

# Restraining False Light: Constitutional and Common Law Limits on a “Troublesome Tort”

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## I. INTRODUCTION

Defamation law in the United States consists of complex rules that have evolved over decades as courts and legislatures have sought to accommodate the varied interests of speakers, recipients of information, and persons discussed. Intricate statutory and judge-made rules seek to foster the constitutional right to speak freely, the interest of readers and viewers in obtaining knowledge, and the reputational and emotional interests of the subjects of discussion. This complex balancing of interests has created a system of tort law that, though imperfect, reflects the considered judgment of appellate courts and legislatures regarding how best to serve those competing interests.

Dissatisfaction with the rules and remedies of defamation law has led some litigants to pursue alternative causes of action in seeking redress for defamatory speech. Most notably, since Dean Prosser's recognition of the false light form of invasion of privacy in 1960,<sup>1</sup> the false light tort has become increasingly popular as a means of seeking redress for defamatory falsehoods. Courts faced with such claims have, at times, indicated that false light litigants need not satisfy the requirements of defamation law.<sup>2</sup> As a result, false light has provided, in many cases, a means of evading defamation's well-established requirements.

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1. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (describing false light as a distinct form of invasion of privacy); J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 790 (1992) ("The first appearance of false light privacy and its first independent recognition took place in the pages of Prosser's own article, not in the cases themselves.").

2. See, e.g., *Gannett Co. v. Anderson*, 947 So. 2d 1, 3, 6 (Fla. Dist. Ct. App. 2006) (discussing trial court's approval of false light claim presented without proof that implication alleged was in fact false), *aff'd on other grounds*, 994 So. 2d 1048 (Fla. 2008); *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355, 360 (Fla. Dist. Ct. App. 2001) (fair-report privilege that might bar defamation claim did not bar false light claim), *abrogated by Anderson v. Gannett Co.*, 994 So. 2d 1048, 1051 (Fla. 2008); *Kurczaba v. Pollock*, 742 N.E.2d 425, 433-37 (Ill. App. Ct. 2000) (finding that defamation claim was barred by failure to plead special damages, but also finding that plaintiff sufficiently stated distinct claim for false light); see also *Rinsley v. Brandt*, 446 F. Supp. 850, 852-53, 858 (D. Kan. 1977) (allowing false light claim to proceed although parallel libel claim was barred by the statute of limitations, "because in Kansas false light privacy is recognized as a tort separate and distinct from libel for which no specific statute of limitations has been created").

The evasion of defamation rules conflicts with well-established common law and First Amendment principles. The common law typically recognizes that novel causes of action are disfavored insofar as they duplicate more established torts.<sup>3</sup> In jurisdictions that recognize this principle disfavoring newer, duplicative torts, false light claims based upon defamatory speech ought to be dismissed at the pleading stage without prejudice to the assertion of defamation claims. In the alternative, jurisdictions that allow false light claims to proceed as alternatives to defamation should—as a matter of constitutional law and common law—impose, in those cases, the essential requirements of defamation law. Otherwise, litigants will be able to evade defamation law’s constitutional, statutory, and judge-made requirements by the simple expedient of relabeling a defamation claim as one for false light.

This Article begins with an analysis of the traditional common law elements of defamation and then discusses the numerous constitutional, statutory, and judge-made limits on the defamation tort. The Article then analyzes why courts ought to apply those limits to alternative torts, such as false light, insofar as they involve defamatory falsehoods. The Article concludes with a discussion of procedures for invoking defamation law in false light cases.

## II. JUDICIAL AND LEGISLATIVE LIMITS ON DEFAMATION

Defamation law in the United States has evolved considerably from its common law origins. Many common law presumptions in favor of defamation plaintiffs are no longer recognized. Consequently, defamation plaintiffs today bear heavier pleading and proof burdens than did their predecessors. In addition, plaintiffs today must satisfy other requirements that courts and legislatures have added to their burdens at common law. As a result, the legal limitations upon defamation claims today are considerable.

### A. *Elements and Presumptions at Common Law*

A traditional common law defamation claim alleged (1) publication<sup>4</sup> (2) of a statement tending to harm the reputation<sup>5</sup> (3) of the plaintiff<sup>6</sup> and

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3. See *infra* Part IV.A.1-2.

4. See RESTATEMENT OF TORTS § 577 (1938) (“Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.”); see *id.* § 577 cmt. a (“Publication of the defamatory matter is essential to liability.”).

5. See RESTATEMENT OF TORTS § 559 (1938) (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”).

(4) thereby causing harm.<sup>7</sup> To say that these were the traditional elements of a plaintiff's case, however, does not mean that a common law plaintiff was required to prove all four to a jury's satisfaction. As illustrated by the initial success of Montgomery City Commissioner L. B. Sullivan in his common law libel action against *The New York Times*,<sup>8</sup> the common law lightened the plaintiff's burden by allowing key presumptions in his favor.

In the spring of 1960, Sullivan was one of three elected commissioners of the municipal government of Montgomery, Alabama.<sup>9</sup> His duties included supervision of Montgomery's police department.<sup>10</sup> On March 29, 1960, *The New York Times* published a full-page advertisement titled "Heed Their Rising Voices" concerning civil rights protests in Alabama.<sup>11</sup> The advertisement described a demonstration on the grounds of the state capitol.<sup>12</sup> After the demonstration, its leaders were expelled from Alabama State College.<sup>13</sup> When students protested the expulsion, police "ringed" the college's campus, according to the advertisement, and the school's "dining hall was padlocked."<sup>14</sup> In response to peaceful protests by the Rev. Dr. Martin Luther King Jr., the advertisement alleged, "Southern violators" had "bombed his home," "assaulted his person," and "arrested him seven times."<sup>15</sup> Citing this advertisement, Sullivan brought an action for common law libel in state court in Alabama.<sup>16</sup>

Alabama common law provided that a libel case consisted of the customary four elements: a defamatory meaning,<sup>17</sup> identification of the plaintiff,<sup>18</sup> publication,<sup>19</sup> and damages.<sup>20</sup> Sullivan, however, had to prove

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6. See RESTATEMENT OF TORTS § 564 (1938) ("A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands it as intended to refer.").

7. See RESTATEMENT OF TORTS § 622 (1938) (recognizing liability "for any special harm of which the defamatory publication is the legal cause").

8. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

9. *Id.*

10. *Id.* at 258.

11. *Id.* at 256.

12. *Id.* at 257.

13. *Id.*

14. *Id.*

15. *Id.* at 257-58.

16. *Id.* at 256.

17. See *Ripps v. Herrington*, 1 So. 2d 899, 901 (Ala. 1941) (A defamatory statement "imports dishonesty, reflects upon plaintiff's good name, impeaches his integrity, tends to injure his reputation.").

18. See *Wofford v. Meeks*, 30 So. 625, 628 (Ala. 1901) ("The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff.").

19. See *Penry v. Dozier*, 49 So. 909, 913 (Ala. 1909) ("Allegation and proof of the publication of the alleged defamatory words are essential to the maintenance of the action

only two of those elements at trial. The defamatory meaning element was satisfied, the trial court instructed the jury, because the advertisement was “libelous per se,” in that (as the Alabama Supreme Court later explained) the advertisement’s printed words would “tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt.”<sup>21</sup> In other words, notwithstanding the common law burden on plaintiffs to prove defamatory meaning, the court decided this issue in Sullivan’s favor before submitting the case to the jury. The damages element was satisfied, the trial court found, for the same reason. Because the ad was “libelous per se,” the law inferred “legal injury from the bare fact of publication itself,” and general damages did not need to “be alleged or proved but [were] presumed.”<sup>22</sup>

So instructed, the *Sullivan* jury considered only whether the defendants published the advertisement and whether the statements actually concerned Sullivan.<sup>23</sup> Truth, although recognized as a defense to common law defamation generally, was not viable in Sullivan’s case because portions of the advertisement were inaccurate.<sup>24</sup> The New York Times Company also had no basis for contesting the element of publication, even though the newspaper did not write any of the words at issue. An advertising agency submitted the advertisement on behalf of the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.<sup>25</sup> An advertising manager at the newspaper approved the copy “because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of ‘a number of people who are well known and whose reputation’ he ‘had no reason to question.’”<sup>26</sup> Neither the advertising manager nor anyone else at the newspaper sought to confirm the accuracy of the advertisement or to check whether the copy’s claims

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for libel or slander. There must be a communication to some person other than the plaintiff and defendant.”).

