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# False Light: Invasion of Privacy

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# FALSE LIGHT: INVASION OF PRIVACY?

## I. INTRODUCTION

After nearly a century of litigation concerning the right to privacy, the state of the law may be compared to "a haystack in a hurricane . . . ."[1] Since its inception in 1890 in an article written by Samuel D. Warren and Louis D. Brandeis,[2] little progress has been made in defining and clarifying the elements of a privacy action and the interests it seeks to protect. Yet there is little doubt that the right to privacy has "become firmly established in our law."[3]

Although the Warren and Brandeis tort was primarily concerned with the media's unwarranted publication[4] of the details of one's private life,[5] Dean Prosser has stated that the law of privacy is not one tort, but a complex of four,[6] each protecting a different interest.[7] One of the torts recognized by Dean Prosser, false light, is the focus of this comment.[8] Neither the elements of the tort[9] nor the interests it seeks to

1. Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

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

3. Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526, 536 (1940).

4. *See* notes 111-130 *infra* and accompanying text.

5. *See* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 330 (1961).

6. *See generally* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). The four torts Dean Prosser has identified as constituting the law of privacy are:

(1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
(2) Public disclosure of embarrassing facts about the plaintiff.
(3) Publicity which places the plaintiff in a false light in the public eye.
(4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

*Id.* at 389.

7. In view of the fact that reputation is the interest purportedly protected by both the false light and the public disclosure cases, there are, in fact, only three interests protected by Prosser's four invasion of privacy torts. In addition, Prosser states that the interests protected by intrusion and appropriation are a mental and a proprietary interest, respectively. *Id.* at 392, 406.

8. This comment will not individually deal with the torts of intrusion, public disclosure and appropriation. It is not suggested that the intrusion, public disclosure and appropriation torts are unnecessary. First, Prosser asserts that the intrusion tort permits recovery in those instances in which intentional infliction of emotional harm, trespass, nuisance and interference with constitutional rights would not provide an adequate remedy. Second, public disclosure of private facts, while protecting a reputational interest, provides a remedy for statements not actionable under the law of defamation in that the actionable disclosure involves a true statement. Finally, appropriation protects an individual's name and likeness as an aspect of his identity. *See id.* at 392, 398, 406.

9. *See* notes 57-130 *infra* and accompanying text.

protect[10] have been adequately defined so as to allow consistent application. As a result, a great deal of confusion exists with respect to the false light tort. Furthermore, the failure to adequately define the elements and interests which this tort protects has permitted the law of privacy to be expanded beyond its logical limits.

This comment will briefly examine the concept of, and the theory behind, the general law of privacy. An examination of the interests sought to be protected and the elements of a false light cause of action will be undertaken. Following a discussion of the relationship between defamation and privacy, two alternatives are suggested. First, a restructuring of the false light tort is suggested in order that it be more closely aligned with the general law of privacy and its underlying concept. In the alternative, it is suggested that the cause of action be abandoned due to an inherent inconsistency between the elements of a false light cause of action and the concept of privacy.

## II. THE WARREN AND BRANDEIS TORT—THE CONCEPT OF PRIVACY

On the basis of their article entitled "The Right to Privacy", Samuel D. Warren and Louis D. Brandeis have been credited with "discovering"[11] the invasion of privacy tort. The Warren and Brandeis article resulted from a Boston newspaper's elaboration of the Warrens' social life. The newspaper apparently made a regular practice of publishing such activities in great detail.[12] Warren's concern with this publication of gossip and his subsequent consultation with Brandeis led to the birth of the law of privacy.

The Warren and Brandeis article stressed the privacy of the matter published and stated that publications which described the private life,

10. *See* notes 25-56 *infra* and accompanying text.

11. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 964 (1964). In Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), the New York Court of Appeals denied that there was a common law right to privacy. In response to this decision the New York Legislature enacted two right of privacy statutes. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976). These statutes, however, deal only with Prosser's appropriation tort and have been strictly limited thereto. *See, e.g.*, McGraw v. Watkins, 373 N.Y.S.2d 663, 49 A.D.2d 958 (1975) (strict construction of the privacy statutes); Long v. Decca Records, 76 N.Y.S.2d 133 (Sup. Ct. 1948) (privacy statutes enacted to prevent non-consensual commercial exploitation); Nizer, *supra* note 3, at 539.

One commentator has remarked that the New York statute "merely prohibits illicit profit-making by commercializing the identity of another," Nizer, *supra* note 3, at 539, adding that the statutory recognition of the right is less preferable than the common law method because of a lack of flexibility. *Id.*

12. A. MASON, BRANDEIS: A FREE MAN'S LIFE 70 (1946).

habits, and relations of an individual should be repressed.[13] The authors contended that the individual should be permitted to determine the extent to which her private affairs shall be communicated to the public.[14]

When Warren and Brandeis formulated their tort they referred to privacy as the right to be let alone. Included in this is protection for "thoughts, sentiments and emotions."[15]

> The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons whatsoever; [*sic*] their position or station from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented.[16]

The authors concluded that the interest of "inviolate personality"[17] afforded very broad protection[18] to the individual against undesired publicity. Warren and Brandeis stressed that the "general object in view is to protect the privacy of private life."[19] The concept of privacy necessarily involves a person's desire to be free from unwanted inspection of her personal affairs and her right to remain secluded and withdrawn from notice and observation by the general public.

Thus, it can be seen that the right to privacy inheres in anyone who has remained a private individual[20] and in a public figure or official who has not publicized her legitimately private affairs.[21] It is the individual's right to protect herself from public knowledge of, or inter-

13. Warren & Brandeis, *supra* note 2, at 216. Of course it should be noted that the authors would not repress the publication of these matters if they had a legitimate connection with a person's fitness for a public office or position she seeks, or with her ability to act in a public capacity. *Id.*

14. *Id.* at 198. The authors wrote: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" *Id.* at 195.

15. *Id.* at 205.

16. *Id.* at 214-15.

17. *Id.* at 205.

18. *Id.* at 211. It is, of course, necessary to afford the greatest possible protection to those persons who do not wish to become public personalities. This protection, however, must be kept within the bounds of privacy law. It should not be expanded to award redress in actions beyond the scope of privacy law and into other areas of the law of torts. *See* notes 77-80 *infra* and accompanying text.

19. Warren & Brandeis, *supra* note 2, at 215.

20. *Id.* at 213.

21. *Id.* at 216.

ference with, her private affairs with which the law of privacy should be concerned.

When one is dealing with the right to privacy, it is important to keep in mind the particular interest it seeks to protect. Although used by many courts as being descriptive of the interest protected by the law of privacy,[22] the "right to be let alone"[23] has allowed an expansion of the law of privacy to encompass interests not within the basic concept of privacy.[24] The right to be let alone is too broad for identifying the interest to be protected by the law of privacy. It can be applied to encompass the interests protected by the general law of torts: freedom from interference with personal comfort, safety, and health. While general tort law is equipped to deal with and protect all such interests, the scope of privacy law should be narrower to protect the more specific individual interest of not permitting others to pry into personal affairs with which they have no legitimate concern, and exposing them against an individual's will.

## III. FALSE LIGHT INVASION OF PRIVACY

### A. *The Interest Protected*

In order to determine the elements necessary to establish a prima facie case involving false light,[25] the interest which the tort protects must first be examined. Prosser's false light tort recognizes reputation as the interest to be protected.[26] Dean Prosser, in identifying the false light tort, has departed from the Warren and Brandeis analysis. Prosser's conclusions, that false light protects a reputational interest and has a false statement as its basis, are apparently based on two premises. First, many false light cases involve defamation claims as well.[27] Sec-

22. *See, e.g.*, Gill v Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); Housh v. Peth, 99 Ohio App. 485, 135 N.E.2d 440 (1955); Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973).

23. T. COOLEY, TORTS 29 (2d ed. 1888).

24. *See* notes 97-109 *infra* and accompanying text.

25. The successful maintenance of a false light cause of action requires that the plaintiff prove that the defendant made a false statement about her which would be offensive to a reasonable person. *See* RESTATEMENT (SECOND) OF TORTS § 652E (1976). *See also* notes 57-130 *infra* and accompanying text.

26. Prosser, *supra*, note 6, at 400. Prosser states that "[t]he interest protected is clearly that of reputation . . . ." *Id.*

27. *See, e.g.*, Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948); Patton v. Royal Indus., Inc., 263 Cal. App. 2d 760, 70 Cal. Rptr. 44 (1968); Foster Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909); Russell v. Marboro Box Co., 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct.

ond, very often an action for either can be successfully maintained on the same factual allegations.[28] Neither of these, however, is a sufficient basis upon which to conclude that the false light privacy tort protects a reputational interest.

