survive if not adequately rationalized).

"conceptually empty."[40] The analogy of false light to defamation is misleading.[41] False light includes a wider class of speech than defamation, especially statements that are false but do not harm the plaintiff's reputation.[42] Further, false light has few of the common law restrictions that limit defamation claims.[43] Therefore, false light does not rationally fit into our constitutional scheme, which offers great protections for most speech.[44] Zimmerman also argues that falsehoods have "affirmative value as speech" because they promote the search for truth.[45]

In his 1992 article, Professor J. Clark Kelso noted the judicial reliance on Prosser's reputation as a leading torts scholar by analyzing false light cases reported after Prosser's article was published.[46] Kelso found more than 600 cases mentioning false light and privacy but could not find "a single good case in which false light can be clearly identified as adding anything distinctive to the law."[47] Kelso concluded that false light does not deserve independent recognition as a tort because even the two cases where false light was the sole, non-overlapping cause of action could have been treated as libel or intentional infliction of emotional distress.[48] "Unfortunately, the mere act of repeatedly quoting the Restatement or Prosser tends to bring an aura of reality to false light privacy," Kelso wrote.[49]

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

41. Id., *supra* note 40, at 393.

42. *Id.* at 394.

43. Id. at 394.

44. Zimmerman, *supra* note 40, at 395.

45. *Id.* at 404-05.

46. J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783 (1992).

47. *Id.* at 785.

48. *Id.* at 886-87.

49. *Id.* at 825.

Some authors argue that the tort should remain viable but with certain limitations. Professor Gary Schwartz proposes limiting the tort to cases where it does not overlap with defamation and even then requiring an actual malice standard of liability.[50] False statements that do not harm one's reputation but are highly offensive include: false claims about plaintiffs' private lives; false claims about very personal thoughts or emotions of plaintiffs; false statements that portray plaintiffs as being severely victimized (i.e., suffering from a serious illness or being kidnapped); and statements that attribute virtues to plaintiffs that are unearned.[51]

Media attorney Steven Zansberg advocates the approach of courts that refuse to recognize false light claims if the publication focuses on issues of legitimate public concern.[52] Examples of scenarios that would not be actionable under a theory of false light invasion of privacy are: public officials who wish to sue based on publication in connection with their public duties, public or private figures who wish to sue based on reports of their "public personae," and businesspersons who want to sue based on publication regarding their professional conduct.[53]

James B. Lake, also a media attorney, argues that existing limits on the defamation tort (such as Internet service provider immunity, pre-suit notice, and the "wire service defense") "ought to apply to . . . alternative torts, such as false light, insofar as they involve defamatory falsehoods."[54] Lake also suggests several legal tactics that can be

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50. Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy,* 41 CASE W. RES. L. REV. 885 (1991).

51. *Id.* at 893-96.

52. Steven D. Zansberg, *Reducing the Glare of False Light: Why the Tort Should be Limited to Personal Information Unrelated to Professional Conduct*, 24 COMM. LAW. 11 (2006).

53. *Id.* at 13.

54. Lake, *supra* note 20, at 627. Lake notes the well-established body of law in the area of defamation:

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

invoked in order to challenge false light claims that accompany defamation claims.[55]

Despite convincing arguments against the recognition of false light, some authors contend that the tort should be recognized as a cause of action distinct from defamation. The personal dignity interest served by false light is just as important as the reputational interest served by defamation, according to one author, and thus the cause of action should be available to the aggrieved plaintiff who suffered mental distress but not reputational harm.[56] Another student author argued that false light claims can actually promote First Amendment values by encouraging public debate and can protect self-determination.[57] Privacy protections also promote independent thinking and government participation without fear of unwanted publicity.[58] Policy considerations such as the ability for advanced technology to infringe on individual privacy also support the existence of a false light tort.[59]

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

II. THE CURRENT LEGAL LANDSCAPE: TRENDS IN FALSE LIGHT JURISPRUDENCE

This part presents an overview of state treatment of the false light tort. It uses the two most recent appellate cases directly considering

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> be lost if the well-established speech-protecting rules of defamation law are evaded.

Id., *supra* note 20, at 650 (quoting R. Bruce Rich & Livia D. Brilliant, *Defamation-in-Fiction: The Limited Viability of Alternative Causes of Action*, 52 BROOK L. REV. 1, 41 (1986)).

55. *Id.* at 648-50.