20. *See* Marion v. Davis, 114 So. 357, 359 (Ala. 1927) (discussing typical circumstance in which defamation plaintiff must allege and prove special damages as an element of the cause of action).

21. N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 37 (Ala. 1962), *rev’d*, 376 U.S. 254 (1964).

22. *Sullivan*, 376 U.S. at 262.

23. *Id.*

24. *See id.* at 258-59 (noting misstatements concerning, inter alia, grounds for students’ expulsion, song that protestors sang, whether police “ringed” the campus, whether the “dining hall was padlocked,” and the number of times King was arrested).

25. *Id.* at 257, 260.

26. *Id.* at 260-61.

comported with information reported in the newspaper's news columns.<sup>27</sup> Despite the newspaper's limited role in preparing the advertisement, the publication element was satisfied because, at common law, "one who repeats or otherwise republishes defamatory matter [was] liable to the same extent as though he had originally published it."<sup>28</sup> For purposes of the publication element, then, the fact that the advertisement was not the newspaper's own work was irrelevant.

So, of the common law's traditional elements, only one—identification—was a genuine issue for the *Sullivan* jury, and on that point the jurors returned a verdict for Sullivan.<sup>29</sup> The trial court awarded damages of \$500,000—the full amount that Sullivan requested<sup>30</sup>—and the Alabama Supreme Court affirmed that award.<sup>31</sup>

As Sullivan's success in the Alabama courts illustrates, the burdens on a common law defamation plaintiff were minimal. The burden of proving the fundamental element of defamatory meaning, for example, was effectively lifted from the libel plaintiff's shoulders by the common law's sweeping definition of libel per se—i.e., words that on their face seemed likely to cause reputational injury.<sup>32</sup> Although in some states a jury in a libel per se case would still have to decide whether a reader would in fact

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27. *Id.*

28. See RESTATEMENT OF TORTS §578 (1938).

29. *Sullivan*, 376 U.S. at 288 (citing "the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent" Sullivan).

30. *Id.* at 256.

31. *Id.* at 263.

32. See, e.g., *White v. Birmingham Post Co.*, 172 So. 649, 651 (Ala. 1937) ("In cases of libel, if the language used exposes the plaintiff to *public ridicule or contempt*, though it does not embody an accusation of crime, the law presumes damage to the reputation, and pronounces it actionable per se." (quoting *Marion v. Davis*, 114 So. 357, 358 (Ala. 1927))); *Smith v. Byrd*, 83 So. 2d 172, 174 (Miss. 1955) ("At common law any written or printed language which tends to injure one's reputation, and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community is actionable per se." (quoting *Conroy v. Breland*, 189 So. 814, 815 (Miss. 1939))); *Becker v. Toulmin*, 138 N.E.2d 391, 395 (Ohio 1956) (To constitute libel per se "it must appear that the publication reflects upon the character of such person by bringing him into ridicule, hatred, or contempt, or affects him injuriously in his trade or profession." (quoting *Cleveland Leader Printing Co. v. Nethersole* 95 N.E. 735 (Ohio 1912))); *Peck v. Coos Bay Times Publ'g Co.*, 259 P. 307 (Or. 1927). The Oregon Supreme Court stated:

Will the natural and proximate consequence be to injure the person about whom they have been published? Will such words tend to bring a person into public hatred, contempt or ridicule? If the words are plain and unambiguous and susceptible of but one meaning, it is the duty of the court to determine from the face of the writing, without reference to innuendo, whether the same are actionable per se.

*Id.* at 311.

understand the words to have the defamatory meaning that the court identified,<sup>33</sup> whereas in many states a finding of libel per se resolved the issue definitively.<sup>34</sup> In either event, a jury hearing the court's instruction that a statement was "libel per se" would seem unlikely to find that the statement ought to be read otherwise.

The court's finding of libel per se also reduced the plaintiff's burden of proving damages. In fact, in cases of written defamation, the common law presumed some damage from the defamatory statement.<sup>35</sup> Thus, in the words of the Restatement's commentary:

The publication of any libel is actionable per se, that is irrespective of whether any special harm has been caused to the plaintiff's reputation or otherwise. Such a publication is itself an injury . . . and therefore a sufficient ground for recovery of at least nominal damages. Although actual harm to the reputation is not necessary to the actionable character of such defamation, the jury may take into consideration any loss of reputation sustained by the other in determining the amount of its verdict. So too, the recovery may include compensatory damages for any special harm . . . and damages for emotional distress or illness or other bodily harm. . . . In a proper case, punitive damages may also be included in the recovery . . . .<sup>36</sup>

Consequently, common law plaintiffs, such as Sullivan, were not required to prove that any injury actually arose from the claimed

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33. See RESTATEMENT OF TORTS § 614 (1938) (“(1) The court determines whether a communication is capable of a defamatory meaning. (2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.”).

34. See, e.g., *Wertz v. Lawrence*, 179 P. 813, 814 (Colo. 1919) (The trial court, having found defamation per se, “instructed the jury that the defendant could present but two defenses—one, that he did not make the alleged statements; and the other, that the statements were true.” The judgment was reversed to allow the affirmative defense of good faith); *Mosler v. Whelan*, 147 A.2d 7, 12 (N.J. 1958) (“If [words] are susceptible of a single imputation and that one is defamatory, the court must declare them actionable in themselves and limit the issue to that of damages.”); *Moore v. Francis*, 23 N.E. 1127, 1128-29 (N.Y. 1890) (citing “settled law” that “where the publication is admitted, and the words are unambiguous and admit of but one sense, the question of libel or no libel is one of law, which the court must decide”; reversing the trial court that submitted the issue to the jury); *Leevy v. North Carolina Mut. Life Ins. Co.*, 191 S.E. 811, 814 (S.C. 1937) (holding that “where the words written or spoken are libelous or slanderous per se, it is the duty of the judge to so declare and leave the other issues in the case to the jury”).

35. See *Sullivan*, 376 U.S. at 267 (“Unless [the defendant] can discharge the burden of proving truth, general damages are presumed, and [damages] may be awarded without proof of pecuniary injury.”); RESTATEMENT OF TORTS § 569 (1938) (“One who falsely publishes, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom.”).

36. See RESTATEMENT OF TORTS § 569 cmt. c (1938).

publication.<sup>37</sup> Defendants, conversely, were presumptively liable for unspecified damages for any writing that a judge deemed likely to have injured a plaintiff's reputation.

### B. *The End of Common Law Strict Liability in Defamation*

In accepting *Sullivan* for review, therefore, the United States Supreme Court confronted a common law tort that presumed defamatory meaning and damages from words alone. The Court responded by launching a fundamental shift in defamation law's pleading and proof requirements.<sup>38</sup> *Sullivan* and its progeny—together with legislative action and changes in the common law—have radically altered the common law tort of defamation.

Most notably, of course, the Court imposed a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>39</sup>

This holding altered the fundamental issues and burdens in a defamation case. No longer could a plaintiff merely point to written words, claim they were spoken about him, and obtain a jury instruction presuming a defamatory meaning and damages. Instead, the plaintiff would have to present evidence of the speaker's mental state—a topic that was previously relevant (if at all) only on the issues of privilege<sup>40</sup> and punitive damages.<sup>41</sup>

Initially, of course, *Sullivan*'s fault requirement applied only to public officials.<sup>42</sup> But, just three years after *Sullivan*, the Court held that public figures—in particular, a university's athletic director and a retired United States Army general—likewise could recover for defamation only upon

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37. See, e.g., *Smith v. Byrd*, 83 So. 2d 172, 174 (Miss. 1955) (reaffirming the rule that "if the article is libelous per se . . . it is not necessary to allege or prove special damages, because the law presumes damages per se from the writing of the libelous words").

38. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (1985) ("*New York Times Co. v. Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander.") (White, J., concurring).

39. See *Sullivan*, 376 U.S. at 279-80.

40. See *id.* at 280-81 n.20 (noting case law from various states requiring proof of actual malice to defeat privilege claim).