As a result of the inconsistency between Prosser's identification of the interest to be protected and the concept and theory of privacy,[29] there has been confusion in the courts. In addressing this question the courts have identified a number of interests that are purportedly protected by false light. Among those recognized are the following: freedom from scorn and ridicule;[30] freedom from personal outrage;[31] freedom from the "unwarranted publication by the defendant of intimate details of the plaintiff's private life;"[32] the "individual's absolute dominion and control over his inviolate personality;"[33] freedom from injury to feelings;[34] freedom from mental anguish;[35] the individual's peace of mind;[36] freedom from shame, humiliation and harassment;[37] the right to seclusion;[38] the right to choose the time, place and manner in and at which she will submit herself to the public gaze;[39] freedom from contempt and disgrace;[40] and, of course, the right to be let alone.[41] Many of the interests identified by the courts are also protected by the law of defamation.[42]

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1959); Martin v. Johnson Publishing Co., 157 N.Y.S.2d 409 (Sup. Ct. 1956); Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959).

28. Prosser, *supra* note 6, at 400.

29. *See* notes 11-24 *supra* and accompanying text.

30. Martin v. Johnson Publishing Co., 157 N.Y.S.2d 409 (Sup. Ct. 1956).

31. Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959).

32. Kelly v. Johnson Publishing Co., 160 Cal. App. 2d 718, __, 325 P.2d 659, 660 (1958).

33. Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, __, 250 N.Y.S.2d 529, 532 (1964), *aff'd*, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1965), *aff'd*, 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543 (1966).

34. Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945).

35. *Id.*

36. Kelly v. Johnson Publishing Co., 160 Cal. App. 2d 718, 325 P.2d 659 (1958); Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

37. Berrier v. Beneficial Fin., Inc., 234 F. Supp. 204 (N.D. Ind. 1964).

38. Gruschus v. Curtis Publishing Co., 342 F.2d 775 (10th Cir. 1965).

39. Pavesich v. New England Life Ins. Co., 122 Ga. 198, 50 S.E. 68 (1905).

40. Trammel v. Citizens News Co., 285 Ky. 529, 148 S.W.2d 708 (1941).

41. *See, e.g.*, Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); Hull v. Curtis Publishing Co., 182 Pa. 86, 125 A.2d 644 (1956).

42. Defamation cases recognizing various protected interests include the following: Jones v. Sears Roebuck & Co., 459 F.2d 584 (6th Cir. 1972) (mental suffering); Hogan v. New York Times Co., 211 F. Supp. 99 (D. Conn. 1962) (shame and disgrace); Fuqua Television Co. v. Fleming, 134 Ga. App. 731, 215 S.E.2d 694 (1975) (hurt feelings); Martin v. Griffin Television, 549 P.2d 85

Professor Bloustein[43] has added yet another interpretation of the interest sought to be protected by the law of privacy. Professor Bloustein's focus is on the entire law of privacy, rather than a false light cause of action, because he disagrees with Prosser's separation of the law into four torts.[44] He has interpreted Warren and Brandeis' phrase "inviolate personality" as giving protection to the individual's independence and integrity.[45] He argues that the overall interest deserving of protection is that of human dignity,[46] thus making invasion of privacy a tort protecting essentially a mental interest.[47]

Bloustein has recognized that the false light cases do protect, to a limited degree, a reputational interest.[48] Yet he properly maintains that the right protected by privacy law is "not the same as the right to reputation."[49] Thus, Bloustein has correctly restricted the scope of privacy law to its conceptual and definitional basis.[50] The right to live a life free from unnecessary inspection of personal affairs is the right protected by the law of privacy. There is then, the individual's right to be free from the "debasement of his sense of himself as a person that results because his life has become a public spectacle against his will."[51] The corresponding compensation is for mental anguish and mortification. Thus, in light of the fact that an interference with an individual's privacy is a dignitary tort, the right to privacy concerns a person's peace of mind.[52] The injury is, therefore, essentially mental and subjective[53] and recovery should be allowed only on the basis of personal outrage[54] and mental anguish.[55]

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(Okla. 1976) (humiliation); Guisto v. Galveston Tribune, 105 Tex. 497, 150 S.W. 874 (1912) (contempt); Enterprise Co. v. Ellis, 98 S.W.2d 452 (Tex. Civ. App. 1936) (ridicule).

43. Bloustein, *supra* note 11. The author points out that the law of privacy protects a single interest and would not identify individual interests to be protected by four different torts. *Id.* at 1000.

44. *Id.*

45. *Id.* at 971.

46. *Id.* at 974.

47. Bloustein, *Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 618 (1968) [hereinafter cited as Bloustein, *Privacy*].

48. Bloustein, *supra* note 11, at 991.

49. *Id.* at 970.

50. *See* notes 11-24 *supra* and accompanying text.

51. Bloustein, *Privacy*, *supra* note 47, at 619. Warren and Brandeis wrote of protecting a person from mental pain and distress. Warren and Brandeis, *supra* note 2, at 196.

52. *See, e.g.*, Kelly v. Johnson Publishing Co., 160 Cal. App. 2d 718, 325 P.2d 659 (1958); Fairfield v. American Photocopy Equip., 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

53. *See, e.g.*, Kelly v. Johnson Publishing Co., 160 Cal. App. 2d 718, 325 P.2d 659 (1958); Billings v. Atkinson, 589 S.W.2d 858 (Tex. 1973).

54. Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959).

Thus, it appears that the conflict between the interests allegedly protected by the false light tort is a result of Dean Prosser's identification of a reputation interest in cases involving false light invasion of privacy. Protection of a reputation interest is inconsistent with the concept of privacy. Privacy law is designed to protect an individual's mental tranquility. The concept of privacy law should not permit an award of damages for injury to a person's reputation.[56]

## B. *The Elements of False Light—Invasion of Privacy*

Prosser maintains, and the courts have accepted, that the false light cause of action requires that three elements be proved. These elements are (1) publication (2) of a false statement concerning the plaintiff (3) that would be offensive to a reasonable person.[57] Gloss has been added to these elements through the requirements that the statement be materially false, that the statement sufficiently identify the plaintiff to the general public, and that the false statement would be highly offensive to a reasonable person.

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55. Reed v. Real Detective Publishing Co., 63 Ariz. 294, __, 162 P.2d 133, 139 (1945). It is interesting to note that the court felt compelled to justify the allowance of damages on the basis of mental suffering alone. The court stated: "It seems clear to us that the mind of an individual, his feelings and mental processes, are as much a part of his person as his observable physical members." *Id.* at __, 162 P.2d at 139. The court's reaction was probably in response to the general principle that "our law recognizes no principle upon which compensation can be granted for mere injury to the feelings." Warren & Brandeis, *supra* note 2, at 197.

56. The purpose of a defamation cause of action is to protect an individual's reputation. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 739 (4th ed. 1971).

The purposes of the laws of defamation and privacy are different. The judiciary should be careful to ensure that the interests protected by the two areas of the law are fully distinguished.

> Invasion of privacy and defamation are separate and distinct torts even though they share some of the same elements and often arise out of the same acts. The first is a cause of action based upon injury to plaintiff's emotions and his mental suffering; the second is a remedy for injury to plaintiff's reputation.

Froelich v. Adair, 516 P.2d 993, 996 (Kan. 1973). The courts must take care to ensure that the bases of the causes of action are sufficiently distinguished so as to permit damage awards in privacy cases strictly on the basis of redress for mental suffering that results from the defendant's interference with the individual's right to be free from unwanted disturbance of her personal affairs.

57. Prosser, *supra* note 6, at 398-401. *The Restatement (Second) of Torts* has basically followed the Prosser formulation and has stated the tort as follows:

> 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 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 with reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (1976).

1. Offensiveness

a. Heightened Offensiveness and Falsity

It is agreed that a false statement is necessary for the successful maintenance of a false light cause of action.[58] While this creates an apparent overlap between a false light cause of action and a defamation cause of action,[59] there remains a distinction. In false light, the degree of falsity required of the statement is heightened by the fact that the statement must be substantially or materially false.[60]

The "materiality" test may be a method of assuring that the statement would be offensive to a reasonable person. Requiring that the statement be "materially" false increases the probability that the statement was objectively offensive and that an injury has occurred. This gradation of falsity serves the purpose of aiding the jury in assessing damages because, as the degree of material falsity increases, there is a greater likelihood that the statement was made with malice.[61] Publications that include additions or embellishments that are not of a significant nature would not be highly offensive to a reasonable person.[62]

The *Restatement (Second) of Torts* has approached the standard of offensiveness differently. It states that liability for false light occurs

58. *See, e.g.*, Rinsley v. Brandt, 446 F. Supp. 850 (D. Kan. 1977); RESTATEMENT (SECOND) OF TORTS § 652E (1976); Prosser, *supra* note 6, at 407.

