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A Tort for the Digital Age: False Light Invasion of Privacy Reconsidered

John C.P. Goldberg

Benjamin C. Zipursky

A TORT FOR THE DIGITAL AGE: FALSE LIGHT INVASION OF PRIVACY RECONSIDERED

John C. P. Goldberg & Benjamin C. Zipursky***

Introduction

Compared to Methuselahs such as trespass or battery, false light invasion of privacy is a youngster. Yet, unlike other "new" torts, including other privacy torts, it has struggled almost from birth. Indeed, before it turned thirty, it was the target of prominent calls for its rejection.[1] Since then, several prominent state courts have disavowed it.

In this Article, we aim to rehabilitate false light's reputation as a tort in good standing. We do so by casting it in its true light: that is, by identifying more clearly than have others the distinctive injurious wrong it identifies, and why, today, its availability matters.

Part I briefly chronicles the tort's recognition and standard criticisms of it. Part II advances our central claim, namely, that prominent jurists have mischaracterized false light by treating it either as a reputational-injury tort or an emotional-distress tort. Instead, as Melville Nimmer observed more than fifty years ago, it is best seen as a variant on a different privacy tort, namely, public disclosure of private fact.[2] At its core, that tort deems wrongful and injurious the widespread sharing of a person's private information, where the dissemination of such information would be highly offensive to a reasonable person. Of course, false light differs from public disclosure in an obvious respect—the putative "information" being circulated is false. But the falsity of the statements does not render the defendant's conduct *less* wrongful, nor does

* Carter Professor of General Jurisprudence, Harvard Law School.

** James H. Quinn '49, Chair in Legal Ethics and Professor of Law, Fordham Law School. For comments on earlier drafts of this Article, we are grateful to the participants in Sturm College of Law's "Privacy Torts in the Digital Era Conference" in March of 2023, participants in DePaul University College of Law's 2023 Clifford Symposium, and Jonathan Bruno. Thanks also to Danielle Dascher for excellent research assistance.

1. *See, e.g.*, Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. Rev. 364, 366 (1989) ("False light invasion of privacy has caused enough theoretical and practical problems to make a compelling case for a stricter standard of birth control in the evolution of the common law.").

2. Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Calif. L. Rev. 935, 963 (1968).

it change the fact that offensive dissemination of "stories" about the plaintiff's private life has caused harm to the plaintiff. Quite the opposite, it typically makes things worse.

Giving publicity to what are purported to be private facts about the plaintiff, where doing so would be highly offensive if such statements were true, is thus properly regarded as a tort in its own right. A paradigmatic example of this wrong—and, again, credit goes to Nimmer for flagging it—consists of posting a doctored image that purports to show a person (in his example, a woman) naked.[3] Even if there was a time when one could suppose it tolerable that a highly offensive, pseudo-revelation of this type would carry no legal consequences, that position is unsustainable today.[4] If false light has been waiting for its day, that day—our deepfake era—is now.[5]

Part III spells out several implications that follow from a proper understanding of false light. On the one hand, as indicated, it calls for courts to limit liability to cases that involve giving publicity to *what would be a private matter if true* (such that its dissemination would be highly offensive) and also for them to be sensitive to newsworthiness considerations. On the other hand, as we will explain, it suggests that "falsity" should be less central to the resolution of many false light claims than it currently is, and that an actual malice requirement in false light cases may be unjustifiable, at least where private figures are involved. This Part also identifies a further concrete benefit that can come from embracing the false light tort, properly understood: once false light is seen to be a privacy tort, it becomes possible to identify scenarios in which it appropriately functions as a complement to defamation law, not an end-around.

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3. *Id*.

4. *See,e.g.*, Julie Jargon, *Fake Nudes of Real Students Cause an Uproar at a New Jersey High School*, WALL ST. J. (Nov. 2, 2023, 7:00 AM), https://www.wsj.com/tech/fake-nudes-of-real-students-cause-an-uproar-at-a-new-jersey-high-school-df10f1bb?reflink=integratedwebview_share (describing incident involving students' use of artificial intelligence to generate fake nude photos of classmates that circulated in their school).

5. *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1934–35 (2019); Matthew B. Kugler & Carly Pace, *Deepfake Privacy: Attitudes and Regulation*, 116 NW. U. L. REV. 611, 629 (2021); Douglas Harris, *Deepfakes: False Pornography is Here and the Law Cannot Protect You*, 17 DUKE L. & TECH. REV. 99, 103 (2019) (noting that only broadly disseminated deepfakes can amount to the placing of the victim in a false light); *cf*. Olivia Wall, *A Privacy Torts Solution to Postmortem Deepfakes*, 100 WASH. U. L. REV. 885, 900–02 (2023) (arguing that, if false light claims were deemed to survive the death of the victim, deceased persons who are the subject of post-mortem deepfakes should be able to recover on such claims).

I. The Light that Flickered

A. Origins: Prosser, Privacy, and Time v. Hill

William Prosser's famous 1960 article on *Privacy* identified "publicity which places the plaintiff in a false light in the public eye" as one of four privacy torts that had been implicitly recognized in case law.[6] This tort, he claimed, traced back to an English case granting Lord Byron's request to enjoin the publication of a terrible poem falsely attributed to him.[7] Prosser also cited cases involving petitions or media stories attributing to persons views, stances, or allegiances that they did not hold. And he pointed to a related case-cluster involving instances of "innuendo," in which a newspaper or magazine juxtaposed the plaintiff's image with a story about less-than-virtuous behavior, thereby associating the plaintiff with such behavior.

Although he deemed false light a wrong in its own right, Prosser's presentation of it raised questions that have dogged it ever since. At the root of false light, he explained, is a feature it shares with the public disclosure tort, namely, an attribution of something to the plaintiff that "would be objectionable to the ordinary reasonable man . . . ."[8] Yet *false* light does not address revelations of actual facts, but instead "lie[s]."[9] The interest it protects, he thus supposed, cannot be the interest in keeping private matters private. Indeed, he thought it "clear[]" that the relevant interest is "reputation, with the same overtones of mental distress as in defamation," and suggested that most plaintiffs with valid false light claims will also have valid defamation claims.[10] This, in turn, led him to pose (but not answer) a portentous question: Given the overlap of false light and defamation, and given the "numerous restrictions and limitations which have hedged defamation [law]" and which had not yet been developed for false light, what would prevent the new tort from "swallowing up" defamation law in cases of widely disseminated false and offensive attributions?[11]

False light's early years were no less complicated than its birth. Its most famous judicial treatment in this period came in *Time, Inc. v. Hill*,[12] the 1967 decision in which the U.S. Supreme Court reviewed the

6. William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960). The other three are: appropriation of name or likeness; intrusion upon seclusion; and public disclosure of private facts.

7. *Id*. at 398 (citing Lord Byron v. Johnston, 35 Eng. Rep. 851 (1816)).

8. *Id*. at 400.

9. *Id*.

10. *Id*.

11. *Id*. at 401.