41. See *id.* at 283 n.24 (noting Alabama case law requiring proof of actual malice as a condition precedent to an award of punitive damages).

42. See *id.* at 279-80 (limiting recovery by "a public official . . . for a defamatory falsehood relating to his official conduct. . .").

proof of actual malice.<sup>43</sup> Thus, both public officials and public figures were required to prove fault (in addition to the common law elements of defamation). Finally, ten years after *Sullivan*, the Court in *Gertz v. Robert Welch, Inc.* extended the fault requirement to cases involving any plaintiffs, public or private.<sup>44</sup> Thus, “the common law of strict liability for defamatory error” was abolished.<sup>45</sup>

### C. *The End of Presumed Damages*

The Supreme Court’s revisions to defamation law have not been limited to the imposition of a fault requirement. The *Gertz* decision also revised the common law’s presumption of damages. At common law, a finding of libel per se—i.e., that the words on their face conveyed a defamatory meaning—automatically entitled the plaintiff to monetary relief, without any showing of actual injury “because the law presume[d] damages per se from the writing of the libelous words.”<sup>46</sup> The *Gertz* majority criticized this presumption as “an oddity of tort law.”<sup>47</sup> The Court explained:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.<sup>48</sup>

Under *Gertz*, therefore, a defamation plaintiff complaining about speech on a matter of public concern<sup>49</sup> must prove either actual malice or

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43. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 134-35 (1967); *id.* at 162-69 (Warren, C.J., concurring); *id.* at 170-71 (Black, J., and Douglas, J., concurring in part and dissenting in part); *id.* at 172-74 (Brennan, J., and White, J., concurring in part and dissenting in part).

44. 418 U.S. 323 (1974). Although some level of fault must be shown, a private figure need not prove actual malice. *Id.* at 345-47. For example, in many states, private figures may recover upon a showing of mere negligence. See RODNEY A. SMOLLA, 1 LAW OF DEFAMATION §§ 3:28, 3:30 (2d. ed. 2008).

45. See *Gertz*, 418 U.S. at 346.

46. *Smith v. Byrd*, 83 So. 2d 172, 174 (Miss. 1955); see also *Mid-Fla. Television Corp. v. Boyles*, 467 So. 2d 282, 283 (Fla. 1985) (“At common law, before *Gertz*, we said ‘[w]ords amounting to a libel per se necessarily import damage and malice in legal contemplation, so these elements need not be pleaded or proved, as they are conclusively presumed as a matter of law.’” (quoting *Layne v. Tribune Co.*, 146 So. 234 (1933))).

47. *Gertz*, 418 U.S. at 349.

48. *Id.*

49. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality) (indicating that states could award presumed and punitive damages without proof

actual injury.<sup>50</sup> Quite simply, as one Florida Supreme Court justice observed, “[l]ibel per se is dead” in most cases.<sup>51</sup>

#### D. *The Burden of Truth Lifted*

At the same time that the Court put to rest libel per se’s presumed damages in most cases, the Court also shifted the burden of proving the truth or falsity of libelous speech. At common law, the defendant had the burden of proving “the truth of the defamatory communication.”<sup>52</sup> So, as the first Restatement’s commentary explained, “[a] defendant who relie[d] upon the truth of the defamatory matter published by him ha[d] the burden of proving it.”<sup>53</sup> The Supreme Court shifted this burden implicitly in *Sullivan*<sup>54</sup> and explicitly in *Philadelphia Newspapers, Inc., v. Hepps*.<sup>55</sup> “To ensure that true speech on matters of public concern is not deterred,” the *Hepps* Court held, “the common law presumption that defamatory speech is false cannot stand.”<sup>56</sup> No longer would the defendant “bear the burden of proving truth.”<sup>57</sup> Instead, the Court adopted “a constitutional requirement that that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.”<sup>58</sup>

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of actual malice in defamation actions that do not involve speech on matters of public concern); *see also id.* at 763-64 (Burger, C.J., concurring in the judgment) (stating *Gertz*’s constitutional requirements ought not apply “to a matter of essentially private concern”); *id.* at 774 (White, J., concurring in the judgment) (finding *Gertz*’s constitutional requirements inapplicable, because “the defamatory publication in this case [an erroneous credit report] does not deal with a matter of public importance”). Although the plurality view in *Dun & Bradstreet* limits the Court’s otherwise sweeping revisions to the common law, as a practical matter, circumstances in which *Dun & Bradstreet* applies would seem exceedingly rare and perhaps limited to the specific context of erroneous credit reports. Aside from those facts, speech on purely private matters seems unlikely to reach a sufficiently large audience, or to cause sufficient monetary injury, to generate litigation.

50. *See Gertz*, 418 U.S. at 349-50.

51. *Mid-Fla. Television Corp.*, 467 So. 2d at 284 (Ehrlich, J., concurring).

52. *See* RESTATEMENT OF TORTS § 613(2)(a) (1938).

53. *See id.* § 613 cmt. h.

54. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (“Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries or administrative officials—and especially one that puts the burden of proving truth on the speaker.”); *see also* *Herbert v. Lando*, 441 U.S. 153, 176 (1979) (plaintiff must “prove a false publication attended by some degree of culpability”); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (public-official plaintiff must “establish[] that the utterance was false”).

55. 475 U.S. 767 (1986).

56. *Id.* at 776-77.

57. *Id.* at 776.

58. *Id.* On its face, the *Hepps* requirement that plaintiffs prove falsity applies only to cases involving media defendants discussing matters of public concern. *Id.* at 777. In other contexts, however, U.S. Supreme Court justices have criticized the proposition that the

Thus, in the last five decades, the Supreme Court has added two elements—fault and falsity—to the typical defamation plaintiff’s common law burdens, while simultaneously taking away the presumption in favor of a third element—damages. These First Amendment-based changes have radically altered the landscape of defamation law.

### *E. Legislative and Judicial Limits on Defamation*

The Constitution is not the only source of restrictions on the common law of defamation. Legislatures and courts also have crafted rules that modify the impact of libel law on freedom of speech. These rules—like the Supreme Court’s First Amendment jurisprudence—reflect a concerted effort to balance the reputational and compensatory goals of tort law with the countervailing interests in fostering a free flow of information.

For example, Congress has limited dramatically the ability of defamed persons to obtain money damages from Web site operators who display falsehoods on the Internet. Section 230 of the Communications Decency Act<sup>59</sup> immunizes Internet service providers who transmit content that third parties create.<sup>60</sup> As a result, a person who is falsely defamed by a posting on an Internet bulletin board may have a cause of action against the author, but not against the bulletin board operator.<sup>61</sup> Thus, § 230 abolishes the common law’s imposition of liability on republishers of defamation (e.g., The New York Times Company in *Sullivan*) on the Internet.<sup>62</sup>

Similarly, many state legislatures have constrained the common law of defamation by requiring that plaintiffs serve notice prior to instituting a

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media have greater free-speech rights than others. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 24 n.2 (1990) (Brennan, J., concurring) (rejecting distinction between media and nonmedia defendants, and opining that speech’s value as a means of informing the public “does not depend upon the identity of the source, whether corporation, association, union, or individual” (quoting *Philadelphia Newspapers, Inc., v. Hepps*, 475 U.S. 767, 780 (1986))); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 796 (1978) (Burger, C.J., concurring) (noting “the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations” from others). Perhaps as a result, the *Hepps* requirement that plaintiffs prove falsity has also been applied in nonmedia cases. *See* Robert D. Sack, *Protection of Opinion under the First Amendment: Reflections on Alfred Hill, “Defamation and Privacy under the First Amendment”*, 100 COLUM. L. REV. 294, 326 n.166 (2000) (listing relevant cases).

59. 47 U.S.C. § 230(c) (2000).

60. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (discussing the “quite robust” immunity that § 230 grants internet republishers).

61. *See, e.g., Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (finding that § 230 barred plaintiff’s claim against AOL for display of advertisements listing plaintiff’s telephone number and purporting to offer t-shirts with tasteless slogans concerning the Oklahoma City bombing, even though advertisements continued to appear after plaintiff complained to AOL).

