CIVIL LIABILITY, CIVILITY, AND NORMS

Ethical Complexities in Defamation and False Light Claims

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ABSTRACT

Richard Simmons was for decades a well-known American celebrity, health and fitness guru, motivational life-coach, comedian, and actor. In early 2014, Simmons left the public spotlight. In 2016, the National Enquirer claimed in a front-page article that Simmons had transitioned from male to female. Simmons sued the Enquirer for defamation and false light invasion of privacy. The author of this article represented him. The case vividly illustrated a long-standing conundrum over what should or should not be deemed defamatory. The realistic position, which can be traced to opinions by the jurists Oliver Wendell Holmes and Learned Hand, asks only whether, viewed realistically, the falsehoods would damage the reputation of the plaintiff within a substantial segment of the community, without regard to whether the views of that segment of the community were "right-thinking." In contrast, the idealistic position requires that the segment of the community in which the reputation of the plaintiff would be diminished be "right-thinking," in the sense that their views reflect the higher or more progressive moral sensibilities of society. Simmons lost, because the court adopted the idealistic view, reasoning that right-thinking persons would not think less of Simmons for having transitioned. The article explores the tensions between these opposing positions and argues in addition that whether or not defamation is an appropriate legal response to the falsehoods Simmons alleged, the tort of false light, properly understood, should still be available, because it was designed to provide a remedy for falsehoods that, while arguably not defamatory, would nonetheless be highly offensive to a reasonable person.

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I. INTRODUCTION

This essay is written by a cross-over artist, an academic who has maintained an active role as a litigator. I have written scores of briefs and presented scores of oral arguments in state and federal courts across the nation on First Amendment issues, including briefing and argument in the United States Supreme Court. This role itself constantly places me in positions of ethical, moral, and intellectual complexity. I often sense that the conflicts presented to an advocate-scholar are more complex than the conflicts of either the pure advocate or the pure scholar.

In this essay, I tell the story of one case in which I was an advocate. The story is told for the moral and ethical complexities it illuminates regarding the core defining element of tort claims for defamation and false light invasion of privacy. I describe the intriguing issues posed as the "defamation conundrum" and the "false light conundrum."

Richard Simmons was for decades a well-known American celebrity, health and fitness guru, motivational life-coach, comedian, and actor. Through his own programs and constant appearances on talk shows, he held a pervasive presence in American pop culture.

In early 2014, Simmons left the public spotlight. His departure from pop culture was sudden and unexplained. Many followers assumed he was a missing person. His departure from public life spurred the popular podcast "Missing Richard Simmons." On June 8, 2016, the *National Enquirer* claimed in a front-page article that Simmons transitioned from male to female. The article included many specific statements adding detail and verisimilitude to the claim that Simmons had begun living as a woman, including:

- Mr. Simmons is "NOW A WOMAN!"
- He "has undergone shocking sex surgery to change from a man to a woman"
- He has "slowly transformed into a female with breast implants, hormone treatments and medical consultations on castration"
- He "had a boob job"
- He had a "SECRET BOOB JOB & CASTRATION SURGERY"
- He "is now considering having a vagina built by doctors"
- He is "The New Caitlyn Jenner"
- He is "Now living as a gal named Fiona"
- He "IS NOW CALLED Fiona!"
- "Fitness guru TRANSITIONS to a Woman"
- He is living in a "BIZARRE WORLD" as a woman
- Sex-change surgery was the "REAL REASON HE DISAPPEARED FOR 924 DAYS!"
- He has been "EXPOSED!"
- His brother Leonard "feels the [nonexistent] sex change conflicts with their Catholic upbringing"
- The photos published by the Enquirer are "not just Richard Simmons in drag"
- The photos published by the Enquirer "prove" the assertions.[1]

Simmons sued. I served as his co-counsel. Simmons alleged that all the material allegations against him were false and that the purported principal source for the stories, Mauro Oliveira, had disclaimed the accounts and quotations attributed to him.

I argued the case in Los Angeles in response to the *Enquirer*'s anti-SLAPP motion. I lost. It was not just any routine loss, but a resounding and resonating loss. The court imposed punishing attorneys' fees on Simmons well over $200,000 as recompense to the *Enquirer*.

1. Complaint at 9, Simmons v. Am. Media, Inc., No. BC660633, 2017 WL 1843836 (Cal. Super. dismissed May 8, 2017).

II. THE DEFAMATION CONUNDRUM

A. Posing the Conundrum

The "defamation conundrum" posed by the Simmons case was simple: Should a statement falsely stating that a person has transitioned from one gender to another be treated as defamation?