12. Time, Inc. v. Hill, 385 U.S. 374, 376 (1967).

constitutionality of liability imposed under New York's privacy statute.[13] Back in 1952, the Hills and their children had been held hostage in their Pennsylvania home by escaped convicts. During the day-long ordeal, their captors did not injure or menace them, though family members were traumatized to varying degrees by the incident and by the national media coverage that followed it. In part to escape further attention, the family thereafter moved to Connecticut. Three years later, *Life* magazine ran a story about the opening of a Broadway play titled *The Desperate Hours.* The play was based on a novel that had been inspired by several hostage incidents, including the Hills', but it depicted a more threatening situation than they had faced. Editors at *Life* decided it would add color to its coverage of the play's opening to tie it overtly to the Hills' well-known experience. Its article thus opened with dramatic language reminding readers of "the desperate ordeal of the James Hill family." It also asserted (misleadingly) that theatergoers would now have the chance to see "the [Hill's] story re-enacted." And the bulk of the article consisted of photographs of cast members reproducing scenes from the play, albeit not from the stage, but instead from the Hills' former Pennsylvania residence, which the story identified for readers as the "actual house where the Hills were besieged." Notably, in the play and in the *Life* story, the fictional captive family members were presented in a positive light—as bravely and cleverly resisting their captors.[14]

Unhappy about being returned to the spotlight, especially given the story's suggestion that family members had been victimized in ways that they had not, the adult Hills sued *Life*'s publisher, Time, Inc. ("Time").[15] As noted, their suit was brought under a New York statute that forbade (and still forbids) persons from "using for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . ."[16] After a $30,000 compensatory damages award to Mr. Hill was summarily affirmed by New York's high court,[17] the Supreme Court—then actively working out the implications of its landmark decision in *New York Times v. Sullivan*[18]—took the case to consider whether the imposition of civil liability on Time violated the First Amendment's guarantees

13. N.Y. Civ. Rights Law §§ 50, 51 (McKinney 2023).

14. *Hill*, 385 U.S. at 377–78 (providing these facts).

15. *Id.* at 378.

16. N.Y. Civ. Rights Law § 50 (McKinney 2023). The law further granted to victims of this misdemeanor the right to obtain injunctive relief and compensatory damages, and the right to seek punitive damages in cases in which the defendant knowingly misused the plaintiff's name, portrait or picture. *Id*. § 51.

17. *Hill*, 385 U.S. at 379.

18. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

of free speech and a free press.[19] Ultimately, it ruled that *Sullivan*'s actual malice rule applied to the Hills' false light action, and hence that the case had to be retried to determine if Time had knowingly or recklessly published falsehoods about them.[20]

Hill is for several reasons an unlikely posterchild for the false light tort. First, the law under which it was brought is, on its face, a statutory version of a different common-law privacy tort: namely, misappropriation of name or likeness.[21] This is, in part, why the Court's opinion does not even mention "false light," instead referring to the plaintiffs' claim as one for "fictionalization."[22] Second, the Court was anything but surefooted in its handling of the case. Indeed, after taking the unusual step of holding a second oral argument, the justices flipped from an initial 6–3 conference vote to affirm liability to a final 6–3 decision to reverse and remand for application of *Sullivan*.[23] Third, and most importantly for our purposes, the gist of what the defendant did wrong to the Hills (if anything) was to give them unwanted publicity by returning them and their ordeal to the public eye.[24] It is far less clear that the story purported to expose sensitive private information to readers, or that its exposure of that putative information, if true, would be "highly offensive" to a reasonable person.[25]

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19. *Hill*, 385 U.S. at 380.

20. *Id.* at 387, 390, 398.

21. While *Hill* was pending before the Supreme Court, the New York Court of Appeals issued a decision in a different litigation that interpreted the state's privacy statute broadly, so as to permit the imposition of liability on a publisher that exploits a fictionalization of another's experiences for its own commercial benefit. *See Hill*, 385 U.S., at 380–86 (discussing Spahn v. Julian Messner, Inc., 221 N.E.2d 543 (N.Y. 1966)). Today it is less clear that this law supports a cause of action for false light. *See* 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 12:7, at 12–104 n.535 (Keith Voelker ed., 5th ed. 2017) (citing post-*Spahn* decisions construing the statute narrowly).

22. *Hill*, 385 U.S. at 384–85 n.9.

23. *Id*. at 374, 398. The vote to remand was 6–3. However, only a bare majority of five held that the standard to be applied on remand was actual malice. Justice Harlan argued instead it should be negligence. *Id*. at 402, 404, 409 n.6 (Harlan, J., concurring in part and dissenting in part).

That the outcome of the case changed during deliberations was revealed with the release of some of the Justices' papers. *See* Bernard Schwartz, The Unpublished Opinions of the Warren Court 240–303 (1985) (discussing *Hill* and reproducing unpublished opinions from the case). Fascinatingly, Justice Brennan—the author of *Sullivan*—was a member of the conference majority that initially voted to uphold liability. He and Justices Harlan and Stewart switched sides after Justices Black, Douglas, and White circulated draft dissents to Justice Fortas's draft majority opinion.

24. In ruling on the Hills' claim, the New York courts appear not to have used the phrase "false light" or to have invoked Prosser's four-part typology. Although a footnote in Justice Fortas's ill-fated initial draft opinion did characterize the suit as presenting a false light claim, see Schwartz, *supra* note 23, at 263, the Court's final opinion did not do so, and mentioned Prosser's *Privacy* article only in passing. *Hill*, 385 U.S. at 380 n.3.

25. Given that the basic facts of the Hills' experience were already well-known, the offensiveness issue arguably turned on whether the dissemination of putative *additional* facts about the

B. Recognition

Seven years later, in *Cantrell v. Forest City Publishing Co.*, the Supreme Court issued an opinion that more clearly attested to the viability of false light claims.[26] Plaintiff Margaret Cantrell, mother of four minor children, was widowed when her husband was killed along with dozens of others in a bridge collapse.[27] Five months after the disaster, a reporter and photographer working for the Cleveland Plain Dealer, without Margaret present or having given permission, visited her home and interviewed her children, then published a story that exaggerated the extent to which the family was living in miserable conditions, and which also misrepresented that Margaret had been present during the visit.[28]

On behalf of herself and her son William, Margaret brought a diversity action against the reporter and the publisher asserting a false light claim.[29] As summarized by the Supreme Court, "the theory of the case was that by publishing the false feature story about the Cantrells and thereby making them the objects of pity and ridicule, the [defendants] damaged Mrs. Cantrell and . . . William by causing them to suffer outrage, mental distress, shame, and humiliation."[30] A jury ruled for the plaintiffs. Although the verdict was reversed on appeal in state court, the Supreme Court reinstated the verdict, concluding that the evidence was sufficient to permit the jury to find that the defendants knowingly or recklessly published falsehoods about the plaintiffs.[31]

Soon after *Cantrell*, the false light tort appeared in the final version of the Restatement (Second) of Torts. Section 652E of that Restatement thus provides in relevant part:

> 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

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family's ordeal indicating that it involved more menace than might have been supposed would be highly offensive to a reasonable person.

26. Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974).

27. *Id.* at 246–47.

28. *Id.* at 247–48.

29. *Id*. at 246, 248 n.2 (noting uncertainty over whether Ohio or West Virginia tort law had been applied by the lower courts but observing that both recognize claims for invasion of privacy, then citing Prosser's *Privacy* article and the false light provision contained in a tentative draft of the Restatement (Second) of Torts for the proposition that false light is "generally recognized" as one type of actionable privacy invasion).

30. *Id*. at 248 (footnote omitted).

31. *Id.* at 252–53. Famously, *Cantrell* declined to answer whether the Court's then-recent ruling in Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974)—which held, roughly, that private-figure defamation plaintiffs with proven damages can recover on a showing of mere negligence rather than actual malice—applied to false light plaintiffs. *Cantrell*, 419 U.S. at 250–51.