56. 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, 179 (1993).

57. Nathan E. Ray, Note, *Let There Be False Light: Resisting the Growing Trend Against an Important Tort*, 84 MINN. L. REV. 713 (2000).

58. *Id.* at 744.

59. *Id.* at 743-44.

the merits of false light — *Jews for Jesus, Inc. v. Rapp*[60] and *Meyerkord v. Zipatoni Co.*[61] — to illustrate the current debate over whether false light should be recognized as a cause of action separate from defamation. This part also discusses *Anderson v. Gannett Co.*,[62] a companion case to *Rapp*, whose facts go to the heart of the very real danger for jurisdictions that recognize false light.

A. State Approaches to False Light

Thirty-one states have accepted false light as a viable cause of action.[63] A few of these states distinguish between public and private

60. 997 So. 2d 1098 (Fla. 2008).

61. 276 S.W.3d 319 (Mo. Ct. App. 2008).

62. 994 So. 2d 1048 (Fla. 2008).

63. These states are: Alabama (Doe v. Roe, 638 So. 2d 826 (Ala. 1994)); Arizona (Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781 (Ariz. 1989)); Arkansas (Dodrill v. Ark. Democrat Co., 590 S.W.2d 840 (Ark. 1979)); California (Fellows v. Nat'l Enquirer, Inc., 721 P.2d 97 (Cal. 1986)); Connecticut (Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317 (Conn. 1982)); Delaware (Price v. Chaffinch, No. 04-956, 2006, WL 1313178 (D. Del. May 12, 2006)); Georgia (Cabaniss v. Hipsley, 151 S.E.2d 496 (Ga. 1966)); Hawaii (Chung v. McCabe Hamilton & Renny Co., 128 P.3d 833, 847 (Haw. 2006)); Idaho (Baker v. Burlington Northern, Inc., 587 P.2d 829 (Idaho 1978)); Illinois (Leopold v. Levin, 259 N.E.2d 250 (Ill. 1970)); Indiana (Near East Side Cmty. Org. v. Hair, 555 N.E.2d 1324 (Ind. App. 1990)); Iowa (Winegard v. Larsen, 260 N.W.2d 816 (Iowa 1977)); Kansas (Dotson v. McLaughlin, 531 P.2d 1 (Kan. 1975)); Kentucky (McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky.1981)); Louisiana (Perere v. La. Television Broad. Corp., 721 So. 2d 1075 (La. App. 1998)); Maine (Estate of Berthiaume v. Pratt, 365 A.2d 792, 795 (Me. 1976)); Maryland (Harnish v. Herald-Mail Co., 286 A.2d 146 (Md. 1972)); Michigan (Deitz v. Wometco West Mich. TV, 407 N.W.2d 649 (Mich. 1987)); Missouri (Meyerkord v. Zipatoni Co., 276 S.W.3d 319 (Mo. 2008)); Montana (Lence v. Hagadone Inv. Co., 853 P.2d 1230 (Mont. 1993)); Nebraska (NEB. REV. STAT. § 20-204 (2009)); New Jersey (Romaine v. Kallinger, 537 A.2d 284 (N.J. 1988)); New Mexico (Moore v. Sun Publ'g Corp., 881 P.2d 735 (N.M. Ct. App. 1994)); Ohio (Welling v. Weinfeld, 866 N.E.2d 1051 (Ohio 2007)); Oklahoma (McCormack v. Okla. Publ'g Co., 613 P.2d 737 (Okla. 1980)); Pennsylvania (Larsen v. Philadelphia Newspapers, Inc., 543 A.2d 1181 (Pa. Super. Ct. 1988)); Rhode Island (R.I. GEN. LAWS § 9-1-28.1(a)(4) (2009)); Tennessee (West v. Media Gen. Convergence, Inc., 53 S.W.3d 640 (Tenn. 2001)); Utah (Russell v. Thomson Newspapers, Inc., 842 P.2d 896 (Utah 1992)); Washington (Eastwood v. Cascade Broad. Co., 722 P.2d 1295 (Wash. 1986)); and West Virginia (Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (W. Va. 1983)).

plaintiffs, similar to the lesser burden of proof for private defamation plaintiffs established in *Gertz v. Welch*.[64] For example, Arizona does not allow public officials to sue for false light if the statement is related to their public duties.[65] Delaware,[66] Indiana,[67] and Maryland[68] do not permit false light suits where the statement at issue is a matter of public concern.