The argument that courts should treat such false statements as defamatory is grounded in an opinion from one of the most famous of all American legal realists —Oliver Wendell Holmes.[2] Transgender persons have historically suffered discrimination and prejudice and, judging the matter realistically, Simmons would suffer reputational injury.

The argument that courts should *not* treat such false statements as defamatory is grounded in American idealism.[3] In an ideal and enlightened society, discrimination and prejudice based on sexual orientation and gender identity would not exist. If enlightened or "right-thinking" persons would not think less of Simmons for having transitioned from male to female, a false statement that he had undergone such a transition ought not be deemed defamatory.

B. The Holmes–Hand Pedigree of the Legal Realist Position

The pedigree of the legal realist position may be traced to an opinion of Supreme Court Justice Oliver Wendell Holmes in *Peck v. Tribune Co.*[4] In *Peck*, a *Chicago Tribune* advertiser implied that an abstinent nurse enjoyed malt whiskey. Reversing the Seventh Circuit's view that the implication should not be deemed libelous, because "there was no general consensus of opinion that to drink whisky is wrong,"[5] the Supreme Court grounded American defamation law in legal realism. It held that a "falsehood need not entail universal hatred to constitute a cause of action."[6] "No conduct is hated by all,"[7] Justice Holmes observed. "That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm."[8] Justice Holmes responded to the question of whether only a minority of the community would regard the statement as libelous as "beside the point."[9] "If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote."[10]

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2. Peck v. Tribune Co., 214 U.S. 185, 190 (1909).
3. *See* Miller v. David, 9 L.R. - C.P. 118 (1874), *discussed in* Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 828 n.14 (1984); Mawe v. Pigott 4 Ir. R - C.L. 54 (1869); RODNEY SMOLLA, LAW OF DEFAMATION § 4.3 (Thomson Reuters 2021 Update Ed.), *quoting* Leetham v. Rank, 57 Sol. J. 111 (1912).
4. *Peck*, 214 U.S. at 190.
5. *Id.* at 189.
6. *Id.* at 190.
7. *Id.*
8. *Id.*
9. *Id.* at 189.
10. *Id.* at 190.

Justice Holmes's opinion also emphasized the quintessential role of juries in American defamation law, observing, "Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view."[11]

Perhaps the most famous articulation of the realistic approach is Judge Learned Hand's in *Grant v. Reader's Digest Association, Inc*.[12] In *Grant*, Judge Hand held actionable a false statement that a lawyer was an agent of the Communist Party. "We do not believe, therefore, that we need say whether 'right-thinking' people would harbor similar feelings toward a lawyer, because he had been an agent for the Communist Party, or was a sympathizer with its aims and means,"[13] Judge Hand wrote. "It is enough if there be some, as there certainly are, who would feel so, even though they would be 'wrong-thinking' people if they did."[14] Judge Hand explained that a plaintiff is entitled to recover even when defamed in the eyes of a minority, and even when that minority may be out of step with the "right thinking" majority, because "[a] man may value his reputation even among those who do not embrace the prevailing moral standards."[15]

C. The Pedigree of the Idealistic Position

The idealistic position has an estimable pedigree. In my defamation treatise, I refer to this as the "English position," tracing its routes to English common-law decisions. "In response to the problem created by the differing effects that a communication may have on various recipients, the English tradition evolved an approach that concentrated on the effect of the communication in the eyes of society at large, if there was a clear social consensus as to the societal value system, or, in the alternative, on the effect in the eyes of the 'reasonable man.'"[16] Thus, in an 1874 English decision, *Miller v. David*,[17] the court held that a statement that an artisan favored a nine-hour workday was not defamatory, even though the statement caused the artisan to be blacklisted by local contractors and to suffer other damage, because many other people also approved of the longer workday. Similarly, in an 1869 decision from Ireland, *Mawe v. Pigott*,[18] an Irish priest was accused of informing on members of a group of Catholic insurgents, an accusation that would obviously cause deep resentment among many Catholics. The court held, however, that the accusation was not defamatory, because the ordinary

11. *Id*.
12. Grant v. Reader's Digest Ass'n, Inc., 151 F.2d 733 (2d Cir. 1945), *cert. denied*, 326 U.S. 797 (1946).
13. *Id*. at 735.
14. *Id*.
15. *Id*. at 734.
16. SMOLLA, *supra* note 3, *citing* PROSSER AND KEETON ON TORTS § 111, at 777 (citing Tolley v. J.S. Fry & Sons, 1 K.B. 467, A.C. 333 (1931)).
17. 9 L.R. - C.P. 118 (1874), *cited in* Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 828 n.14 (1984).
18. 4 Ir. R - C.L. 54 (1869).