59. *See, e.g.*, Moore v. Greene, 431 F.2d 584 (9th Cir. 1970); Caldwell v. Crowell-Collier Publishing Co., 161 F.2d 333 (5th Cir.), *cert. denied*, 332 U.S. 766 (1947); Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974); Glenn v. Gibson, 75 Cal. App. 2d 649, 171 P.2d 118 (1946); Matthews v. Atlanta Newspapers, Inc., 116 Ga. App. 337, 157 S.E.2d 300 (1967); Bloomfield v. Retail Credit Co., 14 Ill. App. 3d 158, 302 N.E.2d 88 (1973).

60. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967); Cordell v. Detective Publications Inc., 307 F. Supp. 1212 (E.D. Tenn. 1968).

61. This malice is not to be confused with the definition of "actual malice" as laid down in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), the Court drew the distinction between the standards of actual and common law malice. Common law malice is "frequently expressed in terms of either personal ill-will towards the plaintiff or reckless or wanton disregard of the plaintiff's rights [and focuses] on the defendant's attitude toward the plaintiff's privacy, not on the truth or falsity of the matter published." *Id.* at 252. Punitive damages cannot be awarded unless it has been determined that a wrongful state of mind, common law malice, existed in the defendant. *See* Brown v. Capricorn Records, Inc., 136 Ga. 818, 222 S.E.2d 618 (1975).

62. *See* Cordell v. Detective Publications Inc., 307 F. Supp. 1212 (E.D. Tenn. 1968), where embellishments could not be offensive to a reasonable person because they were consistent with published newspaper accounts of the event. Dean Prosser also states that minor errors do not entitle the subject of the publication to recover. Prosser, *supra* note 6, at 400. Furthermore, even if the statement is made deliberately, it is not actionable under a false light theory unless it is material and substantial. Winegard v. Larson, 260 N.W.2d 816, 823 (Iowa 1978). *See also* RESTATEMENT (SECOND) OF TORTS § 652E, Comment c (1976), which states that the plaintiff's privacy is not invaded when unimportant false statements are made even if they are made deliberately.

only "when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity."[63] It is arguable that every personal false statement, regardless of how inconsequential, could be, to some degree, offensive to the subject of the statement. It is for this reason that the *Restatement (Second)* has added the requirement that the statement must be "highly offensive."[64]

Thus, it appears that the purpose of both the "materiality" test and the "highly offensive" test used by the *Restatement* is to ensure that the false statement would be highly offensive to a reasonable person, and not only the hypersensitive individual, so as to result in mental suffering.[65]

### b. Heightened Offensiveness and Trivial Claims

The heightened degree of offensiveness may be responsive to a fear that a floodgate could be opened to litigation in this area. One commentator has pointed out that trivial claims[66] may arise under the tort.[67] *Themo v. New England Newspaper Publishing Co.*[68] is an example of such a claim. In *Themo* the claim arose out of the taking of the plaintiff's picture while he was conversing with a police officer. The defendant subsequently published the photograph in its newspaper. The facts surrounding the incident were not stated in the publication.[69] It is clear that nothing personal or private to the plaintiff was publi-

63. RESTATEMENT (SECOND) OF TORTS § 652E, Comment c (1976). Compare the statement of liability in the first *Restatement*: "[L]iability exists only if the defendant's conduct was such that he should have realized that it would be offensive to a person of ordinary sensibilities." RESTATEMENT OF TORTS § 867, Comment d (1933). *See also* Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951).

64. RESTATEMENT (SECOND) OF TORTS § 652E (1976). The requirement of heightened offensiveness is in response to the general proposition that redress is not granted for mere injury to feelings. Warren & Brandeis, *supra* note 2, at 197.

65. *See* notes 25-56 *supra* and accompanying text.

66. Kalven, *supra* note 5, at 337. Professor Kalven offers three cases as being exemplary of trivial claims. Cohen v. Marx, 94 Cal. App. 2d 655, 211 P.2d 320 (1949), where a former boxer sued Groucho Marx for publicly saying, "I once managed a fighter named Canvasback Cohen. I brought him out here, he got knocked out, and I made him walk back to Cleveland." *Id.* at __, 211 P.2d at 321. Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944), where the defendant's book identified the plaintiff as a spinster having a propensity toward profanity. *Id.* at __, 20 So. 2d at 245. Sidis v. F.R. Publishing Co., 113 F.2d 806 (2d Cir. 1940), where a child prodigy, then leading his adult life in seclusion, was made the subject of a "Where Are They Now?" article. *Id.* at 808.

67. *But see* Bloustein, *Privacy*, *supra* note 47, at 614-15, where the author argues that the reasonableness standard is not the cause of trivial claims.

68. 306 Mass. 54, 27 N.E.2d 753 (1940).

69. No reason was given by the court as to why the photograph was published. *Id.* at __, 27 N.E.2d at 753.

cized.[70] The plaintiff was not placed in a false light because the photograph did not communicate anything other than what had actually occurred, namely the conversation.[71] The claim was trivial because the plaintiff sought to recover for the depiction of an incident that took place on a public street and which did not represent the plaintiff in a false manner.

Further illustration of the triviality of the claim can be seen through the court's treatment of the plaintiff's claim in relation to the general law of privacy. The court said that under these circumstances the plaintiff had no privacy interest.[72] Furthermore, the public nature of the incident prevented the plaintiff from proving that the defendant had neither the right to take the photograph nor the right to reproduce and publish it. It appears, therefore, that the plaintiff did not have a legally enforceable[73] right to privacy under the circumstances of the case.

The principle recognized in *Themo* is applicable to trivial claims brought under a false light theory of recovery. Plaintiffs who are not depicted falsely through some action on the defendant's part, should not be permitted to recover damages in a false light cause of action. A material element of the tort, falsity, is missing and recovery should be denied.

### c. Heightened Offensiveness and Laudatory Statements

Use of the heightened degree of offensiveness is not without difficulties. Problems arise when false, but laudatory, statements are made about the plaintiff. In *Spahn v. Julian Messner, Inc.*,[74] statements about the plaintiff, Spahn, were false but complimentary. While Spahn's cause of action was brought under the narrowly construed New York privacy statutes,[75] in their absence Spahn's claim would turn into a

70. *See* notes 110-130 *infra* and accompanying text.

71. In addition to not being a false light case, *Themo* falls into none of the other privacy torts. There was no public disclosure in that no "private" facts were involved. Similarly, no intrusion was involved. There was no appropriation because the photograph was not published for the defendant's pecuniary advantage. The photograph merely published what anyone present at the time was free to see.

72. 306 Mass. at __, 27 N.E.2d at 755. The court stated that if individuals could prohibit such a publication, "no newspaper could lawfully publish a photograph of a parade or street scene." *Id.* at __, 27 N.E.2d at 755.

73. The court noted that the case did not, under its facts, present occasion to decide "whether any right of privacy [was] recognized by the law of [Massachusetts]." *Id.*

74. 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd*, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1965), *aff'd*, 18 N.Y.2d 324, 274 N.Y.S.2d 844, 221 N.E.2d 543 (1966).

75. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976). *See also* note 11 *supra.*

false light cause of action. Under the analyses of both Dean Prosser and the *Restatement*, it seems that Spahn, under a false light theory, would have been permitted to recover for any damage to his reputation. Recovery would have been allowed even though the statement may not have been defamatory.[76] Yet this is precisely the type of case[77] in which recovery should not be permitted under a false light theory. It must be questioned whether complimentary and laudatory statements inflict the degree of mental anguish that should be required[78] in order to allow recovery. Assuming that every false statement about a person is likely to arouse some feeling of animosity in the person who is the subject of the statement, it is unlikely that these complimentary falsehoods would justify a reasonable person in feeling "seriously offended and aggrieved by the publicity."[79]

The offensiveness standard is an objective one and although plaintiffs such as Mr. Spahn may, in fact, have been seriously offended by the false, but complimentary publicity, the object of the law is to protect the average person of ordinary sensibilities[80] in the community, not the hypersensitive individual.[81] Offensiveness is generally a factual determination and not a question of law.[82] In cases of complimentary falsehoods, however, treatment of the offensiveness standard as a matter of law would seem to be more appropriate. Such a ruling would require that the court determine the statement's degree of offensiveness.[83] In making this determination, the court should keep in mind that the statement was not derogatory of the plaintiff. Such a ruling would bar recovery when laudatory falsehoods are involved in that the statement would not meet, as a matter of law, the requirement of heightened offensiveness under either *Time, Inc. v. Hill*[84] or the *Restatement* formulation.[85]

This is essentially what the court did in *Cordell v. Detective Publi-*

76. Prosser, *supra* note 6, at 400.

77. *See also* Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944), where the plaintiff was favorably portrayed as a fine and attractive personality except for a trait of profanity. *Id.* at __, 20 So. 2d at 247. It should be noted that the Florida Supreme Court decided this case sixteen years before the publication of Dean Prosser's article analyzing the law of privacy.