> (a) the false light in which the other was placed would be highly offensive to a reasonable person . . . .[32]

Comments to Section 652E emphasize three features of this tort. First, the "publicity" necessary for liability is not defamation law's notion of "publication," which can be satisfied merely by communicating a defamatory remark to one person other than the victim. Instead, the same widespread dissemination that is needed for the tort of public disclosure of private fact is needed for false light.[33] Second, facts that give rise to valid false light claims will "in many cases" also give rise to defamation claims.[34] Third, the false statement(s) at issue must be "such a major misrepresentation of [the plaintiff's] character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position . . . ."[35]

Section 652E was also accompanied by nine illustrations, many of which were based on cases that Prosser had cited in his 1960 article. Some of these are described as providing the plaintiff with claims for both libel and false light, others for false light alone. Among the latter are: (1) the misidentification of the plaintiff in a petition as a Republican when in fact he is a Democrat; (2) the false but non-defamatory attribution to a war hero (within an otherwise accurate and laudatory portrayal of the plaintiff) of a romance that never occurred; and (3) the use of a photograph of a child accident-victim lying in a public street to illustrate a magazine article about children's contributory negligence, even though the child in the photograph had not been contributorily negligent.[36]

While the Restatement in these respects followed Prosser's initial 1960 outline, it was as much the work of Prosser's co-Reporter John Wade. Prosser had abruptly resigned as Reporter in 1970, so it fell to Wade to steer the project to completion. As it turns out, Wade had in 1962 published an exhaustive review of privacy cases which concluded that "[o]n balance, the weight of authority is . . . clearly to the effect that an action for invasion of the right of privacy can be maintained for false statements about the plaintiff."[37] This was "as it should be," he opined.[38] In his view, the courts, in the interest of protecting emotional

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32. Restatement (Second) of Torts § 652E (Am. L. Inst. 1977). We omit here sub-section (b), which, following *Hill*, requires false light plaintiffs to prove actual malice. *Id*. § 652E, cmt. d.

33. *Id*. § 652E cmt. a.

34. *Id*. § 652E cmt. b.

35. *Id*. § 652E cmt. c.

36. *Id*. § 652E cmts. b & c, illus. 4, 5 & 8. As we discuss below, the facts provided in some of these illustrations probably would not support a claim for false light on our account of it.

37. John W. Wade, *Defamation and the Right of Privacy*, 15 Vand. L. Rev. 1093, 1106 (1962).

38. *Id*.

well-being,[39] had rightly come to confer on each person a legal right not to be presented by another to the public in a highly offensive manner. On this description, the right he identified is as much invaded by inaccurate offensive presentations as accurate ones—either way, the plaintiff is subjected to unwelcome public attention of a sort that can be expected to cause serious emotional distress.[40]

Like Prosser before him, Wade acknowledged that, so understood, false light would cover a good deal of conduct that historically had been treated under the rubric of defamation. However, whereas Prosser was noncommittal and perhaps even concerned about this prospect, Wade seems to have welcomed it. To his mind, defamation really had always been about (or should have been about) protecting against and compensating emotional distress. He thus saw the recognition of false light as an important step in a rationalization process that would ideally culminate in the recognition of a generic wrong of intentional infliction of mental suffering—an uber-tort that would subsume assault, IIED, libel, slander, and other causes of action.[41]

C. Critique and Rejection

The adoption of Section 652E in 1977 marked the realization of Prosser's and Wade's efforts to establish the distinct wrong of presenting another to the public in a light that is false and highly offensive. In retrospect, this would prove to be a high point for the tort. In 1984, the North Carolina Supreme Court purged the tort from that state's common law.[42] Five years later, Diane Zimmerman published her withering condemnation of it.[43] Since then, several high courts—including those of Colorado, Florida, Texas and Virginia—have issued decisions rejecting it.[44]

Zimmerman argued that the problems with false light trace back to its origin, in that Prosser had manufactured it out of a mélange of inconsistent decisions. In fact, she claimed, many of the cases Prosser invoked had not keyed liability to the *falsity* of the defendant's depiction or representation of the plaintiff. Instead, they expressed a somewhat dainty,

39. *Id*. at 1112 (asserting that, in contrast to defamation damages, recovery in privacy actions is primarily for emotional distress).

40. *Id*. at 1107.

41. *Id*. at 1124–25.

42. Renwick v. News and Observer Publ'g Co., 312 S.E.2d 405, 413 (N.C. 1984).

43. *See* Zimmerman, *supra* note 1.

44. Denver Publ'g Co. v. Bueno, 54 P.3d 893, 904 (Colo. 2002); Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1115 (Fla. 2008); Cain v. Hearst Corp., 878 S.W.2d 577, 584 (Tex. 1994); WJLA-TV v. Levin, 564 S.E.2d 383, 394–95 n.5 (Va. 2002). In several other jurisdictions, high courts have declined to recognize claims for false light in particular cases without disavowing the tort entirely.

pre-modern sensibility according to which individuals have a general right to be free of media coverage, regardless of whether they are being portrayed inaccurately or accurately, and regardless of newsworthiness.[45] Such a capacious wrong, she argued, had little chance of surviving the realities of modern mass media, and modern understandings of speech and press freedom. However, Prosser had managed to rescue this doomed line of cases by grafting onto them a falsity requirement, thereby limiting liability to instances in which the attention brought to the plaintiff involved misattributions.[46] In doing so, he reworked what had previously been, in effect, the tort of *unwanted publicity* so that it now closely resembled the defamation torts, a fact seemingly confirmed by the Supreme Court's conclusion in *Hill*.[47]

And yet, as Prosser himself had observed, false light is a more loosely defined cause of action than libel or slander. According to Zimmerman, such a capacious wrong has a much weaker claim to recognition than the defamation torts. First, following Wade, she maintained that the interest it protects is merely the individual's interest in not being distressed by the dissemination of a falsehood about them—a substantially less compelling interest than that of maintaining one's good name.[48] Second, the tort's vagueness poses a more significant threat to free speech because it gives insufficient notice to speakers as to the behavior that will expose them to liability, and because it gives judges and juries too much leeway to find for plaintiffs on the issues of falsity and offensiveness. On these points, she again deemed *Hill* illustrative. The jury in that case held the defendant liable not because the *Life* story harmed the Hills' reputations, but merely because the Hills were upset by it, and because, to add a bit of spice to its story, *Life* had commingled features of the Hills' ordeal with those of the fictional family portrayed in *The Desperate Hours*.[49]

Among the prominent courts that have rejected false light, most have argued that it is best seen—and hence properly rejected—as shadow defamation law. In standard cases, they reason, false light is unnecessary because it is redundant with the law of libel and slander. In particular, one who disseminates an item that juxtaposes an image of the plaintiff next to a story on frowned-upon behavior, thereby creating the false impression that the plaintiff engages in such behavior, may well face liability for implicitly defaming the plaintiff. While it might be accurate to say that the plaintiff justifiably takes serious offense at having been

45. Zimmerman, *supra* note 1, at 377–82.
46. *Id*. at 382.
47. *Id.* at 381–82.
48. *Id*. at 396.
49. *Id*. at 418.

presented to the public in this manner, that description adds nothing to the explanation of why the plaintiff has a valid claim. If anything, it merely describes a type of loss consequent to reputational injury that is compensable. And, in the few cases when false light is not redundant, the absence of liability is warranted because claimants with complaints about reputational harm should not prevail when they would not under the terms of defamation law (including First Amendment law), or is unwarranted but better addressed forthrightly through revisions to defamation law.