The Supreme Court in *Cantrell v. Forest City Publishing* left open the question of whether variable fault standards in false light suits are constitutional under the First Amendment.[69] Perhaps as the number of decisions related to false light increase, so too will the chance that the

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

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

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

65. *Godbehere*, 783 P.2d at 789.

66. *Price*, 2006 WL 1313178, at *7.

67. *Hair*, 555 N.E.2d at 1355.

68. *Harnish*, 286 A.2d at 146.

69. 419 U.S. 245, 250-51 (1974).

Court will answer whether such a variable fault standard is constitutional in false light claims.

Ten states have specifically rejected false light.[70] Tensions between the First Amendment and tort law were at the heart of most of these decisions. The Colorado Supreme Court called false light "too amorphous a tort" that "risks inflicting an unacceptable chill on those in the media seeking to avoid liability."[71] Minnesota's Supreme Court held that "to the extent that false light is more expansive than defamation, tension between this tort and the First Amendment is increased."[72] Judicial inefficiency was a concern for North Carolina's Supreme Court, which thought false light "would reduce judicial efficiency by requiring our courts to consider two claims for the same relief [defamation and false light] which, if not identical, would not differ significantly."[73] False light's duplication of defamation and lack of the procedural safeguards found in defamation law "unacceptably increase[s] the tension that already exists between free speech constitutional guarantees and tort law," according to the Texas Supreme Court.[74]

Five of the remaining states mention false light in a general sense but do not specifically address the tort.[75] North Dakota[76] and

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70. The states that have rejected false light are: Alaska (Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989)); Colorado (Denver Publ'g Co. v. Bueno, 54 P.3d 893 (Colo. 2002)); Florida (Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098 (Fla. 2008)); Massachusetts (ELM Med. Lab., Inc. v. RKO Gen., Inc., 532 N.E.2d 675 (Mass. 1989)); Minnesota (Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998)); New York (Howell v. N.Y. Post Co., Inc., 612 N.E.2d 699 (N.Y. 1993)); North Carolina (Renwick v. News & Observer Publ'g. Co., 312 S.E.2d 405 (N.C. 1984)); Texas (Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994)); Virginia (Falwell v. Penthouse Int'l Ltd., 521 F. Supp. 1204 (W.D. Va. 1981) and WJLA-TV v. Levin, 564 S.E.2d 383 (Va. 2002)); and Wisconsin (Zinda v. La. Pac. Corp., 440 N.W. 2d 548 (Wis. 1989) and WIS. STAT. § 995.50 (2010) (recognizing three types of invasion of privacy, but not false light)).

71. *Bueno*, 54 P.3d at 904.

72. *Lake*, 582 N.W.2d at 235.

73. *Renwick*, 312 S.E.2d at 413.

74. *Cain*, 878 S.W.2d at 580.

75. These states are: North Dakota (Hougum v. Valley Mem'l Homes, 574 N.W.2d 812 (N.D. 1998)); Nevada (People for Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269 (Nev. 1995)); Wyoming (Wells v. State, 846 P.2d 589 (Wyo. 1992)); Vermont (Lemnah v. Am. Breeders Serv., Inc., 482 A.2d 700 (Vt. 1984)); and South Dakota (Truxes v. Kenco Enters., Inc., 119 N.W.2d 914 (S.D. 1963)).

Vermont,[77] for example, are states where it is still unclear whether common law invasion of privacy is recognized. In Wyoming, while the state supreme court has restated Prosser's four invasion of privacy torts in a general sense, it has not directly addressed false light as a viable cause of action.[78]

Finally, four states discuss false light but specifically decline to either reject or recognize false light.[79] In these states, the high courts have directly sidestepped the issue of whether they will recognize the tort. As the Oregon Supreme Court put it: "This court previously has not recognized the tort of invasion of privacy by false light . . . we need not decide in this case whether to do so because, even if that tort is available in Oregon, plaintiff has failed to allege it here."[80]

Despite its acceptance by a majority of states, false light "'remains the least-recognized and most controversial aspect of invasion of privacy.'"[81] The three most recent appellate decisions considering whether to accept or reject false light illustrate the continuing debate over the tort despite the acceptance by a majority of states. The first decision, issued by the Florida Supreme Court in Fall 2008, considered a Jewish woman's claim that a Jews for Jesus newsletter article alleging her conversion to Christianity cast her in a false light.[82]

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76. *Hougum*, 574 N.W.2d at 816.