78. *See* notes 58-65 *supra* and accompanying text.

79. RESTATEMENT (SECOND) OF TORTS § 652E, Comment c (1976).

80. *See* Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951).

81. *See* Reed v. Ponton, 15 Mich. App. 423, __, 166 N.W.2d 629, 630 (1968).

82. Gill v. Curtis Publishing Co., 38 Cal. 2d 73, __, 239 P.2d 630, 635 (1952).

83. *See* notes 58-65 *supra* and accompanying text.

84. 385 U.S. 374, 386 (1967).

85. RESTATEMENT (SECOND) OF TORTS § 652E (1976).

*cations, Inc.*.[86] *Cordell* involved the publication of an article concerning the plaintiff's murdered daughter and the events leading up to the capture of the suspects.[87] The court examined the publication and found that it contained additions and embellishments.[88] The court determined, however, that nothing in the article "could reasonably be interpreted as casting the plaintiff, Mrs. Cordell, in public disrepute, nor could they reasonably be offensive or objectionable to a person of ordinary sensibilities . . . ."[89] It appears, therefore, that false statements which are laudatory should, as a matter of law, be determined not highly offensive to a reasonable person of ordinary sensibilities. Such statements, as a result, should not be actionable under a false light theory of recovery.

2. The Requirement of a False Statement

Although the false light tort has evolved to require the publication of a false statement, Warren and Brandeis based their tort on "injury to the right of privacy"[90] and not on the falsehood of the matters published. Courts have followed the basic goal of protecting privacy by stating that "the gravamen of the tort is ordinarily the unwarranted publication by defendant of intimate details of plaintiff's private life."[91] Hence, "recovery for invasion of a right of privacy is only available when the plaintiff's *private* affairs have been given unauthorized exposure."[92]

In *Patton v. Royal Industries, Inc.*[93] the court held that even

86. 307 F. Supp. 1212 (E.D. Tenn. 1968).

87. For a discussion of the "newsworthiness" standard relating to the constitutional privilege in privacy cases see Comment, *Privacy: The Search For a Standard*, 11 WAKE FOREST L. REV. 659 (1975).

88. *See* note 62 *supra* and accompanying text.

89. 307 F. Supp. at 1219. Note that the court held the statement to be neither offensive nor damaging to reputation. *Id.*

90. Warren & Brandeis, *supra* note 2, at 218.

91. Kelly v. Johnson Publishing Co., 160 Cal. App. 2d 718, __, 325 P.2d 659, 661 (1958). *See also* Mahaffey v. Official Detective Stories, Inc., 210 F. Supp. 251 (W.D. La. 1962); Patton v. Royal Indus., Inc., 263 Cal. App. 2d 718, 70 Cal. Rptr. 44 (1968); Pavesich v. New England Life, 122 Ga. 198, 50 S.E. 68 (1905); Reed v. Ponton, 15 Mich. App.. 423, 166 N.W.2d 629 (1968); Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd*, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1965), *aff'd*, 18 N.Y.2d 324, 274 N.Y.S.2d 844, 221 N.E.2d 543 (1966).

92. Mahaffey v. Official Detective Stories, Inc., 210 F. Supp. 251, 253 (W.D. La. 1962) (emphasis in original).

93. 263 Cal. App. 2d 760, 70 Cal. Rptr. 44 (1968). The case involved the defendant employer's letter to its customers that the plaintiffs were no longer in the defendant's employ intimating that the plaintiffs were incompetent. In fact, the plaintiffs voluntarily left the defendant's employ for the purpose of starting their own business. *Id.* at __, 70 Cal. Rptr. at 46.

though the plaintiffs were placed in a false light their privacy had not been invaded. The court stated that "[t]here is and could be no authority for the broad contention that publicity which places one in a false light is an invasion of his privacy, even though it discloses no fact whatever relative to his private life which he wishes to keep secret."[94] While the *Patton* case may be inconsistent with the false light cause of action as it stands, it is not inconsistent with the concept of privacy law.[95] The court correctly held that an invasion of privacy claim cannot be successful in the absence of some public interference with the plaintiff's private affairs. Despite what would seem to be a fairly logical proposition, it is apparently unclear that a publicized falsehood cannot be a private matter.[96]

In *Rinsley v. Brandt*[97] the court took issue with the *Patton* court's view on what the requirements were for a successful false light invasion of privacy claim. The *Rinsley* court stated that a "false light privacy claim does not require the invasion of something secret to the plaintiff. . . . The key to a false light privacy claim is the falsehood, not any element of secrecy."[98] The *Restatement* also takes the position that a false light cause of action "does not depend upon making public any facts concerning the private life of the individual."[99] These statements remove from a false light claim any element of privacy or secrecy.[100] The removal of the privacy element from the false light claim results in the cause of action resting entirely on the falsity of the publication. Such an analysis is inconsistent with both the concept of privacy[101] and the cases requiring that there be publicity or exposure of something personal or private to the plaintiff.[102]

There is a logical inconsistency between requiring on the one hand that a matter be private and, on the other, that it be false. An escape from this inconsistency should not be available by simply eliminating the "privacy" element from false light claims as has been done by both the *Rinsley* court and the drafters of the *Restatement*. Prosser states

94. *Id.* at __, 70 Cal. Rptr. at 48. The case was remanded for a determination of the plaintiff's libel cause of action.

95. *See* notes 11-24 *supra* and accompanying text.

96. *See* notes 107-108 *infra* and accompanying text.

97. 446 F. Supp. 850 (D. Kan. 1977).

98. *Id.* at 854.

99. RESTATEMENT (SECOND) OF TORTS § 652E, Comment a (1976).

100. Prosser's torts of intrusion and public disclosure require that the matter intruded into or disclosed must be private and be entitled to be private. Prosser, *supra* note 6, at 391, 394.

101. *See* notes 11-24 *supra* and accompanying text.

102. *See* notes 90-96 *supra* and accompanying text.

that his public disclosure tort requires that the publicized matter be private.[103] This requirement should be present in all privacy cases. What the law should primarily seek to protect is an individual's right to be free from unwarranted interference with her personal affairs.[104] Furthermore, it should be required that the plaintiff intend to keep her private affairs insulated from public scrutiny.[105]

The *Restatement* formulation and the *Rinsley* case point to the illogic of making a privacy claim contingent upon the falsity of the statement. This illogic arises from the fact that the person referred to in the statement cannot intend[106] to keep private a matter which, in her own mind, does not exist. If the statement is false, then the person about whom it is made would have no reason to be aware of its subject matter. It must be questioned, therefore, how that individual can desire to keep the subject matter of the publication a private matter.[107] Inasmuch as a false light cause of action does not involve a matter which the plaintiff prefers to keep secret, the individual's interests in remaining withdrawn from the public gaze and in preserving her mental tranquility are not protected. When the law of privacy protects interests other than these, as is done in the case of the false light tort, it has moved outside its logical limits. It can be seen, therefore, that the false light cause of action fails to give proper protection to an individual's privacy interests.

If the false light tort protects a reputational interest, then the interests protected by the laws of defamation and false light privacy would be identical. The law of privacy should not be used as a substitute remedy when known and established remedies are available.[108] This is not to say that tort law should not expand to meet the changing needs of society.[109] What it is to say, however, is that an individual's interest in her good reputation is adequately protected by the law of defamation.

If, in fact, the interests protected by the two areas of the law are

103. Prosser, *supra* note 6, at 393. Although the false light and public disclosure torts purportedly protect the same interest, the subject matter of a public disclosure cause of action is required to be a private matter. *See id.* at 394.

104. *See* notes 11-24 *supra* and accompanying text.