62. *See* RESTATEMENT OF TORTS § 578 (1938).

defamation action.<sup>63</sup> In some states, notice is a condition precedent to maintaining a defamation action and failure to provide notice is grounds for dismissal.<sup>64</sup> In other states, a failure to provide notice limits the available damages.<sup>65</sup>

Legislators are not the only public officials to recognize the danger posed by common law defamation. Courts before and after *Sullivan* created and applied privileges that preclude liability for defamatory speech in certain circumstances. For example, the common law rule equating a repeater of defamatory speech and its author is tempered by the doctrine now known as the “wire service defense,”<sup>66</sup> which immunizes the innocent reprinting of news that a national news organization provides to a local newspaper.<sup>67</sup> To accommodate demands for daily news and to ameliorate the harsh consequences of common law strict liability, the wire service defense precludes liability for “[t]he mere reiteration in a daily newspaper, of an actually false, but apparently authentic news dispatch, received by a newspaper publisher from a generally recognized reliable source of daily news, such as some reputable news service agency engaged in collecting and reporting the news.”<sup>68</sup> The wire service defense has been recognized in at least twenty jurisdictions since 1933.<sup>69</sup>

Courts also have softened the impact of the defamation tort by recognizing broad privileges for fair and accurate reports of official proceedings and records. So, for example, speech that is contained in an official government report can be republished with little risk of liability—even if the speech is both false and defamatory.<sup>70</sup> This “fair and accurate

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63. See, e.g., ALA. CODE § 6-5-186 (LexisNexis 2005); CAL. CIV. CODE § 48a (West 2007); FLA. STAT. ANN. § 770.01 (West 2005); IND. CODE ANN. § 34-15-4-2 (West 1999); KY. REV. STAT. ANN. § 411.051 (LexisNexis 2005); MISS. CODE ANN. § 95-1-5 (West 2007); N.C. GEN. STAT. ANN. § 99-1 (West 2000); S.D. CODIFIED LAWS § 20-11-7 (2004).

64. See, e.g., *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376 (Fla. Dist. Ct. App. 1997) (Failure to comply with statutory provision requiring notice before bringing libel suit based on media publication requires dismissal of complaint for failure to state cause of action.).

65. See, e.g., *Sparagon v. Native Am. Publishers, Inc.*, 542 N.W.2d 125 (S.D. 1996) (Retraction statute does not require a party to serve notice in order to bring an action for actual damages; failure to serve notice operates only to bar recovery of punitive damages).

66. The doctrine’s history and rationale are detailed in Jennifer L. Del Medico, *Are Talebearers Really as Bad as Talemakers?: Rethinking Republisher Liability in an Information Age*, 31 *FORDHAM URB. L.J.* 1409, 1415-17 (2004).

67. *Layne v. Tribune Co.*, 146 So. 234, 239 (Fla. 1933).

68. *Id.* at 238.

69. See Del Medico, *supra* note 66, at 1411.

70. See, e.g., *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir. 1981) (The fair report privilege immunized news magazine’s reporting that tracked contents of FBI notes concerning a reputed Mafia figure’s comments describing the plaintiff as a Mafia chief).

report” privilege has further limited the sweep of the common law defamation tort.

### III. THE GROWTH OF FALSE LIGHT AS AN ALTERNATIVE TO DEFAMATION

In recent years, as courts and legislatures have sought to rein in common law defamation, the false light tort has become increasingly popular with plaintiffs. A search of federal district court opinions nationwide reveals this trend. During the 1960s, only five published district court opinions mentioned false light.<sup>71</sup> In the ensuing decade, the tort was mentioned twenty-six times in published opinions—a more than fivefold increase.<sup>72</sup> In the ten years beginning January 1, 1980, references to false light appeared in 110 published opinions.<sup>73</sup> During the 1990s, district courts mentioned the false light cause of action 236 times.<sup>74</sup> To be sure, some portion of this increase can be attributed to causes other than the tort’s increased popularity, such as increases in population and in the overall number of published opinions. But the growth of false light, far and away, outpaces the increase in the number of references to defamation. False light was mentioned forty-seven times more often in the 1990s than in the 1960s, whereas defamation was mentioned only twelve times more often over the same decades.<sup>75</sup> These statistics illustrate that claimants

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71. *See* *Am. Credit Corp. v. U.S. Cas. Co.*, 49 F.R.D. 314, 321 (N.D. Ga. 1969) (dictum); *see also* *Peacock v. Retail Credit Co.*, 302 F. Supp. 418, 424 (N.D. Ga. 1969); *Holmes v. Curtis Publ’g Co.*, 303 F. Supp. 522, 523 (D.S.C. 1969); *Shorter v. Retail Credit Co.*, 251 F. Supp. 329, 330 (D.S.C. 1966) (dictum); *Cordell v. Detective Publ’ns, Inc.*, 307 F. Supp. 1212, 1218 (E.D. Tenn. 1968).

72. This was calculated by searching all published federal district court decisions between January 1, 1970, and January 1, 1980 on Westlaw (database: dct) using the following query: “false light”. The search was performed on October 31, 2007.

73. This was calculated by searching all published federal district court decisions between January 1, 1980, and January 1, 1990 on Westlaw (database: dct) using the following query: “false light”. The search was performed on October 31, 2007.

74. This was calculated by searching all published federal district court decisions between January 1, 1990, and January 1, 2000 on Westlaw (database: dct) using the following query: “false light”. The search was performed on October 31, 2007.

By October 1, 2007, the tort had already been mentioned 202 times in published district court opinions since January 1, 2000. This was calculated by searching all published federal district court decisions January 1, 2000, and October 1, 2007 on Westlaw (database: dct) using the following query: “false light”. The search was performed on October 31, 2007.

75. This comparison is based upon a search of all published federal district court decisions between January 1, 1960, and January 1, 1970, and between January 1, 1990, and January 1, 2000 on Westlaw (database: dct) using the queries: “false light” and “defamation”. The searches were performed on October 31, 2007.

seeking redress for false speech have turned to false light more often as the rules for defamation have tightened.

No doubt, legislative and judicial curtailment of defamation makes false light an appealing alternative. Less well-defined torts offer litigants the opportunity to pursue causes of action that have not received the appellate and legislative scrutiny applied to defamation. False light invasion of privacy, for example, has been mentioned in only five U. S. Supreme Court opinions<sup>76</sup> and has been discussed extensively in only two of those cases.<sup>77</sup> As a result, the rules governing this “elusive, amorphous” tort<sup>78</sup> are not well-defined. The Court has not explained, for example, whether *Gertz*’s holding, that private-figure libel plaintiffs need not prove actual malice,<sup>79</sup> ought to be applied in false light cases.<sup>80</sup> Consequently, although actual malice is typically considered an essential element of a false light claim,<sup>81</sup> some lower courts have found a lesser degree of fault sufficient.<sup>82</sup> Courts have also issued conflicting and confusing decisions concerning whether statutory and common law defamation defenses might apply in false light cases.<sup>83</sup> As a result, a false light defendant—unlike a defamation defendant—“is not afforded an opportunity to correct an error by making a retraction; reporting privileges may or may not apply; the alleged false impression may be actionable even in the absence of malice; and the cause of action is governed by a longer statute of limitations.”<sup>84</sup>

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76. See *Smith v. Wade*, 461 U.S. 30, 54 n.19 (1983); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 571 (1983); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490 n.19 (1975); *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 248-54 (1974); *Time, Inc. v. Hill*, 385 U.S. 374, 376-98 (1967).

77. See *Cantrell*, 419 U.S. at 248-54; *Hill*, 385 U.S. at 376-98.

78. See BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 11.4.1 (2d ed. 1991).

79. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-47 (1974).

80. The Court assumed, without deciding, that actual malice was the appropriate standard in *Cantrell*. See 419 U.S. at 248-54 (finding that “this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability [such as negligence] for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory,” because at trial, no one objected to jury instruction on actual malice).

81. See *RESTATEMENT (SECOND) OF TORTS* § 652E (1977).

82. See, e.g., *Dresbach v. Doubleday & Co., Inc.*, 518 F. Supp. 1285, 1288 (D.D.C. 1981) (“Since the District of Columbia applies a negligence standard to defamation actions involving private individuals . . . , that standard should also be applied to a false light action.”); *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355, 359 (Fla. Dist. Ct. App. 2001) (stating that “neither knowledge of the falsity of the information nor reckless disregard for its truth is an element of a cause of action for false light invasion of privacy”), *abrogated by Anderson v. Gannett Co.*, 994 So. 2d 1048, 1051 (Fla. Oct. 23, 2008).