77. *Lemnah*, 482 A.2d at 700.

78. *Wells*, 846 P.2d at 600 (Urbigkit, J., concurring in part and dissenting in part).

79. These states are: Mississippi (Cook v. Mardi Gras Casino Corp., 697 So. 2d 378 (Miss. 1997) and Prescott v. Bay St. Louis Newspapers, Inc., 497 So. 2d 77 (Miss.1986)); New Hampshire (Thomas v. Telegraph Publ'g Co., 859 A.2d 1166 (N. H. 2004)); Oregon (Reesman v. Highfill, 965 P.2d 1030 (Ore. 1998)); and South Carolina (Parker v. Evening Post Publ'g Co., 452 S.E.2d 640 (S.C. 1994)).

80. *Reesman*, 965 P.2d at 1036. An Oregon appellate court had previously recognized false light. Dean v. Guard Publ'g Co., 699 P.2d 1158, 1159 (Or. Ct. App. 1985).

81. Denver Publ'g Co. v. Bueno, 54 P.3d 893, 898 (Colo. 2002) (quoting Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994)).

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

B. Jews for Jesus, Inc. v. Rapp

In *Jews for Jesus, Inc. v. Rapp*, Jewish retiree Edith Rapp sued her stepson after he reported in a Jews for Jesus, Inc. newsletter that Rapp had converted to Christianity.[83] Rapp alleged that the newsletter article cast her in a false light.[84] The Florida Supreme Court emphatically rejected false light as duplicative of defamation, concluding that "false light is largely duplicative of existing torts, but without the attendant protections of the First Amendment."[85] The court did, however, recognize defamation by implication as a cause of action.[86]

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83. *Id.* at 1100-01. *See also Praise Report*, JEWS FOR JESUS NEWSLETTER (Jews for Jesus, San Francisco, Cal.), July 2002, at 5, *available at* http://www.jewsforjesus.org/publications/newsletter/2002_07/praisereport (recounting the alleged conversion of the *Rapp* plaintiff). Bruce Rapp reported he "was afraid that [he] may not have another chance to be with" his father, who had been ill, and during the visit, Edith Rapp began asking "questions about Jesus" and converted to Christianity. *Id. See also Court Favors Expression in Rejecting 'False Light'*, TAMPA TRIB., Nov. 3, 2008, at 19, *available at* 2008 WLNR 21119657 (reporting the "victory for free speech and freedom of the press" the *Rapp* decision represented).

84. *Rapp*, 997 So. 2d. at 1098.

85. *Id.* at 1100. The question certified to the Florida Supreme Court was: "Does Florida recognize the tort of false light invasion of privacy, and if so, are the elements of the tort set forth in section 652E of Restatement (Second) of Torts?" *Id.*

86. Florida law is not clear on defamation by implication. For example, a LexisNexis keyword search of all Florida state cases for the term "defamation by implication" turned up only the *Rapp* case. The Court in its opinion referred to a Michigan Supreme Court case, Locricchio v. Evening News Association, 476 N.W.2d 112, 133-34 (Mich. 1991), which stated that defamation by implication claims must carry the First Amendment protections that accompany libel. *Rapp*, 997 So. 2d. at 1108. However, neither the *Loricchio* nor *Rapp* court provides a clear definition of what exactly constitutes defamation by implication. A detailed analysis of defamation by implication is beyond the scope of this article, but it appears to be an expansion of defamation that might also chill speech in Florida. *See also* C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237, 237 (1993) (noting that "[e]ven when all the statements in a publication are factually correct and, at least standing alone, are not defamatory, courts have treated the publication as actionable under the rubric of 'implied libel'" (citing Southern Air Transp., Inc. v. American Broad. Cos., 877 F.2d 1010, 1012 (D.C. Cir. 1989))); Church of Scientology v. Flynn, 744 F.2d 694, 696 (9th Cir. 1984) (discussing defamation by implication).