105. Warren & Brandeis, *supra* note 2, at 214-15. Thus, individuals who voluntarily disclose their private affairs or impliedly consent to public scrutiny thereof would not intend to keep their affairs restricted from public inspection.

106. *Id.* at 215. The authors were concerned with publications against the will of the plaintiff.

107. *Id.* at 214.

108. Gregory v. Bryant-Hunt Co., 295 Ky. 345, __, 174 S.W.2d 510, 512 (1943).

109. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 3-4 (4th ed. 1971).

identical, the false light remedy merely duplicates that available in a successful defamation action. The interest that should be protected by the law of false light privacy is the plaintiff's mental tranquility and not her good reputation. The courts should take care to fully separate defamation and false light causes of action so as not to award redress in a false light cause of action for damage to an individual's reputation.

3. Publication of a Statement About the Plaintiff

The successful maintenance of a false light cause of action requires the plaintiff to prove that the defendant publicized a false statement. It is generally required that there be sufficient identification of the plaintiff to the general public in order to impose liability.

The right to be free from being placed in a false light is a personal one[110] and is peculiar to the individual about whom the statement is made.[111] No recovery, therefore, is available to anyone other than the person who is placed in the false light.[112] It is not required, however, that the plaintiff be directly identified by the statement. The public[113] need only be familiar with the name, likeness, or other characteristic which would identify the plaintiff.[114]

*Meeropol v. Nizer*[115] is illustrative of the publication requirement in a false light privacy claim. In *Meeropol*, the plaintiffs were the children of Ethel and Julius Rosenberg[116] and the publication in question referred to them by that name. The name "Meeropol," by which the plaintiffs had been known for more than twenty years, was not used in the publication. The court held that recovery was unavailable because insufficient identification of the plaintiffs did not apprise the public that the Meeropols were the subjects of the publication. *Meeropol* makes

110. Prosser, *supra* note 6, at 408.

111. *See, e.g.*, Gruschus v. Curtis Publishing Co., 342 F.2d 775 (10th Cir. 1965) (the right to privacy does not survive the death of a person); Kelly v. Johnson Publishing Co., 160 Cal. App. 2d 718, 325 P.2d 659 (1958) (cause of action does not survive the death of a person).

112. Requiring that recovery be limited to the subject of the statement may be viewed as a method of preventing recovery on trivial claims. *See* notes 66-73 *supra* and accompanying text.

113. *See* notes 117-121 *infra* and accompanying text.

114. *See* Brauer v. Globe Newspaper Co., 351 Mass. 53, 217 N.E.2d 736 (1966). It is generally required that there be a sufficient reference to the plaintiff. This terminology should be understood to mean identification which is as much as is necessary for the public to recognize the plaintiff as the subject of the publication. Brittain v. Industrial Comm'n, 95 Ohio St. 391, __, 115 N.E. 110, 111 (1917).

115. 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd in part rev'd in part*, 560 F.2d 1061 (2d Cir. 1977).

116. The Rosenbergs were executed for conspiring to transmit to the Soviet Union information relating to national security. *See* L. NIZER, THE IMPLOSION CONSPIRACY (1973).

clear that unless there is a sufficient reference[117] to the plaintiff by which she can be identified, there is no invasion of privacy.[118]

In addition to the requirement that the plaintiff be sufficiently identified, there must also be general identification to the public as a whole. It is generally held that publication to a small group of people[119] or close friends is not sufficient.[120] The publication must identify its subject to the public in general before there can be recovery for false light invasion of privacy.[121]

Application of this broad publication requirement does not adequately protect the plaintiff's mental interest,[122] the very interest to be protected by a false light privacy claim. As stated earlier, the law should focus upon emotional suffering rather than upon the plaintiff's appearance in the eyes of the community.[123] In order to fully protect the interests protected by the law of privacy and to be consistent with the theory and concept of privacy,[124] compensation should be granted to the plaintiff whose "privacy" has been disturbed and for the mental anguish occasioned by that disturbance. An individual may suffer an equal degree of mental anguish if only one person learns of the falsehood or if the entire community learns of it. This being the case, retention of the false light cause of action[125] dictates that the broad publication requirement be changed so as to better protect the plaintiff.

Such a change in the publication requirement was accomplished in *Beaumont v. Brown*.[126] In *Beaumont*, the Supreme Court of Michigan set forth a more equitable publication standard that better serves to protect a plaintiff's mental interest. The *Beaumont* court found communication to the general public to be an ambiguous term. To more

117. *See* note 114 *supra*. The Second Circuit affirmed the trial court's holding that the book could not have invaded the Meeropols' privacy. The court stated that "the book could not have . . . invaded their privacy since the book never referred to them by the Meeropol name or in any way linked the Rosenbergs to the Meeropols." *Id.* at 1068. The court reversed the case with respect to the fair use defense. The court held that it was "error to uphold the fair use defense as a matter of law as to all defendants." *Id.* at 1071.

118. *See* Bayer v. Ralston Purina Co., 484 S.W.2d 473 (Mo. 1972).

119. Vogel v. W.T. Grant Co., 458 Pa. 124, 327 A.2d 133 (1974).

120. Brauer v. Globe Newspaper Co., 351 Mass. 53, __, 217 N.E.2d 736, 740 (1966).

121. *See, e.g.*, Peacock v. Retail Credit Co., 302 F. Supp. 418 (N.D. Ga. 1969); Brauer v. Globe Newspaper Co., 351 Mass. 53, 217 N.E.2d 736 (1966); Beaumont v. Brown, 65 Mich. App. 455, 237 N.W. 2d 501 (1975), *rev'd on other grounds*, 401 Mich. 80, 257 N.W.2d 522 (1977); Reed v. Ponton, 15 Mich. App. 423, 166 N.W.2d 629 (1968).

122. *See* notes 126-130 *infra* and accompanying text.

123. *See* notes 25-56 *supra* and accompanying text.

124. *See* notes 11-24 *supra* and accompanying text.

125. *See* notes 174-183 *infra* and accompanying text.

126. 401 Mich. 80, 257 N.W.2d 522 (1977).

clearly define that term, it developed a "particular public"[127] standard which takes into account the status of the individual whose privacy has been disturbed. The court stated:

> [C]ommunication of embarrassing facts about an individual to a public not concerned with that individual and with whom the individual is not concerned obviously is not a "serious interference" with the plaintiff's right to privacy, although it might be unnecessary or unreasonable. An invasion of a plaintiff's right to privacy is important if it exposes private facts to a public whose knowledge of these facts would be embarrassing to the plaintiff.[128]

Although the publication standard would be set on a case by case basis,[129] there would be sufficient guidance to trial courts and attorneys as to the extent of publication necessary to hold the defendant liable.

Affording sufficient protection to the plaintiff's mental tranquility may be dependent upon application of the publication requirement. It may be that in certain cases the "particular public" might be comprised of only one person. Put another way, the "particular public" might be viewed as that group of people who, if falsely informed about some aspect of the plaintiff's private life, would, by their knowledge, justifiably cause the plaintiff to feel seriously aggrieved and offended.

Thus, it appears that the "particular public" standard is, in light of the interests to be protected, more appropriate than the presently accepted standard of widespread publication to the general public. Under the "particular public" standard the plaintiff's burden of proof is less exacting. She would be required to prove what persons comprised the relevant "particular public" and that the publication, in fact, reached those persons. This permits a plaintiff who has not received general notoriety from a publication to recover for her mental suffering which resulted from a false message being conveyed to and believed by a group of acquaintances, associates, or friends. The "particular public" standard provides relief for the greatest number of deserving plaintiffs. In addition, the "particular public" standard is flexible enough to award greater damages in the event of widespread publication of an outrageous falsehood. In such an instance a reasonable person is likely to experience greater mental suffering as a result of such a publication.

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127. *Id.* at __, 257 N.W.2d at 531.

128. *Id.* at __, 257 N.W.2d at 531.

129. Beaumont v. Brown, 65 Mich. App. 455, 237 N.W.2d 501 (1975), *rev'd on other grounds*, 401 Mich. 80, 257 N.W.2d 522 (1977).

As well as adequately protecting an individual's mental interest, the "particular public" standard maintains a proper distinction between the publication which should be required in a privacy action and that which is required in a defamation action. The broad, presently existing, publication requirement is not necessary for the protection of the plaintiff's mental interest. The "particular public" standard is sufficiently stringent so as to allow recovery only in those cases in which a reasonable plaintiff would be justified in feeling highly offended or aggrieved by the publicity.[130]

## IV. THE ALTERNATIVES

The failure to adequately define the elements of false light privacy and the interests it seeks to protect, has left the law in a state of confusion. This confusion requires that the law of false light privacy either be restructured so as to protect a plaintiff's mental interest[131] or be abandoned because of an inherent inconsistency between the concept of privacy and the requirement of a false statement.[132]

Before these alternatives can be examined, however, it is necessary to examine some general similarities and differences between the laws of defamation and false light privacy.