83. See *supra* note 2 and sources therein.

84. *Gannett Co. v. Anderson*, 947 So. 2d 1, 5 (Fla. Dist. Ct. App. 2006), *aff’d on other grounds*, 994 So. 2d 1048 (Fla. 2008).

Thus, in a number of respects, the rules governing false light claims remain uncertain—even as more and more false light claims are filed.

#### IV. REDRESSING THE UNCERTAINTY

Dean Prosser recognized the dangers of uncertainty in the false light tort. In the very article in which he first identified the false light theory, Prosser noted:

The question may well be raised, and apparently still is unanswered, whether [false light] is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?<sup>85</sup>

These questions arise because the basic elements of false light and defamation are quite similar. A false light plaintiff must plead and prove that the defendant (1) gave publicity to (2) a matter concerning the plaintiff (3) that placed the plaintiff before the public in a false light (4) that would be highly offensive to a reasonable person, and did so (5) with knowledge or reckless disregard of the falsity of the matter and the false light.<sup>86</sup> Of these five elements, the first (giving publicity) is similar to defamation's publication element.<sup>87</sup> The second (concerning) is identical to defamation's "of and concerning" element.<sup>88</sup> The third (false light) is similar to modern defamation law's falsity element.<sup>89</sup> And the fifth (knowing or reckless

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85. Prosser, *supra* note 1, at 401.

86. See RESTATEMENT (SECOND) OF TORTS § 652E (1977).

87. See *id.* § 558(b) (requiring unprivileged publication to a third party); *id.* § 577(1) (Publication of defamatory matter means communication to one other than the person defamed.). Because communication to one person alone is sufficient to constitute a publication under defamation law, defamation's publication element is more easily satisfied than false light's requirement that the defendant give publicity to a matter. See *Welling v. Weinfeld*, 866 N.E.2d 1051, 1057 (Ohio 2007) (explaining the difference between mere "publication" and "publicity"). As a practical matter, however, this is only a "minor difference" between the torts because speech to only a single person will rarely generate sufficient attention or damages to warrant a defamation claim. *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 899 (Colo. 2002). As a result, the breadth of publication that typically leads to a defamation claim will also amount to "publicity" that could support a false light claim.

88. See RESTATEMENT (SECOND) OF TORTS § 558(a) (1977) (requiring communication to be "concerning another").

89. See *id.* (requiring falsity); *id.* § 581A ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.").

falsity) is similar to defamation's actual malice element.<sup>90</sup> Only false light's fourth element (offensiveness) seems materially different from the corresponding element of defamation (defamatory meaning).<sup>91</sup> But, upon closer examination, even that difference largely disappears (at least in any case claiming reputational injury), because a statement that imparts a defamatory meaning is also likely to be found highly offensive.<sup>92</sup> That is why any claimed "right to recover for a false light invasion of privacy will often either duplicate an existing right of recovery for libel or slander or involve a good deal of overlapping with such rights."<sup>93</sup> That overlap, however, does not necessarily subject false light claims to "the numerous restrictions and limitations" that, as Prosser noted, "have hedged defamation about for many years,"<sup>94</sup> as demonstrated by the refusal of some courts to apply defamation rules to false light claims.<sup>95</sup>

Even so, two well-established legal principles can serve to prevent the "casual and cavalier" circumvention that Prosser anticipated.<sup>96</sup> The first such principle—a common law doctrine that courts have applied in a variety of contexts—holds that novel causes of action are disfavored insofar as they duplicate more developed torts.<sup>97</sup> In states that adhere to this principle, a false light claim based upon defamatory speech ought to be

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90. *See id.* § 580A (liability exists if speaker "(a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters").

91. *See Denver Pub. Co.*, 54 P.3d at 899-900 (charting similarities of false light and defamation before concluding that, "apart from 'defamatory' versus 'highly offensive,' the elements of the two torts are nearly identical"); *see also* *Jensen v. Sawyers*, 130 P.3d 325, 335-36 (Utah 2005) (noting "the possibility that highly offensive but nondefamatory statements could provide adequate grounds for a claim of false light invasion of privacy," but concluding that otherwise "false light invasion of privacy and defamation have much in common," and "differences between the two claims are at their margins").

92. *See Fellows v. Nat'l Enquirer, Inc.*, 721 P.2d 97, 99-100 (Cal. 1986) ("Although it is not necessary [in a false light claim] that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well"); *see also* *Gannett Co. v. Anderson*, 947 So. 2d 1, 10 (Fla. Dist. Ct. App. 2006) (Although false light claims can be based upon statements that are offensive but not defamatory, that distinction "is largely academic," because "[m]ost false light claims involve statements that would also be defamatory."), *aff'd on other grounds*, 994 So. 2d 1048 (Fla. 2008).

93. *Renwick v. News & Observer Publishing Co.*, 312 S.E.2d 405, 412 (N.C. 1984); *see also* RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (1977) ("In many cases to which the rule stated here [false light] applies, the publicity given to the plaintiff is defamatory, so that he would [also] have an action for libel or slander."); Patricia Avidan, *Protecting the Media's First Amendment Rights in Florida: Making False Light Plaintiffs Play by Defamation Rules*, 35 STETSON L. REV. 227, 236 (2005) (noting that false light claims often overlap with defamation claims and are based upon the same facts).

94. *See* Prosser, *supra* note 1, at 401.

95. *See supra* note 2 and sources therein.

96. *See* Prosser, *supra* note 1, at 401.

97. *See* discussion *infra* Part IV.A.1-3.

dismissed without prejudice to the filing of a defamation claim.<sup>98</sup> The second principle appears in the U.S. Supreme Court's decision in *Hustler Magazine v. Falwell*<sup>99</sup> applying the *Sullivan* actual malice requirement to a claim alleging intentional infliction of emotional distress.<sup>100</sup> Under *Falwell*'s reasoning, the First Amendment requires that false light claims based upon defamatory speech satisfy the standards of defamation law.<sup>101</sup>

#### A. *The Common Law's Restraint on Alternative Torts*

The common law in many states disfavors reliance upon novel causes of action as alternatives to more developed torts.<sup>102</sup> Applied in a variety of contexts, this principle recognizes that new labels are not a viable way to avoid the requirements of established law. This well-established principle compels the rejection of false light claims based upon defamatory speech in favor of the more established claim of defamation.

##### 1. The Single Action Rule

The principle disfavoring innovative torts is embodied in Florida common law in that state's single action rule, which limits persons seeking redress for false speech to a single cause of action—defamation.<sup>103</sup> The Florida Supreme Court first applied the single action rule in *Fridovich v. Fridovich*,<sup>104</sup> in which a plaintiff sued for defamation and for intentional infliction of emotional distress based upon the same allegedly defamatory statements. In analyzing the defamation claim, the Florida Supreme Court found that the statements were privileged. In addressing the separate count asserting the intentional infliction of emotional distress, the court declared that a plaintiff cannot “make an end-run around a successfully invoked defamation privilege by simply renaming the cause of action and repleading the same facts.”<sup>105</sup> Moreover, the court concluded, “*regardless of privilege*, a plaintiff cannot transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as ‘outrageous.’”<sup>106</sup> Thus, the single action

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98. See *infra* notes 155 to 158 and accompanying text.

99. 485 U.S. 46 (1988).

100. See *infra* notes 153 and 154 and accompanying text.

101. See discussion *infra* Part IV.B.

102. See discussion *infra* Part IV.A.1-2.

103. See *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 609 (Fla. Dist. Ct. App. 1975) (noting that “a single wrongful act gives rise to a single cause of action”).

104. 598 So. 2d 65 (Fla. 1992).

105. *Id.* at 69.

106. *Id.* at 70.

rule prohibits relabeling a defamation claim in order to avoid privileges and defenses applicable in defamation actions.