Unsurprisingly, cases that have resulted in high court rejections of false light have usually included borderline defamation claims. *Jews for Jesus v. Rapp*, is illustrative.[50] The plaintiff, who was Jewish, alleged that the defendant published a newsletter that included a narrative from her stepson falsely characterizing her as having embraced the tenets of Jews for Jesus.[51] Included in her complaint were claims for defamation and false light.[52] The Florida lower courts dismissed her defamation claim on the ground that the attribution to her of the particular religious beliefs in question would not tend to cause the average person to hold her in lower esteem.[53] To reach this conclusion, they rejected the rule associated with Justice Holmes's famous opinion in *Peck v. Tribune Co.*,[54] according to which a statement can be defamatory if it harms one's reputation among any "important and respectable part of the community."[55] More happily for Rapp, the intermediate appellate court concluded that her complaint had stated a cognizable false light claim.[56] Yet, because of uncertainty as to whether the Florida Supreme Court had actually recognized false light as a tort, it certified that question to the court.[57]

The Florida high court answered in the negative. Accepting the argument of the defendant and several amici, it reasoned that any claim that might pass muster as a false light claim can and should instead be analyzed as a case of defamation by implication.[58] While acknowledging that, in principle, the core injury in false light consists of a person being justifiably offended over how they have been presented to the public, whereas the core injury in defamation is reputational harm, the court

50. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098 (Fla. 2008).
51. *Id*. at 1100–01.
52. *Id.* at 1101.
53. *Id.* at 1101–02.
54. Peck v. Tribune Co., 214 U.S. 185, 190 (1909).
55. *Rapp*, 997 So. 2d at 1115.
56. *Id.* at 1102.
57. *Id.*
58. *Id*. at 1108.

reasoned that these distinct interests tend to merge in practice.[59] The court also observed that the relative indefiniteness of the false light tort generates First Amendment concerns, especially because courts have not layered into false light law various common law privileges recognized in the law of libel and slander.[60]

For reasons already mentioned and discussed further below, it is no coincidence that the Florida Supreme Court's rejection of false light went along with its endorsement of a broader conception of defamation than the lower courts had applied. Thus, rather than dismissing Rapp's case, the court remanded it with instructions to those courts to apply the "important and respectable part of the community" test that they had previously rejected.[61] In other words, the high court's comfort with rejecting false light was tied to its embrace of a standard for reputational injury that is broad enough to encompass many claims fitting the Restatement's definition of the false light tort.

II. False Light, Public Disclosure, and The Right to Partial Control of What Others "Know" About One's Private Life

While false light is, today, on the ropes, it is by no means dead. It remains on the books in most jurisdictions. And it would be inaccurate to say that there is a scholarly consensus against it. Among others, Edward Bloustein, Nimmer, and Gary Schwartz have offered powerful arguments in support.[62] We build on their efforts in what follows.

The strongest argument against the recognition of false light as a freestanding tort can be summarized as follows. False light is either an extension of defamation law or an emotional distress tort. As an alternative reputational-injury tort, there is little to be said for it. Either it provides an undesirable end-run around limitations appropriately built into the law of libel and slander, or it provides a desirable extension of liability that is better achieved through revisions to defamation law.[63] Meanwhile, as an emotional distress tort, false light has a weak claim to recognition, not only because courts have generally been cautious about

59. *Id*. at 1109–10.

60. *Id*. at 1110–11.

61. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1114–15 (Fla. 2008).

62. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 991–93 (1964); Nimmer, *supra* note 2, at 962–66; Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 Case W. Res. L. Rev. 885, 895–96 (1991).

63. Hence, the Florida Supreme Court's ruling in *Rapp* that the test for whether a statement can be defamatory should be a broad one that incorporates Holmes's notion that a seemingly nondefamatory statement can be defamatory if members of a "respectable" group would consider it defamatory.

recognizing liability for "pure" emotional distress, but also because they must be especially cautious when the claimed source of the distress is speech.

Though versions of this argument have been influential among academics, it is flawed because it proceeds from a false premise. The tort of false light is grounded neither in reputational injury nor in emotional distress. Rather, it is what it purports to be—a privacy tort. Indeed, as Nimmer astutely observed, it is best understood as a (freestanding) complement to the tort of public disclosure of private fact.

Here is how he articulated the point:

> An untrue statement may in the same way as a public disclosure of embarrassing private facts constitute an invasion of privacy without in any manner constituting an injury to the subject's reputation. Once the false light cases are understood as a logical, even a necessary, extension of the private facts cases, the fallacy of equating the false light cases to defamation actions becomes apparent. The injury to the plaintiff's peace of mind which results from the public disclosure of private facts may be just as real where that which is disclosed is not true. It would be absurd to hold that the publication of an intimate fact creates liability, but that the defendant is immunized from liability (though the injury to plaintiff's peace of mind is no less) if the intimate "fact" publicly disclosed turns out not to be true, thus putting a premium on falsehood.[64]

By way of illustration, Nimmer then offered a prescient example:

> The sensibilities of [a] young lady whose nude photo is published would be no less offended if it turned out that her face were superimposed upon someone else's nude body. The resulting humiliation would have nothing to do with truth or falsity. The unwarranted disclosure of intimate "facts" is no less offensive and hence no less deserving of protection merely because such "facts" are not true.[65]

To develop Nimmer's insights, it will help to juxtapose the Restatement (Second)'s provisions on public disclosure and false light:

> **§652D. Publicity Given to Private Life**
>
> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.[66]

64. Nimmer, *supra* note 2, at 963.
65. *Id*.
66. Restatement (Second) of Torts § 652D (Am. L. Inst. 1977).

> **§ 652E. Publicity Placing a Person in a False Light**
>
> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[67]

As we noted above, comment a to Section 652E, which incorporates by reference comment a to Section 652D, makes explicit that the false light tort does not adopt defamation law's concept of publication but instead follows the public disclosure tort's requirement of "giv[ing] publicity to" (i.e., disseminating widely) a matter concerning another.[68] And as is apparent from their respective texts, Section 652E(a) follows Section 652D(a) in setting as a condition of liability that the matter in question must be of a sort such that its dissemination "would be highly offensive to a reasonable person."[69] Finally, a separate section—Section 652H—makes clear that the damages available to public disclosure and false light claimants are the same.[70]

To note these important commonalities is not to deny differences. Three are particularly salient. The most obvious is that Section 652D is about *making facts* public while 652E is about *statements that are not true*.[71] Second, the text of Section 652D refers to matters that "are not of legitimate concern to the public," while Section 652E does not.[72] Third, Section 652E contains a "reckless disregard of falsity" requirement that is absent from Section 652D.[73]

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67. *Id*. § 652E.

68. *Id*. § 652E cmt. a.

69. *Id.* § 652E.

70. *Id*. § 652H (compensation recoverable for all privacy torts includes damages for the harm to the victim's interest in privacy, as well as mental distress and any "special damage" caused by the invasion).

71. *Id*. § 652E cmt. a ("The form of invasion of privacy covered by the rule stated in this Section does not depend upon *making public any facts* concerning the private life of the individual. On the contrary, it is essential to the rule stated in this Section that *the matter published* concerning the plaintiff is *not true*.") (emphasis added).

72. RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

73. This difference reflects First Amendment law as it was when the American Law Institute (ALI) adopted these provisions. Section 652E(b)'s false light provision thus incorporates *Time v. Hill*, while Section 652D(b)'s public disclosure provision makes no reference to constitutional restrictions that would later emerge in decisions such as *Florida Star*. Fla. Star v. B.J.F., 491 U.S. 524, 542 (1989) (striking down on First Amendment grounds civil liability imposed under a state rape-shield law for a newspaper's publication of information contained in a police report identifying plaintiff as a rape victim).

For present purposes, we will leave aside the last of these differences, which is rooted in the First Amendment,[74] and focus instead on those that spell out the common law of false light, starting with Section 652E's omission of a requirement that the matters to which publicity has been given not be of legitimate public concern. This omission is facially puzzling, to say the least. Specifically, it seems to run contrary to Section 652E's overall presentation of false light as an *invasion-of-privacy* tort by allowing for liability in cases in which publicity given to non-private matters would be highly offensive to a reasonable person. In our view, this surprising asymmetry owes to mistakes in Prosser's and Wade's respective conceptualizations of false light as a reputational-injury tort or an emotional-distress tort. As we explain below, had they been more steadfast in treating false light as a genuine privacy tort, they would have included Section 652D's "not of legitimate concern" language in Section 652E. And they probably would have omitted some of its illustrations, such as the example based on Lord Byron's case (mentioned above).[75] It may well be an injurious wrong falsely to attribute a terrible poem to a renowned poet. Less clear is that this wrong consists of interfering with the poet's interest in not having members of the public form beliefs about certain sensitive matters pertaining to the poet's private life.

While the foregoing difference addresses which sorts of disseminations the two torts cover, the bigger difference, conceptually, between them concerns whether the statements disseminated by the defendant are true (public disclosure) or false (false light). Indeed, it is the fact that this is the crucial differentiator between the two torts that makes Nimmer's point so powerful. If it wrongs someone to disseminate certain kinds of private information about them, then surely it wrongs them to purport to disclose the same information when it is actually *misinformation*. To update Nimmer's example: if, in the eyes of the law, *D* wrongfully injures *P* by posting on a website a video of *P* having sex in private, surely *D* wrongfully injures *P* by posting online a fake video that is sufficiently convincing to cause viewers to believe, falsely, it is a video of *P* having sex in private.

But are these really both invasions of privacy? Recall that Prosser thought the latter example—the deepfake—by definition could not be an invasion of privacy, because no actual information about *P* is being

74. Because a theme of this Article is that the Supreme Court and the ALI were overly focused on the resemblance of false light to defamation, we shall not, for the moment, take the differences in part (b) of the respective torts to be evidence against our view about the fundamental conceptual similarity of false light to public disclosure. We briefly discuss the proper place of actual malice in false light law below.

75. Prosser, *supra* note 6, at 398.

revealed. And on this point, Nimmer didn't offer a fully satisfactory response. He emphasized that the "injury to the plaintiff's peace of mind which results from the public disclosure of private facts may be just as real where that which is disclosed is not true."[76] In doing so, however, he arguably downplayed the privacy interest at stake and embraced the erroneous thought that false light is an emotional distress tort.

Closer to the mark is Edward Bloustein's claim that the privacy torts are united in that all implicate what he sometimes referred to as the "interest in preserving human dignity and individuality."[77] However, Bloustein's view comes with a lot of moral and philosophical baggage.[78] Moreover, he mistakenly conceded to Prosser that, among the privacy torts, false light, turns in the first instance on reputational harm (even though he maintained that it also implicates privacy concerns).[79] On our view, false light, shares with public disclosure, appropriation of likeness, and intrusion upon seclusion a focus on the wrong of interfering unduly *with how (and whether) others perceive them, how others imagine, think, and feel about them, and especially how (and whether) others dwell upon ordinarily private aspects of their lives*. In general, one is entitled to a wide measure of control over which intimate details of one's life are shared with others (intrusion upon seclusion and public disclosure). And one is entitled to comparable control as to whether and when one is prepared to be publicly associated with a commercial enterprise (appropriation of likeness). By the same token, one can legitimately insist on control over the flow of private information about them that is received by others. When *D* falsely presents putative private facts about *P* to the public, *D* unduly interferes with how the public thinks and feels about *P*.

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76. Nimmer, *supra* note 2, at 963.

77. Bloustein, *supra* note 62, at 1005.

78. For example, in aligning his view with those he attributed to Warren and Brandeis, Bloustein wrote as follows:

> I take the principle of "inviolate personality" to posit the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being. It is because our Western ethico-religious tradition posits such dignity and independence of will in the individual that the common law secures to a man "literary and artistic property"—the right to determine "to what extent his thoughts, sentiments, emotions shall be communicated to others." The literary and artistic property cases led Warren and Brandeis to the concept of privacy because, for them, it would have been inconsistent with a belief in man's individual dignity and worth to refuse him the right to determine whether his artistic and literary efforts should be published to the world. He would be less of a man, less of a master over his own destiny, were he without this right.

Id. at 971 (internal citation omitted).

79. *Id*. at 991. This said, Bloustein at times emphasized, as do we, the centrality to privacy torts of a person's entitlement to exercise control over the public presentation of oneself and the circulation of one's private information. *Id*. at 973, 987, 989.

Some of the foregoing ideas are well captured by Judge Posner in his opinion in *Haynes v. Alfred A. Knopf, Inc.*[80] Plaintiff Luther Haynes was offended by the portrayal of his relationship with Ruby Lee Daniels, whose personal saga was the focus of *The Promised Land*, a journalistic account of the "great migration" of African-Americans to northern cities.[81] Although Posner's opinion ultimately deemed Haynes's public disclosure claim nonviable,[82] in doing so it nicely isolated the injury that undergirds the tort. "Even people who have nothing rationally to be ashamed of can be mortified by the publication of intimate details of their life," Posner explained.[83] This is why the unauthorized dissemination of medical records, as well as images of a person's naked body, their sexual activity, or their toilet usage are all grounds for liability.[84] One need not take a reputational hit to be injured in the relevant sense—a person need not suffer any loss of esteem to be entitled to take great offense at another having circulated such information or images. Our point, building on Nimmer's, is that the same can be said for putative revelations of information that are false. Whether or not it causes reputational harm, being falsely presented to the world in a fake sex video is to be associated with something with which it is highly offensive to be associated. To say the same thing: a person suffers an injury if, when others think of them, speak of them, or encounter them, their sex tape is called to mind. And when the association of that person with "their" sex tape is precipitated by the defendant's widespread dissemination of a fake, the defendant is responsible for the injury.

Although false light is thus grounded in persons' interest in how the public perceives and feels about them, and their control over such public perceptions, it is not difficult to see why many courts and scholars have lost sight of its core, instead treating it as a reputational injury like those redressed by defamation law or an affective injury like those redressed by emotional distress torts. Certainly, the idea of an entitlement to control how one presents oneself to others is in the same ballpark as defamation law's notion of an entitlement not to have one's name besmirched. Both are tied to how others think or feel about the victim. Yet not everything that one thinks or feels about another

80. Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993).

81. *Id.* at 1224.