### A. *General Similiarities and Differences Between the Laws of Defamation and False Light Privacy*

The requiring of a false statement,[133] the granting of recovery for damage to reputation,[134] and the absence of requiring that the published matter be secret,[135] indicate that there is an overlap between the laws of privacy and defamation.[136] The confusion caused by this overlap can be traced to the origins of the invasion of privacy tort in that

130. RESTATEMENT (SECOND) OF TORTS § 652E (1976).
131. *See* notes 174-183 *infra* and accompanying text.
132. *See* note 184 *infra* and accompanying text.
133. *Id.*; RESTATEMENT (SECOND) OF TORTS § 652E (1976).
134. Prosser, *supra* note 6, at 400.
135. Rinsley v. Brandt, 446 F. Supp. 850 (D. Kan. 1977); RESTATEMENT (SECOND) OF TORTS § 652E, Comment a (1976); Prosser, *supra* note 6, at 400.
136. Prosser, *supra* note 6, at 408; Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962). In Brink v. Griffith, 65 Wash. 253, 396 P.2d 793 (1964), the court stated:

> A problem arises, however, from the fact that for either defamation or invasion of privacy the damages recoverable are not limited to the theoretical bases of the respective torts. In defamation actions the injured party is allowed to recover for emotional distress as well as injury to reputation and vice versa in some actions for invasion of privacy.

*Id.* at __, 396 P.2d at 796-97 (citations omitted).

Warren and Brandeis analogized their tort to the law of defamation and applied its standards to the law of privacy.[137] There is little doubt that because of the strong similarity between false light and defamation cases the courts have consistently treated the two claims in essentially the same manner.[138] This similarity became greater when, in *Rinsley v. Brandt*,[139] the court held that the key to a false light cause of action is the falsity of the statement and not any element of secrecy.[140] This overlap has been taken to its extreme by Dean Wade who has written that "the action for invasion of the right of privacy may come to supplant the action for defamation."[141]

The greatest similarities between defamation and false light are, therefore, the requirements that a false statement be made and that the interest purportedly protected by each is reputation.

There has not, however, been a complete extension of defamation principles into the law of false light privacy.[142] Although defamation

137. Warren & Brandeis, *supra* note 2, at 214-15.

138. Rinsley v. Brandt, 446 F. Supp. 850 (D. Kan. 1977).

139. *Id.*

140. *Id.* at 854. *See also* notes 97-108 *supra* and accompanying text.

141. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1121 (1962). Dean Prosser had earlier noted the possibility that false light might be "capable of swallowing up and engulfing the whole law of public defamation." Prosser, *supra* note 6, at 401. Yet Prosser was more reluctant to accept this chain of events than was Wade. Prosser expressed concern over the scope of the false light cause of action and asked if 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 of] so little consequence that they may be circumvented in so casual and cavalier a fashion?" *Id.*

142. The requirement of a false statement indicates one area in which the overlap between defamation and false light privacy has not been total. This area relates to the operation of truth as a defense. Warren and Brandeis maintained that the truth of the matter should afford no defense to an action for invasion of privacy. Warren & Brandeis, *supra* note 2, at 218. Dean Prosser has since recognized, however, that truth has limited importance as a defense when a false light claim is asserted. Prosser, *supra* note 6, at 419. Yet despite this recognition by the founder of the false light tort, courts have consistently held that while truth is a defense to an action for libel or slander, it is no defense to an action for invasion of privacy. *See, e.g.*, McKinzie v. Huckaby, 112 F. Supp. 642 (W.D. Okla. 1953); Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944); Themo v. New England Newspaper Co., 306 Mass. 54, 27 N.E.2d 736 (1940); Belle v. Courier-Journal & Louisville Times Co., 402 S.W.2d 84 (Tex. 1966).

Judicial rejection of the truth defense to a false light cause of action is, in relation to the elements of the tort, illogical. In that the action is based on the falsity of the statement then truth, as a matter of simple logic, must afford a complete defense. If the defendant is able to prove that the statement is, in fact, true, then that proof negates the essential element upon which the cause of action is based. Truth, therefore, necessarily defeats the plaintiff's claim. In Brown v. Capricorn Records, Inc., 136 Ga. 818, 222 S.E.2d 618 (1975), the court reached essentially this result although it did not directly address itself to the effect of the truth defense. In *Brown*, the plaintiff alleged that, as a result of his picture being used on a record album cover, he had been placed in a false light. The court, however, refused to grant relief because the plaintiff was a street singer and often sang in front of the liquor store at which he was depicted. The use of the picture described the plaintiff as neither something he was not nor in a manner in which he did not often appear.

cases may prove helpful in determining liability in privacy cases,[143] defamation standards should not be absolutely controlling in privacy cases. One apparent difference, discussed previously,[144] is the extent of publication required for liability under the two torts. In false light the publication requirements are more exacting in that the plaintiff must show that the false statement was broadcast to the public in general.[145]

A second similarity between the laws of false light privacy and defamation arises from the fact that the right to privacy deserves full protection as a right of natural law and derivative of the United States Constitution as well.[146]

It is clear that the *New York Times Co. v. Sullivan*[147] standard of "actual malice"[148] applies to privacy cases.[149] Yet, it is not clear whether the constitutional privilege applies to the status of the person as a public official[150] or a public figure[151] or whether it applies to the

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*Id.* at __, 222 S.E.2d at 619. The fact that the picture conveyed a message, or depicted a scene, which was, in fact, true, afforded the defendant with a complete defense. If, therefore, a statement made and published by the defendant is true, then the basis of the false light cause of action is destroyed and no false light recovery is justified.

Of course, the preceding discussion must be read in the context of the possible alternatives that can be pursued in the courts. If the false light cause of action is retained, then the truth defense must be permitted because proof by the defendant that the statement was true would negate a material element of the tort, that is, falsity. If the extreme alternative of abandonment of the tort is pursued, then the defense is totally inapplicable because the courts would be holding that a false statement cannot, as a matter of law, be an invasion of privacy.

143. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1120 (1962).

144. *See* notes 110-130 *supra* and accompanying text.

145. *See* notes 110-125 *supra* and accompanying text. Assume for the moment, however, that the false light tort should protect the plaintiff's reputation, as Prosser contends. If this be the case then the right to maintain a good reputation becomes more readily actionable under the publication requirement of defamation. In terms of the extent of publication, the plaintiff's reputation should not be required to be more greatly harmed in privacy than in defamation before recovery will be permitted. If, in fact, the interest protected by the two torts is the same, then that interest should receive equal protection under both torts.

146. Pavesich v. New England Life Ins. Co., 122 Ga. 198, __, 50 S.E. 68, 71 (1905). It should be noted, however, that the "constitutional right of privacy is not to be equated with the common law right recognized by state tort law." McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir. 1976). The doctrine of constitutional privacy is a limited one and "the federal courts have generally rejected efforts by plaintiffs to constitutionalize tortious invasions of privacy involving less than the most intimate aspects of human affairs." *Id.* at 76-77.

147. 376 U.S. 254 (1964).

148. "Actual malice" is defined as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

149. Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967). The specific holding with regard to the *Time* case was as follows:

> We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

*Id.*

150. "[T]he 'public official' designation applies at the very least to those among the hierarchy

newsworthiness of the event.[152] In *Time, Inc. v. Hill*[153] the Court held that the *Times* standard applied to matters of public interest in privacy cases[154] rather than to public officials and public figures.[155] This application of the *Times* standard to the event as opposed to the status of the person, has left a gap in the overlap between false light privacy and defamation. It has been argued that the constitutional privilege in relation to privacy cases should be different from that found in the law of defamation.[156] This question remains open because the United States

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of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

It has also been stated that "a person may be deemed a public official where he is fulfilling duties which are public in nature, 'involving in their performance the exercise of some portion of the sovereign power, whether great or small.'" Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, __, 352 N.E.2d 914, 920 (1976).

151. The Supreme Court has identified two ways in which a person may become a public figure for purposes of the constitutional privilege.

> For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolutions of the issues involved.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

152. *See* Comment, *Privacy: The Search For A Standard*, 11 WAKE FOREST L. REV. 659 (1975).