The single action rule has been applied in other cases challenging seemingly defamatory speech through causes of action other than defamation. For example, in *Trujillo v. Banco Central del Ecuador*,<sup>107</sup> plaintiffs brought a two-count complaint against a public relations firm (Conover). In their first count, the plaintiffs contended that a Conover press release was defamatory. In their second count, the plaintiffs alleged that the press release cast them in a false light. Conover's motion to dismiss the defamation count was denied, but dismissal of the false light claim was granted based upon the single action rule. The court explained:

Conover correctly argues that the false light privacy claim as presented by the Plaintiffs is precluded, because it is based on the same facts giving rise to the claim for defamation. 'Florida courts have held that a single wrongful act gives rise to a single cause of action, and that the various injuries resulting from it are merely items of damage arising from the same wrong. . . .' Thus, if the sole cause of action for the false light invasion of privacy claim is the same defamatory publication that gives rise to the defamation claim (i.e., the Press Release), the false light claim is precluded.<sup>108</sup>

Because both the defamation and false light counts concerned the same publication, the *Trujillo* court concluded, dismissal of the false light claim was warranted.<sup>109</sup> A false light claim also failed in *Ovadia v. Bloom*<sup>110</sup> because the appellate court found that the claim was based upon the same television news report at issue in a defamation claim.<sup>111</sup> Thus, the single action rule precludes use of alternative torts as a way of evading the requirements of defamation law.

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107. 17 F. Supp. 2d 1334 (S.D. Fla. 1998).

108. *Id.* at 1339-40 (quoting *Easton v. Weir*, 167 So. 2d 245 (Fla. Dist. Ct. App. 1964)).

109. *Id.* at 1340.

110. 756 So. 2d 137 (Fla. Dist. Ct. App. 2000).

111. *Id.* at 140-41; *see also* *Thomas v. Patton*, 34 Media L. Rep. 1188, 1191-92 (Fla. Cir. Ct. 2005), *available at* 2005 WL 3048033 (rejecting invasion of privacy and conspiracy claims based upon same television news broadcasts as defamation claim), *aff'd*, 939 So. 2d 139, 140 (Fla. Dist. Ct. App. 2006); *Sewall's Point v. Rhodes*, 852 So. 2d 949, 951 (Fla. Dist. Ct. App. 2003) (rejecting invasion of privacy claim because parallel defamation claim also failed as a matter of law); *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 208 (Fla. Dist. Ct. App. 2002) (rejecting tortious interference and abuse of process claims that were based upon same factual basis as disparagement of title claim); *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 609 (Fla. Dist. Ct. App. 1975) (rejecting intentional interference claim based upon same newspaper articles that were basis for libel claim). *But see* *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355, 358 (Fla. Dist. Ct. App. 2001) (A broadcast that the plaintiff claimed consisted of truthful, non-defamatory facts could be the subject of a false light claim that the single action rule did not bar.), *abrogated by* *Anderson v. Gannett Co.*, 994 So. 2d 1048, 1051 (Fla. 2008).

## 2. Other Rules Rejecting Alternative Torts

The same principle that animates the single action rule in Florida is apparent in other jurisdictions that favor defamation and other established causes of action over more novel theories. New Jersey law, for example, limits a defamation plaintiff to that cause of action alone—even if the evidence also supports a claim for interference with contractual relations.<sup>112</sup> Similarly, in New York, breach of contract claims are preferred over claims alleging a breach of a fiduciary duty.<sup>113</sup> The common law of numerous states prefers *any* well-established cause of action to a claim for the infliction of emotional distress.<sup>114</sup> “Where the gravamen of a plaintiff’s complaint is really another tort,” the Texas Supreme Court has explained, “intentional infliction of emotional distress should not be available.”<sup>115</sup> The cause of action known as a *prima facie* tort also is a legal theory of last resort. If the facts of a case support an established cause of action, the established theory must be followed instead of the *prima facie* tort.<sup>116</sup> Thus, the principle rejecting novel claims in favor of established remedies runs throughout the common law of the United States.

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112. *Lutz v. Royal Ins. Co. of America*, 586 A.2d 278, 289 (N.J. Super. Ct. App. Div. 1991) (Defendant’s summary judgment on interference claim was affirmed, because the same evidence supported both that claim and the defamation claim.).

113. *See, e.g., Brooks v. Key Trust Co.*, 809 N.Y.S.2d 270, 272 (N.Y. App. Div. 2006) (“plaintiff’s cause of action for breach of a fiduciary relationship . . . is based upon the same facts and theories as his breach of contract claim and was properly dismissed as duplicative”).

114. *See, e.g., Durant v. A.C.S. State & Local Solutions Inc.*, 460 F. Supp. 2d 492, 499 (S.D.N.Y. 2006) (Intentional infliction of emotional distress “is an extremely disfavored cause of action.”); *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806, 813 (Minn. Ct. App. 1992) (“Minnesota disfavors tort actions seeking damages for intentional infliction of emotional distress.”); *Ruth v. Fletcher*, 377 S.E. 2d 412, 415 (Va. 1989) (Because of the inherent risks in torts where mental or emotional injury is claimed, such torts are “not favored” in the law.).

115. *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004).

116. *See, e.g., Entm’t Partners Group, Inc. v. Davis*, 603 N.Y.S.2d 439, 439 (N.Y. App. Div. 1993) (“a plaintiff may not circumvent the one-year statute of limitations applicable to defamation actions . . . by denominating the action as one for intentional interference with economic relations, *prima facie* tort, or injurious falsehood if, in fact, the claim seeks redress for injury to reputation”); *Green v. Time, Inc.*, 147 N.Y.S.2d 828, 830 (N.Y. Sup. Ct. 1955) (dismissing *prima facie* tort claim based upon supposedly inaccurate magazine article, because libel statute of limitations had expired), *aff’d*, 146 N.Y.S.2d 812 (N.Y. App. Div. 1955), *aff’d*, 143 N.E.2d 517, 163 (N.Y. 1957); *cf. Morrison v. NBC*, 19 N.Y.2d 453, 459 (N.Y. 1967) (“Concluding as we do that this cause of action sounds in defamation, it would be highly unreal and unreasonable to apply some Statute of Limitations other than the one which the Legislature has prescribed for the traditional defamatory torts of libel and slander.”).

### 3. Rejecting False Light Claims as Evasive Devices

The reasons cited for rejecting undeveloped theories in favor of established torts compel application of that principle to false light claims targeting defamatory speech. Courts adhering to this principle point to legislative and common law rules that were developed in response to the senior causes of action. Use of more novel theories—such as false light—to evade legislative and common law rules has been rejected. As the Texas Supreme Court has explained with regard to another novel cause of action, such theories must not “be used to evade legislatively-imposed limitations on statutory claims or to supplant existing common law remedies.”<sup>117</sup>

For example, in *Fellows v. National Enquirer, Inc.*,<sup>118</sup> the California Supreme Court considered an attempt to use false light to evade California’s special damages statute. Under California Civil Code Section 45a,<sup>119</sup> language that is defamatory only by reference to extrinsic facts is not actionable in libel unless the plaintiff can prove special damages.<sup>120</sup> In *Fellows*, the plaintiff initially asserted libel and false light claims, but dropped the libel claim in response to the defendant’s argument that special damages had not been pled with sufficient specificity.<sup>121</sup> The plaintiff sought to proceed only on the false light claim without proving special damages.<sup>122</sup> The California Supreme Court rejected such use of the false light tort:

Since virtually every published defamation would support an action for false light invasion of privacy, exempting such actions from the requirement of proving special damages would render the statute a nullity. Permitting a plaintiff to circumvent the statutory requirement by labeling the action as one for false light invasion of privacy would defeat the legislative purpose of [Section 45a] providing a zone of protection for the operation of a free press.<sup>123</sup>

The *Fellows* court then concluded that “whenever a claim for false light invasion of privacy is based on language that is defamatory,” the statutory special damages requirement would apply.<sup>124</sup> Thus, under *Fellows*, the relatively novel false light tort is not an avenue for evading California’s special damages requirements.

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117. *Hoffmann-La Roche Inc.*, 144 S.W.3d at 447.

118. 721 P.2d 97 (Cal. 1986).

119. CAL. CIV. CODE § 45a (2007).

120. *Fellows*, 721 P.2d at 97.

121. *Id.* at 98-99.

122. *Id.*

123. *Id.* at 108.