82. In particular, the opinion rejects Haynes's contention that passages in the book about his "heavy drinking, his unstable employment, his adultery, and his irresponsible and neglectful behavior toward his wife and children" amounted to a tortious public disclosure of private facts. *Id*. at 1230. Arguably this conclusion was grounded as much or more on considerations of newsworthiness and free speech than on a rejection of the idea that the disclosures in question could not have been offensive to a reasonable person.

83. *Id.* at 1229.

84. *Id*.

concerns the other's "reputation," in the morally charged sense that the term "reputation" tends to be used in defamation law.

To be sure, there is disagreement over the breadth of the legal concept of reputation. Some see it is a kind of ranking by reference to a community's shared moral criteria.[85] Robert Post, in his influential article on the social foundations of defamation law, offers a somewhat broader view.[86] One of us is inclined to take a still-more expansive view,[87] at least as a matter of interpreting the reach of the common law torts of libel and slander. While what counts as "defamatory" is in theory distinct from a characterization of what interests are protected by defamation law,[88] many courts see defamation law as protecting persons from degradation, disgrace, ostracism and the deprivation of friendly intercourse in society. In this sense, we might understand the law of defamation as sweeping in not just third-party beliefs about a person's moral or professional attributes, but more generally a range of attitudes, feelings, and dispositions about others. A classic passage from New York's highest court states that defamatory words are those "which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society."[89]

While this Article is about privacy, not defamation, the prior paragraph foregrounds the idea that each of has a range of interests in what others know, believe, feel, imagine, suppose, and opine about us. As defamation law and the law governing breach of confidence reveal, sometimes these interests pertain to what particular people (an actual or prospective employer, a spouse, a litigation adversary) think, know or feel about us. American privacy law is plainly especially concerned about what *the public* comes to know, feel, and think about individuals, which affects our interactions with others and our sense of ourselves in innumerable ways. Regardless of whether one accepts a narrower or broader notion of reputation, the common law governing public disclosure of private facts—along with a wide array of state and federal statutes—make it clear that our legal system recognizes that interests in

85. *See generally* Lawrence McNamara, Reputation and Defamation (2007).

86. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Calif. L. Rev. 691, 738 (1986).

87. Benjamin C. Zipursky, *Presumed Damages and Reputational Injury*, 3 J. Free Speech L. (forthcoming 2024).

88. It is possible that, although the *wrongfulness* of defamation turns on the defendant having made a statement that is defamatory in the somewhat narrow sense of attributing discreditable conduct or attributes to the plaintiff, the range of *reputational injuries* for which plaintiffs can recover is sometimes broader. Post, *supra* note 86.

89. Kimmerle v. N.Y. Evening J., Inc., 186 N.E. 217, 218 (N.Y. 1933).

what others think, believe, or feel about us are not limited to their estimate of our moral or professional virtues or vices, but cut much more broadly. As noted, other privacy torts not discussed here—misappropriation and intrusion—show that it is not only beliefs about sensitive personal matters, either. Still, public beliefs, attitudes, and feelings about a person that pertain to sexuality, disease, bodily functions, and intimate family matters obviously do matter, which is why public disclosure is a tort. For this reason, the creation of such beliefs and attitudes about others matter even if they are not true. At least to these, the tort of false light should apply.

The injury of being presented in a false light is no less proximate to emotional distress than it is to reputational injury, but they, too, are distinct. By definition, a valid false light complaint is rooted in the offensiveness of the defendant's misrepresentation of the plaintiff. Unsurprisingly, then, plaintiffs' complaints will emphasize the offense that the plaintiff actually took, and with it, the distress they experienced. But the fact that persons who have been presented in an offensively false light will naturally tend to experience distress over being so presented, and that this distress is likely to ground the bulk of any compensatory damages they receive, does not entail that the injury on which their tort claims are predicated is emotional distress. After all, it could be said of many defamation plaintiffs that they are "really" complaining about their distress over having been defamed. Yet it is standard, and accurate, to suppose that the injury at the core of libel and slander is not interference with emotional tranquility, but injury to reputation.

Some brief attention to case law will help capture the distinctive wrongfulness of false light, how it relates to the wrong of public disclosure, and why it really belongs to the invasion-of-privacy genus. In this regard it is worth pointing out, first, how well the facts of *Cantrell*—unlike those of *Time v. Hill*—fit our characterization. Disclosing to the public that a family is living in squalor would be highly offensive to reasonable persons in the position of family members; or at least a reasonable jury could so conclude. By the same token, one can reasonably expect to cause serious offense to a person by *mis*representing to the public that they are living in such conditions.

Consider next *Peoples Bank and Trust Co. of Mountain Home v. Globe International Publishing, Inc.*[90] A woman named Mitchell was something of a local legend in her northern Arkansas community, having worked for more than fifty years operating a newsstand and delivering

90. Peoples Bank & Tr. Co. of Mountain Home v. Globe Int'l Publ'g, Inc., 978 F.2d 1065 (8th Cir. 1992).

newspapers.[91] At some point, the defendant publisher ran a story about her, and thus was in possession of photographs of her.[92] Years later, apparently on the assumption that Mitchell had passed away in the interim, an editor used one of the photographs to accompany a cover-page headline stating: "Pregnancy forces granny to quit work at age 101."[93] The body of the story that followed—accompanied by a second image of Mitchell—purported to recount the tale of "Audrey Wiles," who was described as an Australian woman who had "quit her paper route at the age of 101 because an extramarital affair with a millionaire client on her route had left her pregnant."[94] The issue and its bogus story circulated widely in Mitchell's community.

Notably, although the jury rejected the defamation claim brought on Mitchell's behalf, it held the defendant liable for false light invasion of privacy, awarding significant compensatory and punitive damages.[95] Also notable is the fact that, on appeal, the defendant chose not to contest that it had depicted her in a way that was false and would be offensive to a reasonable person, instead resting its argument on the plaintiff's supposed failure to prove that it acted with actual malice.[96] And if one considers a variation on the case involving a less facially preposterous "revelation"—for example, if the photo and story suggested that a sixty-year-old-woman had quit her job after becoming pregnant—the strength of the false light claim becomes clearer. There is little doubt that "outing" a person as pregnant at an early stage of their pregnancy would be a significant and highly offensive interference with their privacy, i.e., their entitlement to exercise control over the dissemination of personal information about them. Hence the sense of betrayal that can occur when retailers collect and analyze data from a consumer's purchases to infer that they are pregnant, then send congratulations, coupons, or otherwise communicate in a way that reveals a pregnancy to family, friends, or colleagues.[97] Again, it hardly makes things better

91. *Id.* at 1067.

92. *Id.*

93. *Id.*

94. *Id*.

95. *Id*. The jury also found for the plaintiff on a claim for intentional infliction of emotional distress. The federal court of appeals for the Eighth Circuit affirmed liability, though it remanded for a substantial remittitur on the compensatory award. *Id*. at 1071.

96. *Globe Int'l Publ'g, Inc.*, 978 F.2d at 1068–69 (8th Cir. 1992). In particular, it argued that, given the story's outlandishness, no reasonable reader could believe it to have any factual content, and hence the defendant could not be deemed to have made a false statement, much less to have made one intentionally or recklessly. In rejecting this argument, the appellate court emphasized that even outlandish stories are often taken as true by some readers.

97. Morgan Hochheiser, Comment, *The Truth Behind Data Collection and Analysis*, 32 J. Marshall J. Info. Tech. & Priv. L. 32, 32–33 (2015) (describing such an incident).

for the plaintiff if the announcement to the world that someone is pregnant turns out to be false.