Prior to *Rapp*, the Florida Supreme Court had made mention of false light by way of "acknowledg[ing] Prosser's paradigm of the four general categories of invasion of privacy, one of which is a cause of action for false light."[87] Noting the absence of either a statutory prohibition against or case law recognizing false light, the court examined the policy concerns surrounding the adoption of the tort.[88] The court focused on false light's similarities to defamation and "the potential to chill speech without any appreciable benefit to society."[89]

The court addressed the concern that false light "allows recovery for literally true statements that create a false impression."[90] For example, a Florida case involved a newscast that juxtaposed an interview of a man's ex-wife along with stories and photos of women who had been killed by their partners.[91] The man sued, alleging that while the facts broadcast about him were true, the newscast created the false impression that he was an abusive spouse.[92] The *Restatement* example is that of a cab driver whose photo is used with a news story about drivers who manipulate fares.[93] The Florida Supreme Court reasoned that defamation by implication, "a well-recognized species of defamation that is subsumed within the tort of defamation," offered adequate protection in cases such as these.[94] Despite the Court's characterization of defamation by implication as well recognized, a legal database search of all Florida cases (state and federal) for the term "defamation by implication" prior to the *Rapp* decision yielded zero cases.[95]

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87. *Rapp*, 997 So. 2d at 1103 (citing Allstate Ins. Co. v. Ginsberg, 863 So. 2d 156, 160-61 (Fla. 2003) and Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239, 1252 n.20 (Fla. 1996)).

88. *Id.* at 1104-05.

89. *Id.* at 1105.

90. *Id.* at 1106 (citing Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 787 (Ariz. 1989)).

91. Heekin v. CBS Broad., Inc., 789 So. 2d 355, 358 (Fla. Dist. Ct. App. 2001).

92. *Id.*

93. *Rapp*, 997 So. 2d at 1106 (citing RESTATEMENT (SECOND) OF TORTS § 652E cmt. b). *See also* Peay v. Curtis Publ'g Co., 78 F. Supp. 305 (D.D.C. 1948) (finding the use of a taxi cab driver's photograph in a satirical news article about cab drivers sufficient to sustain libel and right to privacy claims).

94. *Rapp*, 997 So. 2d at 1108.

95. The authors searched the "FL Federal & State Cases Combined" LexisNexis database for the Boolean term "defamation by implication."

The Florida Supreme Court also raised concerns about the First Amendment implications of false light, noting that additions to the false light invasion of privacy tort would "'take[] from the field of free debate.'"[96] Citing the Colorado Supreme Court's decision in *Bueno*, Florida's high court took issue with the "highly offensive to a reasonable person" standard, fearing that its ambiguity would chill free speech.[97] The *Bueno* court honed in on the difficulty the media would have in determining what would be highly offensive: "'[D]efamation is measured by its results; whereas false light invasion of privacy is measured by perception.'"[98] The *Rapp* court also worried that the safeguards built into Florida defamation actions — privilege, statutory notice, and damage limits — might be circumvented by false light actions.[99]

Based on its concerns for the First Amendment and confidence that defamation by implication would provide redress for plaintiffs who took issue with factually true yet still disparaging statements, the Florida Supreme Court rejected the tort of false light invasion of privacy.[100] At the same time *Rapp* was decided, the Florida Supreme Court issued its decision in the companion case — one more troubling for the media — *Anderson v. Gannett Co.*[101]

C. Anderson v. Gannett Co.

Businessman Joe Anderson, Jr. sued the *Pensacola News Journal* for defamation over a series of stories about his political connections and involvement in federal grand jury investigations.[102] One article, published in December 1998, recounted the death of Anderson's

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96. *Rapp*, 997 So. 2d at 1110 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964)).

97. *Id.* at 1110-11.

98. *Id.* at 1111 (quoting Denver Publ'g Co. v. Bueno, 54 P.3d 893, 903 (Colo. 2002)).

99. *Id.* at 1112-13.

100. *Id.* at 1115.

101. Anderson v. Gannett Co. (*Anderson II*), 994 So. 2d 1048 (Fla. 2008) (rejecting false light as a valid cause of action in a case where a man sued a newspaper, alleging that an article implied that he killed his wife). *See* Gannett Co. v. Anderson (*Anderson I*), 947 So. 2d 1 (Fla. Dist. Ct. App. 2006).