124. *Id.* at 109.

False light is also not a means of circumventing defamation law's pre-suit notice requirements. Kentucky has one such statute, which provides that a defamation plaintiff must give notice before seeking punitive damages "for the publication of a defamatory statement in a newspaper, magazine, or periodical."<sup>125</sup> Applying that statute to a false light claim, a district court in *White v. Manchester Enterprises, Inc.*<sup>126</sup> found that the plaintiff's failure to comply with the notice statute precluded recovery of punitive damages. In Kentucky, therefore, as in California, a false light claim is not available as a means of evading the requirements of defamation law.

Finally, false light is not a way around defamation's statute of limitations. In *Gannett Co. v. Anderson*,<sup>127</sup> the plaintiff alleged that a newspaper article created the false impression that he murdered his wife.<sup>128</sup> Claims for libel and false light were filed more than two years after the article's publication, so the plaintiff's libel claim was barred by Florida's two-year statute of limitations applicable to libel actions.<sup>129</sup> Yet, the jury awarded more than \$18 million on the theory that the article cast the plaintiff in a false light.<sup>130</sup> A district court of appeal reversed, holding that the two-year libel statute of limitations applied.<sup>131</sup> The "false light theory cannot be used," the appellate court explained, "to circumvent the shorter limitations period that applies to defamation actions."<sup>132</sup> The court explained:

To the extent that false light invasion of privacy overlaps defamation, it must be treated the same way. Otherwise, the relatively short statute of limitations and other strict requirements in the law of defamation would have no effect at all. Plaintiffs would always choose the easier course of asserting a false light invasion of privacy claim.

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"Publications which may give rise to liability under both torts travel through the same media at the same speed. That a particular act may give rise to a cause of action under both torts but that the two statutes of limitations may differ in such cases baffles the court as well as the

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125. See KY. REV. STAT. ANN. § 411.051(1) (West 2008).

126. 871 F. Supp. 934, 938 (E.D. Ky. 1994).

127. 947 So. 2d 1 (Fla. Dist. Ct. App. 2006), *aff'd on other grounds*, 994 So. 2d 1048 (Fla. 2008).

128. *Id.* at 2.

129. *Id.* at 2-3 (applying FLA. STAT. § 95.11(4)(g) (2002)).

130. *Id.*

131. *Id.* at 11.

132. *Id.* at 7.

layman and gives substance to Dickens' observation about the nature of the law."<sup>133</sup>

Thus, the *Anderson* district court of appeal's decision—like the law in many other states—rejects use of the novel false light tort to evade the requirements that govern claims arising from defamatory speech. As the Second Restatement's commentary teaches:

When the false publicity is also defamatory so that either action can be maintained by the plaintiff, it is arguable that limitations of long standing that have been found desirable for the action for defamation should not be successfully evaded by proceeding upon a different theory of later origin, in the development of which the attention of the courts has not been directed to the limitations.<sup>134</sup>

Applying this principle, therefore, plaintiffs that invoke the more novel tort of false light in response to seemingly defamatory speech must comply with the rules applicable to parallel claims for defamation.

### B. *Constitutional Limits on Alternative Torts*

Common law principles disfavoring novel torts are not the only basis for rejecting false light claims challenging defamatory speech. First Amendment jurisprudence also provides strong grounds for rejecting assertion of such claims. In particular, the U.S. Supreme Court's decision in *Hustler Magazine v. Falwell*<sup>135</sup> precludes use of novel theories to bypass constitutional limits on libel law.

The *Hustler* decision arose from televangelist Jerry Falwell's outrage over a mock advertisement in the November 1983 issue of *Hustler* magazine.<sup>136</sup> The fictional advertisement described a "drunken incestuous rendezvous" between Falwell and his mother in an outhouse.<sup>137</sup> Falwell brought claims of libel and intentional infliction of emotional distress against the magazine and its publisher, Larry Flynt.<sup>138</sup> Regarding the libel claim, the trial court asked the jury to determine whether the advertisement

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133. *Id.* at 8-9 (quoting, in part, *Uhl v. CBS*, 476 F. Supp. 1134, 1137 (W.D. Pa. 1979)). This quotation alludes to CHARLES DICKENS, *OLIVER TWIST* 463 (3d ed. The New American Library 1961) (1901) ("If the law supposes that," said Mr. Bumble . . . "the law is a[sic] ass—a[sic] idiot."); see also *Moll v. Blair*, 985 So. 2d 1132, 1132 (Fla. Dist. Ct. App. 2008) ("Because Appellants' false light claim overlaps defamation, it must be treated the same way. . . . As such, Appellee's defamation defenses, which preclude the defamation claim, also preclude Appellants' false light claim." (internal citations omitted)).

134. RESTATEMENT (SECOND) OF TORTS § 652E cmt. e (1977).

135. 485 U.S. 46 (1988).

136. See RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* 3 (1988) (quoting Falwell's recollection of the first time he saw *Hustler's* ad parody: "I have never been as angry as I was at that moment").

137. *Hustler*, 485 U.S. at 48.

138. *Id.* at 47-48.

could “reasonably be understood as describing actual facts.”<sup>139</sup> “No,” the jury answered.<sup>140</sup> Because only a statement of fact can be false, and because falsity is an essential element of a public figure’s libel claim,<sup>141</sup> the *Hustler* jury explicitly found for the defendants on the libel cause of action.<sup>142</sup> Regarding the emotional distress claim, the jury determined that the defendants intended to inflict emotional distress, that the advertisement offended generally accepted standards of decency, and that Falwell was entitled to compensatory and punitive damages.<sup>143</sup> A judgment was entered accordingly, which the Fourth Circuit affirmed.<sup>144</sup> The jury’s split decision, therefore, presented the U.S. Supreme Court with the question of whether a plaintiff whose libel claim fails might nevertheless prevail on the more novel theory of intentional infliction of emotional distress.

The Court’s answer to that question was no. In upholding the jury’s verdict, the Fourth Circuit had reasoned that, because falsity is not an element of an emotional distress claim, requiring “knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress would add a new element to this tort, and alter its nature.”<sup>145</sup> The Fourth Circuit declined to alter the emotional distress tort in this way. Instead, the Fourth Circuit concluded, proof of intentional or reckless “misconduct,” not necessarily falsity, would suffice.<sup>146</sup> Thus, the Fourth Circuit’s opinion would have allowed a defamation plaintiff to use a novel cause of action (i.e., the emotional distress tort) to bypass one of the fundamental requirements of defamation law (i.e., knowing falsity).

The Supreme Court squarely rejected this view. It is one thing, the Court explained, to impose liability upon proof of falsity: “False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”<sup>147</sup> Liability for “intent to cause injury,” however, is another matter.<sup>148</sup> The First Amendment protects ridicule and

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139. SMOLLA, *supra* note 136, at 156 (quoting Judge Turk in the case).

140. *Id.* at 158.

141. *Philadelphia Newspapers, Inc., v. Hepps*, 475 U.S. 767, 775 (1986) (“a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation”).

142. *See Hustler*, 485 U.S. at 49.

143. SMOLLA, *supra* note 136, at 158.

144. *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986).

145. *Id.* at 1275.

146. *Id.*

147. *Hustler*, 485 U.S. at 52.

148. *Id.* at 53.

satire, even though a satirist's motivation might be hatred or ill will.<sup>149</sup> Such speech might well be offensive, the Court acknowledged, but "the fact that society may find speech offensive is not a sufficient reason for suppressing it."<sup>150</sup> Accordingly, the *Hustler* Court concluded that public debate about public figures is actionable only upon proof of actual malice—i.e., upon proof of defamation law's constitutionally essential element of knowing falsity.<sup>151</sup> Falwell's assertion of the more novel tort of intentional infliction of emotional distress failed for lack of this essential element.<sup>152</sup>

The *Hustler* case illustrates that constitutional rules developed in response to one tort are not subject to circumvention by the assertion of another cause of action. "Although the *Hustler* holding specifically addresses intentional infliction of emotional distress, it essentially prohibits plaintiffs from 'circumventing *New York Times* by the artful pleading of alternative tort theories, at least when the focus is on the content of the article.'"<sup>153</sup> The particular alternative tort theory known as false light, therefore, does not provide a means of evading the Constitution's limits on defamation.<sup>154</sup>

## V. PROCEDURE FOR CHALLENGING FALSE LIGHT CLAIMS

As these constitutional and common law principles illustrate, the false light cause of action is subject to the same constraints that apply to defamation law. The proper procedure for asserting those constraints in a false light case will depend in part upon the degree to which the claimant's initial pleading reveals that defamation is the appropriate remedy. If the false light claim accompanies a count for defamation, the defendant has at least three options. First, the defendant might move the trial court to

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149. *Id.* at 53-54 (citing *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)).