Other relevant examples are not hard to come by. In *Jackson v. Mayweather*, the defendant was found to have committed the tort of public disclosure of private fact by posting that his ex-girlfriend had undergone plastic surgery.[98] If the statement had been false, the plaintiff's offense and humiliation would have been actionable as false light.[99] In *Zieve v. Hairston*, the plaintiff also prevailed on a public disclosure claim, obtaining punitive damages, after the defendant aired television commercials using "before" and "after" pictures of him to tout the efficacy of its hair transplant methods—this despite the plaintiff's having expressly denied it permission to do so and having repeatedly requested it to stop doing so.[100] If the plaintiff had never in fact been the recipient of such treatment, a false light claim would and should lie.[101]

III. Clarifications and Implications

A. Truth, Falsity, and Actual Malice

We have been keen to emphasize that false light is, in effect, the pseudo-disclosure counterpart to the tort of giving publicity to private facts. It is, thus, fair to ask whether we are committed to the idea that it is *irrelevant*, normatively, whether a defendant's presentation to the public of private matters is true or false. Our answer is: "not necessarily." A plausible argument can be made that, at least for certain statements, the plaintiff's psychological injury is different and, in some ways, deeper when a statement is true because the public disclosure amplifies an underlying shame that plaintiffs experience, because there is no possibility of changing public perception by demonstrating the statement's falsity, and because the risks of persons using this information in damaging ways.

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98. Jackson v. Mayweather, 217 Cal. Rptr. 3d 234, 240 (Ct. App. 2017).

99. *Id.* at 255–56.

100. Zieve v. Hairston, 598 S.E.2d 25, 28–29, 33 (Ga. Ct. App. 2004). That, after the commercials began airing, the plaintiff was relentlessly teased by co-workers who gave him the nickname "HRS man" helps to confirm the offensiveness of the dissemination of the images. ("HRS" presumably refers to "hair replacement system.").

101. A variation on *Zieve* might help make our point. Suppose that, without plaintiff's permission, defendant newspaper uses an image of the plaintiff, a sixty-year-old man, to illustrate a story about a local company that has developed new adult diapers that are less bulky and less prone to leak. Plaintiff does not use adult diapers. After the story is published, plaintiff is mocked regularly by his co-workers, who now refer to him as "Captain Underpants." There is little doubt that there would be a cause of action for public disclosure if the plaintiff did in fact use adult diapers. The embarrassment and mockery and—indeed—intrusion in one's life by having people think of oneself this way is substantial whether it is true or false.

This difference, however, can cut both ways. Normally the dissemination of truth is thought to have some inherent value. By contrast a pseudo-disclosure has none. Similarly, faulting someone for misrepresenting the facts is much less problematic than faulting them for representing facts correctly. Finally, even if one assumes that there is some wisdom in the idea that people must come to a place where they can adjust to what the facts about themselves really are (which could provide a reason to set limits on public disclosure claims), individuals should certainly not have to interact with others in environments that are riddled with misinformation about them.[102]

All of this returns us to our principal point, which is that there is a profound similarity between the injuries inflicted by the two kinds of public statements about individuals that ordinary people would find highly offensive—those which are true and those which are not—and that for a wide range of cases, it is the effect on how other people come to see the person (and how public that image of them becomes) that constitutes the injury. Falsity should enhance the case for liability, not save the defendant from it, and that is a strong reason to retain the false light tort.[103]

Commentators and courts have understandably thought of false light as a device that clever plaintiffs' lawyers can use to evade substantive or procedural rules applicable to other torts, but it may be the case that the whole structure of privacy torts is itself inappropriately tilted against plaintiffs.[104] On the conventional legal analysis of a false light claim, plaintiffs lose if they cannot prove that the statement made by the defendant was *false*. However, if—as we contend—false light claims should exist only with regard to matters are that are genuinely *private*, offensive when publicly disseminated, and not newsworthy, then a plaintiff should have a tort claim *even if the statement is* true (because the plaintiff will then have a valid public disclosure claim). The conclusion to draw from this observation is that the actionability of the plaintiff's

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102. For the reason just mentioned, some false light cases appear meritorious even where a "public disclosure" parallel would not seem so. *See* Schwartz, *supra* note 62, at 895–96. While we do not necessarily mean to criticize the availability of such false light causes of action in jurisdictions that today have a robust false light tort, our own proposed model of false light—crafted with a sense of the understandable anxiety the potential breadth of the tort has created—rejects actionability in such cases.

103. Here it is worth emphasizing the familiar point that, insofar as publishers of false statements are entitled to protection from defamation liability, it is largely for instrumental reasons—i.e., to ensure that there is adequate "breathing room" for true speech. *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727, 732 (1968); Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

104. Writing in 1991, Gary Schwartz maintained that it was false to suppose that courts were allowing plaintiffs to "game" the overlap of false light and defamation law, and that, in any event, a properly tailored false light tort would minimize the risk of such gaming. Schwartz, *supra* note 62, at 890–93.

claim, cast either in terms of false light or public disclosure, should *not* turn on proof of falsity. Conversely, plaintiffs who have in certain ways had their privacy intruded upon by the dissemination of fabricated stories or images should not be required to depict these statements or representations as true to recover at all, which they seem to be required to do in jurisdictions that have eliminated false light. And even in those which have not eliminated false light, plaintiffs face the dilemma of admitting the disclosure is true (by bringing a public disclosure claim), running the gauntlet of actual malice (if it is false light), and trying to explain how they can have it both ways.

For a whole range of non-newsworthy statements that are publicly disseminated and would be found highly offensive by a reasonable person, there should be no requirement to sort the true from the false because they should be actionable either way. Relatedly, for a range of non-newsworthy statements that would be found highly offensive by a reasonable person and would be nonactionable as opinion in a defamation context *because they are not provably true* or *provably false*, there is a strong argument defendants should not be shielded from liability. The point may be taken even one step further: it is not clear why—within a domain of widely disseminated representations that are not newsworthy and would be found offensive by a reasonable person—a visible disclaimer of nonseriousness or nonauthenticity should shield the defendant. To repair again to Nimmer's example, pornographic images, strewn across the internet, of a woman's face attached to someone else's naked body should not become nonactionable just by virtue of a visible disclaimer (of nonauthenticity) on the image itself.

The arguments sketched above also have implications for the role of actual malice in false light claims. In keeping with *Time v. Hill*, the actual malice requirement for claims on behalf of public figures presumably should be no weaker than it is for public-figure defamation claims. Otherwise, the end-arounds will be constant (and it is in the spirit of actual malice requirement for public figures in defamation claims that something like the concept of "newsworthiness" has been cast extremely broadly, for better or worse). But today's false light common law in many jurisdictions, like Section 652E of the Restatement (Second) of Torts, includes an actual malice requirement even in private figure cases. As mentioned, this is due largely to the fact that the Supreme Court could not bring itself in *Cantrell* to decide whether to apply *Gertz*'s public figure/private figure distinction to false light claims. But it is also due to anxiety about the false light tort itself. As demonstrated above, these anxieties are unwarranted. Not only that, but for non-newsworthy cases with public dissemination of sensitive

information and serious offensiveness, an honest belief in the truth of the statement does not render the defendant's conduct non-wrongful, *because truth itself does not do so*. *Indeed, if the information is true, the plaintiff's claim converts to a meritorious public disclosure claim*. Thus, in private figure false light cases, the plaintiff should not face the burden of having to prove actual malice and indeed states should be entitled to allow liability even if the defendant was not negligent with respect to the risk of falsity.