reasonable person would not think less of someone for disclosing another's criminal activities. Thus, the consensus as it evolved in England was that "it is not enough to prove that the words spoken rendered the plaintiff obnoxious to a limited class."[19]

D. The Restatement Straddle

The position embraced by the Restatement (Second) of Torts seems to straddle the realistic and idealistic positions, noting that a statement may be deemed defamatory if it tends to prejudice the plaintiff in the "eyes of a substantial and respectable minority" of society:

> A communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them, and that it is made to one or more of them or in a manner that makes it proper to assume that it will reach them. On the other hand, it is not enough that the communication would be derogatory in the view of a single individual or a very small group of persons, if the group is not large enough to constitute a substantial minority.[20]

There is some ambiguity here. The word "substantial" is plainly aimed at the size of the minority. As the Restatement clearly states, it is not enough that one person or a "small group of persons" would have a lower estimation of the plaintiff. The notion that a statement may be deemed defamatory if it would prejudice the plaintiff in the eyes of a substantial minority does seem to partake at least in part of the realism of Holmes and Hand, particularly the comment by Holmes in *Peck* that the issue is not a question of majority vote.[21]

The Restatement's use of the word "respectable," however, arguably conjures elements of the idealistic position, if "respectable" means that the group's position is deemed *worthy* of respect. On the other hand, Holmes in *Peck* used the phrase "important and respectable," which seems to connote a meaning closer to "influential." But respectable has another common meaning, reflecting a normative judgment akin to "right-right thinking."

E. Comparison to the 2020 Election Theft Lie

The ambiguity in the Restatement standard is apparent when considering the current division in the United States over the idea that the 2020 election was stolen from Donald Trump.

On January 6, 2021, a rally was held on the Ellipse in front of the White House in Washington, D.C. At the event, President Donald Trump and other speakers exhorted those in attendance to march down Pennsylvania Avenue from the

19. SMOLLA, *supra* note 3 (quoting Leetham v. Rank, 57 Sol. J. 111 (1912)).
20. RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (AM. L. INST. 1977).
21. Peck v. Tribune Co., 214 U.S. 185, 190 (1909).

White House to the United States Capitol Building, where both houses of Congress and Vice President Mike Pence were assembling to certify the results of the 2020 election for President of the United States. Donald Trump and his supporters believed that Joseph Biden was not the duly elected President of the United States, and that the election had been stolen from Donald Trump.

Spurred on by cries of "trial by combat" and "stop the steal," many of those who attended the rally marched down Pennsylvania Avenue to the United States Capitol. The mob proceeded to storm the Capitol Building to disrupt the constitutional process through which the United States Congress would—following over two centuries of constitutional tradition and practice—certify the results of the election as determined by the Electoral College and provide for the peaceful transition of government.

> As it stormed the Capitol, the mob yelled out "President Trump Sent Us," "Hang Mike Pence," and "Traitor Traitor Traitor." The insurrectionists assaulted police officers with weapons and chemical agents. They seized control of the Senate chamber floor, the Office of the Speaker of the House, and major sections of the Capitol complex. Members and their staffs were trapped and terrorized. Many officials (including the Vice President himself) barely escaped the rioters. The line of succession to the Presidency was endangered. Our seat of government was violated, vandalized, and desecrated. Congress's count of electoral votes was delayed until nightfall and not completed until 4 o'clock the next morning. Hundreds of people were injured in the assault. Five people—including a Capitol Police officer—died.[22]

Vituperative political debate and division raged over whether Joseph Biden was or was not the lawful President of the United States. President Trump and his supporters insisted that the election was stolen through massive fraud.[23]

Are those who continue to cling to the manifest falsehood that the election was stolen members of a "substantial and respectable" minority? An idealist would

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22. Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump (Jan. 28, 2021), https://perma.cc/97U2-H7GV.

23. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2020, 3:34 PM) ("Watch: Hundreds of Activists Gather for 'Stop the Steal' Rally in Georgia https://t.co/vUG1bqG9yg via @BreitbartNews Big Rallies all over the Country. The proof pouring in is undeniable. Many more votes than needed. This was a LANDSLIDE!"); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 24, 2020, 7:33 AM) ("Poll: 79 Percent of Trump Voters Believe 'Election Was Stolen' https://t.co/PmMBmt05AI via @BreitbartNews They are 100% correct, but we are fighting hard. Our big lawsuit, which spells out in great detail all of the ballot fraud and more, will soon be filled [sic]. RIGGED ELECTION!"); President Donald J. Trump, Speech on Election Fraud Claims (Dec. 2, 2020) ("But no matter when it happens, when they see fraud, when they see false votes and when those votes number far more than is necessary, you can't let another person steal that election from you. All over the country, people are together in holding up signs, 'Stop the steal.'"); Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 19, 2020, 9:41 AM) ("He didn't win the Election. He lost all 6 Swing States, by a lot. They then dumped hundreds of thousands of votes in each one, and got caught. Now Republican politicians have to fight so that their great victory is not stolen. Don't be weak fools! https://t.co/d9Bgu8XPIj").

surely say "no," there is no way that such persons are "right-thinking." In contrast, the realistic position advanced by Holmes and Hand would likely conclude that no matter how "wrong-thinking," the widespread belief among those who support Donald Trump constitutes, however objectively wrong-headed, a substantial and respectable minority.

F. The Race Cases

There was a time when courts were willing to hold that it was defamatory to falsely describe a white person as Black.[24] In a 1954 decision, the same year the United States Supreme Court decided *Brown v. Board of Education*,[25] the Supreme Court of Mississippi held that "in this State to assert in print that a white woman is a Negro is libelous per se."[26]

In 1957, the Supreme Court of South Carolina in *Bowen v. Independent Publishing Co*.[27] refused to abandon the rule "that under the older decisions . . . it was actionable *per se* to publish of a white person that he is a Negro."[28] The court admitted that "[t]he earlier cases were decided at a time when slavery existed, and since then great changes have taken place in the legal and political status of the colored race."[29] Even so, the court refused to jettison the rule, reasoning that "there is still to be considered the social distinction existing between the races, since libel may be based upon social status."[30] Elaborating, the court stated: "Although to publish in a newspaper of a white woman that she is a Negro imputes no mental, moral or physical fault for which she may justly be held accountable to public opinion, yet in view of the social habits and customs deep-rooted in this State, such publication is calculated to affect her standing in society and to injure her in the estimation of her friends and acquaintances."[31]

In my defamation treatise, I take the position that decisions such as these are no longer even *constitutionally* permissible. I theorize that recognizing the erroneous identification of someone's race as defamatory, particularly the paradigm of the older cases holding that for a white person to be identified as Black is defamation *per se*, places a legal rule of the state in the position of aggrandizing and lending the state's imprimatur to the notion that to be identified as Black is inherently stigmatizing. The state, through its rule, becomes party to the stigmatization.[32]

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24. *See* Jones v. R.L. Polk & Co., 67 So. 577 (Ala. 1915); Upton v. Times-Democrat Publ'g Co., 28 So. 970 (La. 1900); Bowen v. Indep. Publ'g Co., 96 S.E.2d 564 (S.C. 1957); Spencer v. Looney, 82 S.E. 745 (Va. 1914).

25. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

26. Natchez Times Publ'g Co. v. Dunigan, 72 So. 2d 681, 684 (1954).

27. Bowen, 230 S.E.2d at 565.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. SMOLLA, *supra* note 3.

In the words of Robert Post, such holdings operate as a mechanism through which "defamation law enforced the values of the dominant white culture."[33] As Lyrissa Barnett Lidsky has written, critiquing the South Carolina decision in *Bowen*:

> Here, the *Bowen* court automatically assumed that the values of the dominant (read: white and racist) culture would brand a black person as being of inferior "social status" and that plaintiff, her friends and acquaintances shared the values of this culture. Indeed, the court considered the issue hardly worth discussing, which is perhaps understandable since presumably the members of the court were themselves members of this dominant culture. But perhaps more significant was the court's unconscious prioritization of the dominant culture's values by assuming without question that the plaintiff's community was a "considerable and respectable" one whose values are worthy of the law's attention, respect, and support. In doing so, the court ignored the views of other communities, particularly the black community, and made a value choice cloaked in the guise of simply following a long line of established precedent. In essence, therefore, the defamatoriness determination enables the dominant community to validate the status quo and thereby to validate racist views.[34]

The race defamation cases have largely disappeared from the landscape.[35] To the extent any more recent cases address the problem, even obliquely, however, they appear to reject the proposition that false imputations of race may be defamatory.[36] The evolution of the race cases, including my own interpretation of the learning to be gleaned from that evolution, was in doctrinal and moral tension with the Complaint I drafted on behalf of Simmons.

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33. Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 300 n.18 (1988).

34. Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 30 (1996) (citation omitted).

35. *Id.* at 31.