153. 385 U.S. 374 (1967). In *Time* the plaintiff brought a cause of action under the New York right to privacy statute.

154. 385 U.S. at 388. The Supreme Court's extension of the defamation privilege to matters of public or general interest in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), was shortlived. Three years later in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the *Rosenbloom* rationale was impliedly overruled.

155. The constitutional privilege in defamation cases was extended to public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

156. Comment, *Privacy: The Search For A Standard*, 11 WAKE FOREST L. REV. 659, 679 (1975). The author argues that the newsworthiness standard is appropriate for application to privacy cases as a result of its ability to put a person on notice that an event is of public interst. The author continues:

> [T]he contemporaneousness of the event as it affects public interest alerts the individual that his privacy might be abridged. In other words, the more current an event is, the greater the public interest. The private plaintiff is thereby put on notice of intrusion, and "under some circumstances . . . an incident is so notorious that contemporaneous publication can hardly cause a further impairment of privacy."

*Id.*

In fact, it is true that the newsworthiness, or public interest, standard has been applied to privacy cases. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967); Miller v. News Syndicate Co., 445 F.2d 356 (2d Cir. 1971); Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969); Hotchner v. Castillo-Puche, 404 F. Supp. 1041 (S.D.N.Y. 1975); Fletcher v. Florida Publishing Co., 319 So. 2d 100 (Fla. Ct. App. 1975). It must, however, be borne in mind that the Supreme Court has not had occasion to decide which of these standards is applicable.

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Supreme Court reiterated its holding in the *Time* case as to matters of public interest. The Court stated that

> [W]here the interest at issue is privacy rather than reputation and the right claimed is to be free from the publication of false or misleading information about one's affairs, the

Supreme Court, in *Cantrell v. Forest City Publishing Co.*,[157] expressly rejected the opportunity to decide whether the rule of *Gertz v. Robert Welch Inc.*,[158] applied to privacy cases.[159]

The application of the newsworthiness standard, as opposed to the public figure rule, will result in a difference in the protection afforded to the individual's privacy. The difference is in the analysis and will have a direct bearing on whether the privacy plaintiff will be required to prove actual malice.[160] An event might be of public interest, but the

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target of the publication must prove knowing or reckless falsehood where the materials published, although assertedly private, are "matters of public interest."

*Id.* at 490. The Court, however, did not reach the constitutional privilege question. After stating that the privacy cause of action involved was one of public disclosure, the Court narrowly framed its scope of inquiry. The Court stated:

> Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.

*Id.* at 491.

157. 419 U.S. 245 (1974).

158. 418 U.S. 323 (1974). In *Gertz* the Court held that that the *Times* standard applied to defamation actions brought by public officials and figures but stated that the private individual plaintiff would not be required to prove actual malice on the part of the defendant. The standard as to private individuals would be set by the states as long as they did not impose liability without fault. *Id.* at 347.

159. The Court stated that the *Cantrell* case presented no occasion to determine whether the *Gertz* distinctions between public and private persons applied to privacy cases because no objection was made to the knowing-or-reckless falsehood instruction given to the jury. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 250 (1974).

As a result of the Court's reluctance in *Cantrell*, the status of both *Hill* and *Gertz*, in their relation to privacy law, is in question. Consequently, the constitutional privilege in privacy cases is also in doubt. The law is uncertain as to whether the privilege to speak relates to the event or to the person. The problem lies not in the inherent confusion of the *Gertz* opinion, *see* Yasser, *Defamation As A Constitutional Tort: With Actual Malice For All*, 12 Tulsa L.J. 601, 618-24 (1977), but rather in determining whether the *Gertz* standards apply at all in privacy cases. *See* RESTATEMENT (SECOND) OF TORTS § 652E, Comment d (1976), where the drafters state that the effect of *Gertz* on the *Hill* decision is uncertain. The drafters point out that if the *Hill* case is modified along the lines of *Gertz*, "then the reckless disregard rule will apparently apply if the plaintiff is a public official or a public figure and the negligence rule will apply to other plaintiffs." *Id.*

160. In Herbert v. Lando, 99 S. Ct. 1635 (1979), the Supreme Court was required to decide the extent to which a defamation plaintiff might inquire into the state of mind accompanying the editorial process. The Court stated that "*New York Times* and its progeny made it essential to proving liability that plaintiffs focus on the conduct and state of mind of the defendant." *Id.* at 1641.

The court buttressed its conclusion by noting that evidence dealing with the editorial process has been continually accepted without constitutional objection. After citing forty-one cases in support of this proposition, the Court stated that none of them "as much as suggested that there were special limits applicable to the press on the discoverability of such evidence, either before or

individual around whom it centers might still be considered a private individual.[161] To first look to the event, therefore, for the purpose of determining whether the constitutional privilege exists, is to possibly deprive a person of her status as a private individual.[162]

In *Wolston v. Reader's Digest Ass'n*,[163] the Court gave some indication that the *Gertz* rule, rather than the newsworthiness standard, would apply to privacy cases by stating that "[a] libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*."[164] Although the *Wolston* case arose in the context of a libel suit, the principle appears to be consistent with the *Cantrell* privacy decision in which the Court was apparently unconcerned with the newsworthy nature of the *Cantrell* facts. Thus, it appears that the general repudiation of the newsworthiness standard as it relates to defamation causes of action will carry over into the law of privacy.

It appears, therefore, that one major difference between the public figure and newsworthiness standards is that in the former, analysis is to be concentrated on the plaintiff's activity while in the latter, the plaintiff's voluntary conduct may have no bearing on the issue of newsworthiness.[165] The newsworthiness standard and analysis of the

during trial." *Id.* at 1644 n.15. *Compare* Note, *Defamation and the First Amendment: Editorial Process Found "Privileged" in* Herbert v. Lando, 13 TULSA L.J. 837 (1978).

161. *See* Hutchinson v. Proxmire, 99 S. Ct. 2675 (1979); Wolston v. Reader's Digest Ass'n, Inc., 99 S. Ct. 2701 (1979). These cases pertained to situations in which the plaintiffs were involved in newsworthy events. Each plaintiff had been the subject of newspaper articles. In both cases, however, the Court held that the plaintiffs had not acheived public figure status. Thus, neither was required to prove actual malice on the defendant's part.

162. The reason that the individual's status *should* be the primary consideration arises from the fact that, as earlier stated, the *Times* standard is fully applicable to invasion of privacy cases. In the recent case of Wolston v. Reader's Digest Ass'n., Inc., 99 S. Ct. 2701 (1979), the United States Supreme Court concluded that the plaintiff was not a public figure. The facts were that the plaintiff had been listed as a Soviet agent in a book entitled *KGB, The Secret Work of Soviet Agents*. His failure to appear at a grand jury investigation as a result of health problems resulted in a contempt citation followed by a suspended sentence of one year. Although the incidents surrounding the court proceedings received great publicity, the Court concluded that the plaintiff was not a public figure merely as a result of his failure to appear at a federal grand jury investigation of Soviet activities. The Court stated the plaintiff had been "dragged unwillingly into the controversy," *id.* at 2707, thus holding that the plaintiff had retained his status as a private individual.

163. *Id.* at 2701.

164. *Id.* at 2708.

165. Thus, in Hutchinson v. Proxmire, 99 S. Ct. 2675 (1979), a case decided the same day as *Wolston*, the Court stated that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* at 2688. Hutchinson, a research scientist, was the recipient of Senator William Proxmire's "Golden Fleece of the Month" award as an example of wasteful government spending. After concluding that Senator Proxmire's publication of libelous statements was not protected by the Speech or Debate Clause, the Court

constitutional privilege, as it relates to privacy actions, results in removing from many plaintiffs their right to undisturbed privacy. It permits the disturbance of the right if only for the reason that an individual became involved in a topic of public concern through no voluntary, concerted action of her own.[166]

At least one court[167] has gone so far as to predict that the *Gertz* rule will eventually be applied to privacy causes of action. In *Rinsley v. Brandt*[168] the court stated that judicial focus[169] must be directed at the plaintiff's "status and not upon the public interest in determining whether the plaintiff must demonstrate malice in order to recover upon his invasion of privacy claim."[170] Despite general application of the newsworthiness standard[171] to determine the applicability of the constitutional privilege in privacy cases, it seems fairly safe to assume that the Court, when confronted with a privacy claim involving the public figure and corresponding constitutional privilege issues, will apply the *Gertz* rule.[172] This assumption is based on the similarity between the laws of privacy and defamation,[173] judicial desire to give full redress to an infringement of an individual's right to privacy, and the fact that the

held that the plaintiff was not a public figure. The Court stated that Hutchinson had not assumed a role of public prominence and that the defendant did not identify a controversy, but merely a "concern about general public expenditures." *Id.*

166. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

167. Rinsley v. Brandt, 446 F. Supp. 850 (D. Kan. 1977).

168. *Id.*

169. It has been held that "it is for the trial judge in the first instance to determine whether the proofs show [plaintiff] to be a 'public official.'" Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1045 (S.D.N.Y. 1975) (quoting Rosenblatt v. Baer, 383 U.S. 75, 88 (1966)).