102. *Anderson I*, 947 So. 2d at 2.

wife a decade earlier.[103] Anderson shot his wife while the two were hunting deer, and authorities ruled her death accidental.[104] The *News Journal*'s account of the death was factually accurate, as Anderson himself admitted.[105] However, Anderson alleged that the arrangement of the story portrayed him as a murderer.[106] The story contained a paragraph about his filing for divorce days prior to the shooting between paragraphs about the description of the shooting and the determination that it was an accident.[107]

After some of his defamation allegations were dismissed for failure to meet Florida's two-year statute of limitations, Anderson amended his complaint to add a new claim for false light invasion of privacy.[108] This cause of action proceeded under Florida's four-year statute of limitations for "unspecified torts."[109] A jury awarded Anderson $18.28 million in compensatory damages on his false light claim.[110] An intermediate appellate court reversed the jury award, holding that "[b]ecause [the false light] claim was not distinguishable in any material respect from a libel claim, it was subject to the two-year statute of limitations that applies to defamation actions."[111] The Florida Supreme Court, in rejecting false light as a whole, avoided addressing the merits of Anderson's claim and approved the lower appellate court's decision.[112]

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103. *Id.* at 2-3.

104. *Id.*

105. *Id.* at 3.

106. *Id.*

107. *Id.* at 2-3.

108. *Id.* at 2.

109. *Id.* at 3.

110. *Id.* at 2. The compensatory damages were based on Anderson's claim that as a result of the story, his paving company lost a "$50-million road contract." *Court Favors Expression in Rejecting "False Light"*, TAMPA TRIB., Nov. 3, 2008, at 19, *available at* 2008 WLNR 21119657.

111. Gannett Co. v. Anderson (*Anderson I*), 947 So. 2d 1, 2 (Fla. Dist. Ct. App. 2006).

112. Anderson v. Gannett Co. (*Anderson II*), 994 So. 2d at 1048 . *See also* Lucy Morgan, *"False Light" Lawsuit Rejected,* ST. PETERSBURG TIMES, Oct. 24, 2008, at 1B, *available at* 2008 WLNR 20292475. Anderson distributed a statement to the media commenting that:

> Today the Court shut the courthouse door to every Floridian who is falsely accused by a newspaper when they publish

D. Meyerkord v. Zipatoni Co.

Exactly two months after the Florida Supreme Court's decisions in *Rapp* and *Anderson*, another state court weighed in on the viability of false light. In Missouri, the Court of Appeals for the Eastern District embraced false light, reasoning:

> As a result of the accessibility of the internet, the barriers to generating publicity are quickly and inexpensively surmounted. Moreover, the ethical standards regarding the acceptability of certain discourse have been diminished. *Thus, as the ability to do harm grows, we believe so must the law's ability to protect the innocent.*[113]

In *Meyerkord v. Zipatoni Co.*, Greg Meyerkord was listed as the registrant for "www.alliwantforxmasisapsp.com," a fake blog (or "flog") created by marketing company Zipatoni for Sony's handheld PSP videogame console.[114] The blog launched (and ended) in 2006, but Meyerkord had left the company in 2003.[115] The backlash to the failed viral marketing campaign included "concern, suspicion, and accusations over the campaign and those associated with it, including Zipatoni and

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> words that are literally true but carefully crafted to include thinly veiled accusations of wrongful conduct . . . . The Court should be ashamed of itself for shielding the nation's largest newspaper chain, Gannett, from being accountable for its reckless actions.

Id.

113. Meyerkord v. Zipatoni Co., 276 S.W.3d 319, 325 (Mo. Ct. App. 2008) (emphasis added) (citing Welling v. Weinfeld, 866 N.E.2d 1051, 1058 (Ohio 2007)).

114. In 2006, the Zipatoni Company created a viral marketing campaign for the Sony PlayStation Portable (PSP) that included a fake blog at "www.alliwantforxmasisapsp.com." The site quickly drew criticism on the Web, directed at both Zipatoni and Greg Meyerkord, a former Zipatoni employee who was listed as the Web site's registrant. *Meyerkord v. Zipatoni*, 276 S.W.3d at 321. *See also* Ellen P. Goodman, Symposium, *Commercial Speech in an Age of Emerging Technology and Corporate Scandal: Intellectual Property & Cyberlaw: Peer Promotions and False Advertising Law,* 58 S.C. L. REV. 683, 701 (2007) ("[A]dvertiser-created content designed to appear as a peer promotion . . . should constitute commercial speech and 'advertising or promotion' under the Lanham Act, regardless of whether the promotion looks like it is peer-generated.").

115. *Meyerkord,* 276 S.W.3d at 321.