The foregoing discussion is not meant to imply that false light cases should be easy to win. Rather, it is meant to isolate where the pressure on plaintiffs ought to be if courts wish to retain only a narrow version of this tort. If courts can justify an aggressive "public dissemination" element, a narrow notion of private fact, a demanding conception of what would be highly offensive to a reasonable person, or a broad notion of public figure status or newsworthiness, they can produce good reasons for keeping false light narrow. Where all of these hurdles have been crossed, however, there is no reasoned basis—putting aside the obviously substantial role of precedent and stare decisis—for falsity or actual malice to play major roles.

The prior paragraph supposes that there are courts that wish to preserve or adopt a version of false light. Some readers might accuse us of being naïve in maintaining this supposition. After all, several jurisdictions have eliminated the tort, and some have never had it. Moreover, many judges—especially federal judges more attuned to First Amendment law than the common law of tort—might be tempted to go further and question whether the public disclosure tort is itself on shaky ground, given what some would say are generally diminishing expectations of privacy, as well as the Supreme Court's expansive take on free speech rights in *Florida Star* and subsequent decisions.[105] For them, our claim that false light has no less of a claim to recognition than public disclosure might seem to be an instance of damning with faint praise, and our claim to have made a case for revitalizing false light untethered from reality.

No doubt, there are many who continue to push against the availability of redress for invasion of privacy. But if there is any naivete in this debate, it lies on the side of privacy detractors. Even before the perils of the digital era were adequately appreciated, scholarly efforts to convince courts that the public disclosure tort is "dead" seem to have made

105. Fla. Star v. B.J.F., 491 U.S. 524, 542 (1989); Jared A. Wilkerson, *Battle for the Disclosure Tort*, 49 Cal. W. L. Rev. 231, 263–66 (2013) (citing scholarship arguing that free speech rights require courts to reject the public disclosure tort outright, or to severely narrow it).

little headway.[106] And the current political and legal situation is not the one that existed in 1964, 1984, or even 2004. In our age of surveillance, blind faith that free speech must trump privacy is hardly the obvious place to plant one's flag.[107] Surely it is valuable to expose, for the consideration of courts across the country, the availability of a clear-headed and limited path for protecting aspects of individuals' privacy.

B. Defamation Law's Dilemma: False Attributions of Disease, Victimization, and Sexual Orientation

Another advantage of our framework for understanding false light is that it can help to solve a serious problem in defamation law. Courts around the country—and the current Reporters for the Restatement (Third) of Torts: Defamation and Privacy—are rightly troubled by a range of cases that seem meritorious, doctrinally, but today seem intolerable.[108] Some of these are cases in which a person is falsely said to have a serious disease or disability—terminal cancer, AIDS, or autism—and brings a defamation suit on that basis. Historically, "loathsome disease" was per se actionable in slander.[109] The problem is that characterizing such statements as defamatory carries the implication that a person should be deemed inferior or less deserving of respect or esteem because they have such a disease. Even if it is unfortunately true that many will in fact have that reaction—indeed, even if a plaintiff is able to prove concrete harm suffered because of falsehoods about her or his diseased or disabled state—courts understandably do not wish to endorse such reactions.

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106. Wilkerson, *supra* note 105, at 266 ("Despite often-furious attempts, neither constitutional nor tort scholars have induced practical change to the disclosure tort for decades. In fact, the tort in most states looks as it did in the early 1970s, although the Supreme Court has clarified the trends. Further, courts have increasingly adopted the tort over time, even though scholars were trying to change or abolish it.").

Note that those who maintain that there is a deep conflict between free speech rights and liability for public disclosure of private matters need not, and often do not, deny that such disclosures can be seriously damaging to victims. Instead, their injuries are understood to be an unfortunate price that must be paid to ensure the circulation of newsworthy information. As this justification is not available for the dissemination of falsehoods, there is an even stronger case for a tort based on the dissemination of putative but false private facts than for one based on the dissemination of true private facts.

107. *See generally* Danielle Keats Citron, The Fight for Privacy: Protecting Dignity, Identity, and Love in the Digital Age (2022).

108. *See, e.g.*, Kenneth Simons, *Defamatory in Whose Eyes*, 3 J. Free Speech L. (forthcoming 2024); Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 Wash. L. Rev. 1, 9 (1996).

109. Sack, *supra* note 21, § 2:8.2 (noting that, historically, plaintiffs who sued for slander based on the attribution to them of a "loathsome disease" could prevail without proof of special damages).

Were courts to treat false light on the terms we have suggested, these cases could be handled more appropriately through privacy law. For all or many of them involving broad dissemination, a public disclosure tort would be plausible if the statements in question are true, because all of them concern matters that are plausibly "private facts." This means that we recognize individuals as having an interest in the public *not perceiving them through the lens of having a certain disease or disability*. It is not a matter of whether having such a disease or disability reflects on a person's character; it is a question of how a person wants the public to perceive them, and how much they are entitled to control how others perceive them. The same interest is implicated if the statement is false. Moreover, if harmful consequences flow from this set of perceptions becoming public, they should typically be included as part of compensatory damages.[110]

False attributions of disease are just one example of the benefit our treatment of false light provides. A related line of cases comes out of the well-known *Youssoupoff* case, which troublingly declares that it is defamatory to say of a woman that she has been raped, and recognizes a defamation claim on that basis.[111] Today's courts are understandably reluctant to adopt this position, but that is not to say they should be unsympathetic to such plaintiffs. Perhaps the most widely discussed cases of the past few decades involve untrue statements about a person's sexual orientation. Courts quite understandably do not wish to announce that one defames another person by calling them gay, bisexual, queer, or the like. That does not mean that they must deny the possibility that a person can be caused serious harm by such a false statement. So long as we regard a person's sexual history and sexual orientation as private matters, false light would seem to present a sensible and sensitive way to thread the horns of this dilemma. If the cost of our advocating this solution is to qualify our assertion that false light should not be deemed a supplement to defamation, we are happy to accept that cost.

Conclusion

Late-twentieth-century attacks on the tort of false light invasion of privacy were grounded in at least four sources: confusion about what

110. Of course, the right to recover under false light would be in some ways narrower than under defamation. Public dissemination is a more demanding element than mere publication to a third party, non-newsworthiness is not built in, and presumed damages would not be available (although general damages would be available). Crucially, a court recognizing a false light action based on such statements would not in any way be crediting a negative appraisal of the attribute in question.

111. Youssoupoff v. MGM Pictures, Ltd., 50 T.L.R. 581 (C.A. 1934).

the tort is; the then-still-sacrosanct status of *New York Times v. Sullivan*; faith that, in an open society, truth prevails; and skepticism about whether false and offensive, but-not-exactly-defamatory statements and representations about others can really hurt them. If nothing else, we hope to have taken out the first of these grounds. As for the others, it is perhaps enough to observe, with Dorothy Gale from *The Wizard of Oz*, that we are not in Kansas anymore. Blind faith in the marketplace of ideas seems untenable in a world of ubiquitous and highly influential disinformation. Partly as a result, *Sullivan* has lost some of its luster. Above all, no one can seriously doubt the enormous harm that is being wreaked upon individuals every day through the broad dissemination of harmful messages in cyberspace. Today's world needs the tort of false light.