In *Hotchner* the court concluded that the author of a "best-seller" was a public figure. The court focused on the individual even though his book, arguably the event, was of public interest or newsworthy.

170. Rinsley v. Brandt, 446 F. Supp. 850, 856 (D. Kan. 1977). The *Cantrell* decision is apparently what led the court to declare that the *Gertz* rule as to status would come to control over any concern as to the matter being of public interest. Although the Court was not required to decide the applicability of *Gertz* to the *Cantrell* fact situation, it was seemingly unconcerned with the newsworthiness of the collapse of the bridge in which Mr. Cantrell had been killed.

The dissenting opinion in Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977), would have applied the *Gertz* rule rather than the pubic interest standard. The dissenting judge stated that "the majority opinion conceivably errs by characterizing the standard to be used, in the first instance, as 'whether the matters reported were of public interest,' as that standard was rejected in *Gertz v. Robert Welch, Inc.* . . ." 47 Ohio St. 2d at __, 351 N.E.2d at 364. In reversing the Ohio Supreme Court, the United States Supreme Court stated that the *Zacchini* case involved the right of publicity rather than the right to privacy. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

171. *See* note 156 *supra*.

172. The drafters of the *Restatement* hint that the *Gertz* rule will eventually replace the public interest standard. *See* RESTATEMENT (SECOND) OF TORTS § 652E, Comment d (1976).

173. *See* notes 27-28, 97-109, 133-166 *supra* and accompanying text.

right to privacy deserves the full protection of the Constitution.[174]

As is evident from the preceding discussions, the state of the law concerning false light privacy is uncertain. Two alternatives are offered for the purpose of remedying this confusion. The first is closely related to the interest that should be protected by the false light tort. It suggests that the tort be realigned so as to fully protect a plaintiff's mental interest by making the tort consistent with the concept underlying the law of privacy. The second, and more drastic of the two alternatives, relates to the elements of the false light cause of action and suggests that the tort be abandoned due to an inherent conflict between the concept of privacy and the requirement of a false statement.

### B. *The First Alternative: Retention of the False Light Tort*

Examination of the interests and elements of the false light tort indicates that there are both similarities and differences between it and defamation. Despite these similarities and differences, the courts must ensure that the two areas of the law remain separate and distinct from each other. As stated earlier, there is little doubt that both the right to privacy and the false light cause of action have become firmly established in the law. The first alternative relates closely to the interest purportedly protected by the false light tort. It calls for a restructuring of the tort so as to fully protect a plaintiff's interest in her mental tranquility. Invasion of privacy is based upon injury to an individual's emotions and her mental suffering while defamation is a remedy for injury to a plaintiff's reputation.

Privacy law is not identical to defamation and should be used neither to engulf it[175] nor duplicate its remedy. The concept and theory of privacy law[176] does not and should not allow compensation for damage to an individual's reputation. Under the retention alternative, a plaintiff who is placed in a false light should, however, be permitted to recover for the mental anguish suffered as a result of the publicized falsehood. Recovery should never be granted, however, on the basis of any damage to reputation that results from being placed in a false light. A failure to protect a plaintiff's mental interest and a lack of concern for her interest in remaining free from unwanted interference with her personal affairs has moved the false light tort beyond the realm of pri-

174. Pavesich v. New England Life Ins. Co., 122 Ga. 198, __, 50 S.E. 68, 71 (1905).
175. *Contra* Wade, *Defamation and the Right Of Privacy*, 15 VAND. L. REV. 1093, 1124 (1962).
176. *See* notes 11-24 *supra* and accompanying text.

vacy law. Privacy law should compensate only for serious mental anguish[177] suffered as a result of the defendant's conduct.

It should be noted that although the *Restatement* formulation of the false light tort rests on the falsity of the statement,[178] it is, if the tort is to be retained, probably the best formulation yet to be followed by the courts. The *Restatement* formulation seeks to protect a mental interest by allowing recovery only in those instances in which the false light "would be highly offensive to a reasonable person."[179] It is true that an individual has an interest "in not being made to appear before the public . . . otherwise than as he is."[180] It must be remembered, however, that the false light tort is a privacy action and not an action for defamation. An inconsistency arises, therefore, between the language of comment "b" to section 652E and the section itself in that the comment would protect reputation while the language of the section would protect only a plaintiff's mental interest. The comment is also inconsistent with the concept of privacy and should not, therefore, be used by the courts as a guidepost to the law of false light privacy.

In light of the foregoing, the false light tort should be restructured so as to give compensation to plaintiffs who, as a result of an erroneous depiction to the public,[181] have suffered serious mental distress. No compensation should be granted under a false light theory for any damage to a plaintiff's reputation. The scope of the protection afforded by privacy law should be limited to its intended, obvious, and conceptual basis.

It appears, then, that a plaintiff should be permitted to recover to the full extent of her mental injury under a false light cause of action in those instances in which the falsehood does not rise to the level of being defamatory. If, however, a plaintiff is able to mount a successful defamation action, then she should be permitted to recover for the injury to her reputation. Of course any mental suffering endured by the plaintiff would be compensated as incidental damages in the defamation action.[182] Thus, the false light tort should be accepted by the courts as being a remedy for mental suffering and not as a remedy to compensate for injury to reputation. If the false light cause of action is to be re-

177. *See* notes 25-89 *supra* and accompanying text.
178. RESTATEMENT (SECOND) OF TORTS § 652E (1976).
179. *Id.*
180. *Id.* at Comment b.
181. *See* notes 97-119 *supra* and accompanying text.
182. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971).

tained, it should be limited to its conceptual basis as found in section 652E of the *Restatement (Second) of Torts*.[183]

### C. *The Second Alternative: Abolition of the False Light Cause of Action*

It is clear that a material element of a false light cause of action is that a false statement be made about the plaintiff. As earlier stated, an inconsistency arises between falsity and the concept of privacy. This inconsistency is illustrated by the fact that an individual cannot intend to keep private that which is false.

It is because of this inherent inconsistency that the second alternative of abandoning the false light cause of action is advocated.[184] A matter cannot be both false and private at the same time. The inconsistency, coupled with the fact that the concept of privacy should be a necessary factor in all false light privacy actions, leads to the conclusion that the false light cause of action should be removed from the law of privacy. Moreover, the inconsistency has permitted the law of privacy to be expanded beyond its logical limits in that the concept of privacy has been removed from a false light privacy action.

The requirement of a false statement has resulted in additional confusion by bringing false light causes of action into closer relation with defamation actions. A false statement is the basis of both causes of action. Inasmuch as false statements should occupy no place in the law of privacy, this requirement has moved the law of privacy beyond its logical limits.

## V. CONCLUSION

Dean Prosser's article entitled *Privacy*, giving birth to a new analysis of the law of privacy, is the modern equivalent of the Warren and Brandeis article giving rise to a cause of action for invasion of privacy. Prosser argues that much of the confusion in the law is a result of the failure to separate the four torts he has identified. Yet it is the false light tort that has, in fact, caused the confusion. Privacy law was not intended to protect a person's reputation. Nor was it designed to deal

183. *Compare* notes 11-24 *supra* and accompanying text.

184. As a practical matter, it is not likely that this alternative will be accepted by the courts. In view of the fact that the false light cause of action is firmly established, this alternative is an extreme one. It is presented here primarily for the purpose of illustrating the inconsistency in the false light tort.

specifically with false statements. Courts and writers cannot ignore the underlying principle of the law of privacy. That foundation is the individual's right to be free from public scrutiny of those facets of her life that she would prefer to keep private.

In order to properly conform the law of privacy to its conceptual basis, the courts must either realign the false light tort so as to protect an individual's mental interest by granting redress on that basis when the plaintiff has been placed in a false light, or they must undertake to abandon the false light tort on the ground that a false statement cannot be an invasion of an individual's privacy. Regardless of which course the judiciary deems most appropriate, an effort must be made to clarify the tort so as to allow consistency of application.

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