Meyerkord."[116] Meyerkord sued his former employer for false light, alleging his privacy was invaded, reputation injured, and that "he has suffered shame, embarrassment, humiliation, harassment, and mental anguish."[117] The trial court dismissed Meyerkord's claim based on Zipatoni's argument that Missouri did not recognize false light, and Meyerkord did not plead a defamation claim.[118]

On appeal, Meyerkord was given the opportunity to amend his complaint to plead the standard for false light as established by the Missouri Court of Appeals.[119] In deciding whether to recognize false light, the court first looked to the treatment of the tort by other jurisdictions.[120] The *Meyerkord* court identified three common rationales for the rejection of false light: overlap with defamation; increasing tension with the First Amendment; and the judicially inefficient process of courts considering two nearly identical claims for relief.[121] The court then addressed each argument.

As to the argument that false light and defamation are too much alike, the *Meyerkord* court asserted that the two were "sufficiently

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116. *Id. See* Kris Graft, *Sony Screws Up: First the hardware woes. Now a viral campaign for the PSP has backfired*, BUSINESSWEEK, Dec. 19, 2006, *available at* http://www.businessweek.com/print/innovate/content/dec2006/id20061219_590177.htm. After the blog was exposed as fake, Sony put this statement on the site:

> Busted. Nailed. Snagged. As many of you have figured out (maybe our speech was a little too funky fresh???), Peter isn't a real hip-hop maven and this site was actually developed by Sony. Guess we were trying to be just a little too clever. From this point forward, we will just stick to making cool products, and use this site to give you nothing but the facts on the PSP.

Id. However, in reaction to early criticism of the blog, a post to the site stated: "We don't work for Sony. And for all you dissin' my skillz I'm down for a one on one rap off or settling it street stylez if you feel me playa." Ed Kemp, *Sony Ridiculed for Setting Up Fake PSP Fan Website,* MARKETING, Dec. 20, 2006, at 1, *available at* 2006 WLNR 22286201. The Web site was taken down in December 2006, but a British site maintains a screenshot of the first page of the blog. UK Resistance screenshot of www.alliwantforxmasisapsp.com, http://www.ukresistance.co.uk/sonylieblog/default.aspx.htm (last visited Mar. 29, 2011).

117. *Meyerkord,* 276 S.W.3d at 322.

118. *Id.*

119. *Id.* at 326.

120. *Id.* at 323-24.

121. *Id.* at 324.

distinguishable" based on the different interests protected (injury to one's right to be let alone versus injury to reputation).[122] It also stated that "where the issue is truth or falsity, the marketplace of ideas provides a forum where the answer can be found, while in privacy cases, resort to the marketplace merely accentuates the injury."[123]

The *Meyerkord* court held that First Amendment concerns could be assuaged by requiring proof of actual malice for all cases, regardless of the plaintiff's status as a public or private figure.[124] This approach, according to the court, "strikes the best balance between allowing false light claims and protecting First Amendment rights."[125] Requiring proof of actual malice also "alleviate[s] some of the concerns regarding judicial economy."[126] The court concluded that the facts of the "www.alliwantforxmasisapsp.com" fiasco were just right to prompt a Missouri decision regarding false light, especially considering the Internet's increased potential for harm to "the innocent."[127]

III. DANGER AHEAD: THE POTENTIAL FOR FALSE LIGHT TO DIM THE LIGHTS ON FREE SPEECH

Privacy law is a relatively new area of the common law, and as Professors Don R. Pember and Dwight L. Teeter Jr. quipped a quarter century ago, "[t]o say that the law of privacy is not a great hallmark of

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122. *Id.* On the other hand, Washington University Professor Neil Richards told *Missouri Lawyers Weekly* that "[t]here isn't a strong argument for why we should resuscitate false light when defamation covers the main areas of reputation . . . . False light is vague and any tort that tries to remedy statements made about someone raises a danger to free speech." Angela Riley, *Internet Necessitates "False Light" Protection, Missouri Court of Appeals Eastern District Says,* MO. LAWYERS WEEKLY, Dec. 29, 2008, *available at* 2008 WLNR 25932967. But Meyerkord's attorney, Steven Rineberg, argued that the distinguishing feature "'between false light and defamation is that in a false light case the statement doesn't need to be defamatory . . . . Just [Meyerkord] being listed as a registrant isn't defamation. The false light was how the public views him afterward where his privacy is invaded.'" *Id.*

123. *Meyerkord,* 276 S.W.3d at 325 (citing West v. Media Gen. Convergence, Inc., 53 S.W.3d 640, 644 (Tenn. 2001)).