150. *Id.* at 55 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)).

151. *Id.* at 56.

152. *Id.* at 57.

153. Jacqueline A. Egr, Comment, *Closing the Back Door on Damages: Extending the Actual Malice Standard to Publication-Related Damages Resulting from Newsgathering Torts*, 49 U. KAN. L. REV. 693, 701 (2001) (citation omitted) (quoting David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161, 169 (1997)); see also R. Bruce Rich & Livia D. Brilliant, *Defamation-in-Fiction: The Limited Viability of Alternative Causes of Action*, 52 BROOK. L. REV. 1, 1-2 (1986) ("the constitutional analysis developed in defamation cases must be applied whenever a plaintiff seeks damages for injuries arising out of statements in a work of fiction regardless of plaintiff's legal theory — be it defamation, invasion of privacy or intentional infliction of emotional distress" (citation omitted)).

154. See *Time, Inc. v. Hill*, 385 U.S. 374, 376-77, 387-88 (1967) (holding that, absent actual malice, constitutional protections for speech and press precluded statutory claim alleging that magazine article falsely portrayed plaintiff and his family).

dismiss the duplicative false light count for failure to state a claim, either because the count is duplicative<sup>155</sup> or because the count is vulnerable to a defamation defense.<sup>156</sup> A second option would be a motion to strike the false light claim as redundant. Federal Rule of Civil Procedure 12(f) empowers a district court to strike “redundant . . . matter,” such as “a claim that merely recasts the same elements [as another count] under the guise of a different theory.”<sup>157</sup> Citing Rule 12(f), therefore, numerous district courts have stricken causes of action seeking relief available through other means.<sup>158</sup> Thus, a motion to strike might be asserted in response to a false light claim that duplicates a defamation count. A third option would be to answer the complaint, including the false light count, and later seek summary judgment or dismissal on the theory that the jury ought not be burdened with duplicative counts,<sup>159</sup> or that the duplicative count is subject to defenses that bar the defamation count.<sup>160</sup>

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155. *See, e.g.*, *Wooten v. Pleasant Hope R-VI School Dist.*, 139 F. Supp. 2d 835, 845 (W.D. Mo. 2000) (The plaintiff “should not be allowed to plead a separate privacy tort that is duplicative of her defamation claim”; the motion to dismiss false light claim is granted.). The California Supreme Court has stated:

Insofar as the instant plaintiff’s right to privacy action is of the ‘false light in the public eye’ variety, resting on the allegedly false nature of the editorial statements, we find the action is in substance equivalent to the children’s libel claim . . . . Since the complaint contains a specific cause of action for libel, the privacy count, if intended in this light, is superfluous and should be dismissed.

*Kapellas v. Kofman*, 459 P.2d 912, 921 n.16 (Cal. 1969).

156. *See, e.g.*, *Gannett Co. v. Anderson*, 947 So. 2d 1, 7 (Fla. Dist. Ct. App. 2006) (The “false light theory cannot be used . . . to circumvent the shorter limitations period that applies to defamation actions.”), *approved on other grounds*, 994 So. 2d 1048 (Fla. 2008).

157. *Dethmers Mfg. Co. v. Automatic Equip. Mfg. Co.*, 23 F. Supp. 2d 974, 1008-09 (N.D. Iowa 1998) (emphasis omitted).

158. *See, e.g.*, *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp. 2d 1255, 1264 (W.D. Mo. 2001) (A claim for injunctive relief against pipeline owner was dismissed pursuant to Rule 12(f), because the claims were reiterations of trespass claims that also sought injunctive relief.); *Velez v. City of New London*, 903 F. Supp. 286, 291 (D. Conn. 1995) (striking *respondeat superior* claim because plaintiff had recourse against defendant via indemnification); *Kusek v. Family Circle, Inc.*, 894 F. Supp. 522, 528 (D. Mass. 1995) (rejecting claim for unjust enrichment and another claim of “co-opt” as merely recasting prior claims for trademark infringement and consumer fraud); *Sudul v. Computer Outsourcing Servs.*, 868 F. Supp. 59, 61 (S.D.N.Y. 1994) (finding claim redundant that essentially duplicated another claim involving identical promisor, acts of breach, and measure of damages).

159. *See, e.g.*, *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1237 n.20 (11th Cir. 1999) (noting trial court’s dismissal at trial of false light claim at the close of the evidence, because “the false light and defamation claims were duplicative and thus not separately actionable”).

160. *See, e.g.*, *Davidson v. John Deere & Co.*, 644 F. Supp. 707, 708, 712-13 (N.D. Ind. 1986) (dismissing UCC claim of breach of a implied warranty as duplicative of strict liability/products liability claim in response to summary judgment motion); *Lutz v. Royal Ins. Co. of America*, 586 A.2d 278, 289 (N.J. Super. Ct. App. Div. 1991) (affirming

In a case consisting of a false light count that is not coupled with a defamation claim but tracks the elements of a libel count, a motion to dismiss is appropriate.<sup>161</sup> Alternatively, the defendant might answer, assert any defamation defenses that apply, and argue those defenses in a dispositive motion or at trial.<sup>162</sup>

## VI. CONCLUSION

Courts and legislatures have spent decades developing intricate rules that govern claims for defamation. Given this well-established jurisprudence, “there is nothing to be gained from taking a problem easily solvable under the traditional rules of defamation and shunting it over to the murky recesses of other torts.”<sup>163</sup> In fact, not only is nothing to be gained, but much is to be lost if the well-established speech-protecting rules of defamation law are evaded. The common law and First Amendment require that false light claims based upon defamatory falsehoods be dismissed or, at a minimum, subject to the rules of defamation.

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summary judgment for the defense on interference claim because the same evidence supported that claim and the failed defamation claim).

161. *See, e.g.,* Cain v. Hearst Corp., 21 Media L. Rptr. 1511, 1993 WL 304412 (S.D. Tex. 1993) (granting motion to dismiss false light claim because limitations period applicable to libel claims had expired), *aff'd on other grounds*, 35 F.3d 562 (5th Cir. 1994); *cf.* Green v. Time, Inc., 147 N.Y.S.2d 828, 830 (N.Y. Sup. Ct. 1955) (granting motion to dismiss prima facie tort claim based upon supposedly inaccurate magazine article; “reading of the complaint herein shows that plaintiff’s grievance arises from the publication of two articles in defendant’s magazine, which plaintiff claims injured him in his reputation,” and libel statute of limitations had expired with regard to first article), *aff'd*, 146 N.Y.S.2d 812 (N.Y. App. Div. 1955), *aff'd*, 143 N.E.2d 517 (N.Y. 1957); Koussevitzky v. Allen, Towne & Heath, Inc., 68 N.Y.S.2d 779, 784-85 (N.Y. Sup. Ct. 1947) (dismissing claim for injunction halting publication of supposedly false and defamatory invasion of privacy, and applying settled doctrine that “equity will not restrain the publication of a libel”), *aff'd*, 69 N.Y.S.2d 432 (N.Y. App. Div. 1947).

162. *See, e.g.,* Rinsley v. Brandt, 700 F.2d 1304, 1307-08 (10th Cir. 1983) (The defense summary judgment in false light case was affirmed; “the defense available in a defamation action that the allegedly defamatory statements are opinions, not assertions of fact, is also available in a false light privacy action.”); Varnish v. Best Medium Pub. Co., 405 F.2d 608, 611-12 (2d Cir. 1968) (The publisher argued a defamation defense of substantial truth in seeking a directed verdict and judgment notwithstanding the verdict on a false light claim.).

163. Rich & Brilliant, *supra* note 153, at 41 (internal quotations omitted) (quoting Alfred Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205, 1242 (1976)).