124. *Id.* at 325.

125. *Id.*

126. *Id.*

127. *Id.*

logic and clarity in American law is to indulge in egregious understatement."[128] Warren and Brandeis' assertion of a right to privacy was considered by courts for decades, but Prosser's articulation of the four privacy torts and their subsequent inclusion in the *Restatement (Second) of Torts* put these causes of action on the fast-track to widespread judicial acceptance. In some cases, through mere repetition, these torts, especially false light, took hold in American jurisprudence without adequate inquiry into their necessity or actual basis in case law. The result is a cause of action — false light — that is hard to define, duplicative of defamation, and most concerning, threatens speech. False light's rate of appearance in published court decisions has also increased dramatically over the years, making the issue all the more important to the press.

Consider defamation law, an area that is as well-defined as possible[129] with case law that for nearly fifty years has been applied with the First Amendment lens established in *New York Times Co. v. Sullivan*[130] as protection for speech. The usefulness of defamation is perhaps best illustrated by the willingness of courts to freely borrow from its concepts in false light cases. Why borrow from an established body of law to patch together an alternative tort that rarely, if ever, redresses a wrong that cannot be remedied by a defamation claim?[131]

The strongest argument of false light proponents is that false light remedies harm resulting from non-defamatory falsehoods. Put another way, false light provides redress for *truthful* statements that cast

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128. Don R. Pember & Dwight L. Tweeter Jr., *Privacy and the Press Since* Time, Inc. v. Hill, 50 WASH. L. REV. 57, 57 (1975).

129. *See, e.g.,* Lake, *supra* note 20, at 626-27 ("Defamation law in the United States consists of complex rules that have evolved over decades as courts and legislatures have sought to accommodate the varied interests of speakers, recipients of information, and persons discussed.").

130. 376 U.S. 254 (1964).

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

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

The solution to this problem — the justifiable need to protect innocent subjects of stock photos who end up associated with negative stories versus the First Amendment dangers of suppressing truthful reporting — lies within existing law. As Professor Kelso has argued, many of the cases Prosser relies upon to support his assertion of the existence of the false light tort can almost uniformly be addressed by other causes of action.[132] In the images and unrelated content scenario, the remedy is a misappropriation of likeness action. This tort could also have addressed Meyerkord's wrong had he argued that the

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132. Kelso, *supra* note 46, at 807. Professor Kelso concluded:

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

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

misappropriation of his name was an invasion of privacy.[133] Or, as the Florida Supreme Court suggested, defamation by implication could suffice in these instances.[134]

This leaves the *Anderson* scenario — what if a news story or broadcast is truthful but this truthful information is allegedly arranged in such a way that creates a false light? Exposing the press to liability in situations such as these is simply too big of a gamble to take with First Amendment freedoms. First, the pace of the modern newsroom (especially in the age of the Internet) dictates quick decision-making. The process of intentionally choosing a photo and then placing it with an unrelated and often controversial story is one in which an editor would probably have a reasonable opportunity to assess the potential for backlash from the photo subject. In contrast, the process of determining whether the subtle arrangement of sentences in a truthful story might be "highly offensive to the reasonable person"[135] is a near-impossible task and to charge the press with doing so would impermissibly violate the First Amendment.

IV. CONCLUSION

Despite its acceptance by a majority of states, false light remains the most controversial and least understood aspect of invasion of privacy.[136] Legislatures and judges around the country have struggled with this issue since the U.S. Supreme Court recognized the false light tort more than 40 years ago but at that time failed to establish the constitutional parameters and the necessary protections for free speech in a society that values the marketplace of ideas and free-wheeling debate.[137]

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133. *See, e.g.*, Faegre & Benson, LLP v. Purdy, 367 F. Supp. 2d 1238 (D. Minn. 2005) (holding that an anti-abortion activist who registered domain names with names and nicknames of pro-choice advocates misappropriated their names for his own benefit).

134. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1100 (Fla. 2008).

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

136. Denver Publ'g Co. v. Bueno, 54 P.3d 893, 898 (Colo. 2002) (quoting Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994)).

137. *See, e.g.*, John Milton, *Areopagitica* (1644), *in* 29 GREAT BOOKS OF THE WESTERN WORLD 379, 409 (1952). As Milton eloquently stated:

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

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

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

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

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