36. *See* Thomason v. Times-Journal, Inc., 379 S.E.2d 551 (Ga. Ct. App. 1989) ("Further, like the trial judge, we are not persuaded by appellant's assertions and argument that 'special circumstances' exist in this case, because the funeral home listed in the obituary 'has primarily black clientel [sic],' her family 'is white,' and she has been 'ridiculed and held in contempt' because the funeral home 'serves primarily black people whose customs at death are different than whites.'"); Polygram Records, Inc. v. Superior Ct., 170 Cal. App. 3d 543, 557 (Ct. App. 1985) ("As indicated, the defamation claim in this case rests in part on the argument that Williams' joke 'associates "Rege" brand wines with Blacks,' allegedly 'a socio-economic group of persons commonly considered to be the antithesis of wine connoisseurs,' who 'harbor obviously unsophisticated tastes in wines.' This argument is utterly untenable. Assuming, purely for the sake of argument, that the joke did convey the meanings ascribed by Rege, he could not recover damages based upon a theory that his wine had been disparaged by association with a particular racial or ethnic group, or a segment thereof. Courts will not condone theories of recovery which promote or effectuate discriminatory conduct.").

G. Sexual Orientation Cases

In defamation cases involving false statements that the plaintiff is gay or lesbian, courts have split over whether to treat such assertions as actionable. The law has generally evolved in the same progression as the race cases, though on a slower and more convoluted track. The split is perhaps best captured by opposite conclusions on the issue reached by two different federal district court judges in the United States District Court for the Southern District of New York within the scope of a year. The United States Court of Appeals for the Second Circuit did not hear appeals in either case, leaving the law in the Southern District of New York divided.[37]

The defamation cases involving sexual orientation are complicated in part by the arcane and byzantine rules distinguishing libel and slander, and in turn "libel per se" and "slander per se."[38] These rules differ from state to state and are hopelessly confusing. One strain of common law doctrine historically associated principally with "slander per se" treated slander falling within certain defined categories as defamatory per se.[39] Among those categories were slanders imputing the commission of serious crime.[40] Because for decades homosexual conduct was criminal, it seemed to follow that imputations of homosexual conduct automatically qualified as slander per se. The imputation of crime argument, however, effectively evaporated with the Supreme Court's landmark decision in *Lawrence v. Texas*,[41] in which the Court held that laws criminalizing homosexual conduct violate the Due Process Clause of the Fourteenth Amendment.[42]

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37. *Compare* Stern v. Cosby, 645 F. Supp. 2d 258 (S.D.N.Y. 2009) (imputations of homosexuality not actionable per se because they do not fall one of the four traditional defamation per se categories), *with* Gallo v. Alitalia-Linee Aeree Italiane-Société per Azioni, 585 F. Supp. 2d 520, 549–50 (S.D.N.Y. 2008) (holding imputations of homosexuality actionable given the substantial prejudice against homosexuals that continues to exist the real world). Prior New York cases held that such imputations were actionable defamation. *See* Moye v. Gary, 595 F. Supp. 738, 740 (S.D.N.Y.1984) (noting that some New York courts include homosexuality); Tourge v. City of Albany, 285 A.D.2d 785, 786 (N.Y. App. Div. 2001) (noting same as above); Privitera v. Town of Phelps, 79 A.D.2d 1, 3 (N.Y. App. Div. 1981) (noting same as above); Nowark v. Maguire, 22 A.D.2d 901, 901 (N.Y. App. Div. 1964) (noting same as above). *See also* Callahan v. First Congregational Church of Haverhill, 808 N.E.2d 301 (Mass. 2004) (noting that a false accusation of homosexuality may be actionable).

38. SMOLLA, *supra* note 3, at §§ 7:1–7:35.

39. *Id.*

40. *Id.*

41. Lawrence v. Texas, 539 U.S. 558 (2003).

42. Yonaty v. Mincolla, 97 A.D.3d 141, 144 (N.Y. App. Div. 2012) ("We agree with defendant and amici that these Appellate Division decisions are inconsistent with current public policy and should no longer be followed. Defamation 'necessarily . . . involves the idea of disgrace[.]' Defendant and amici argue—correctly, in our view—that the prior cases categorizing statements that falsely impute homosexuality as defamatory per se are based upon the flawed premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual. In fact, such a rule necessarily equates individuals who are lesbian, gay or bisexual with those who have committed a 'serious crime'—one of the four established per se categories[.] That premise is inconsistent with the reasoning underlying the decision of the Supreme Court of the United States in *Lawrence v. Texas*[.]") (citation omitted).

H. Simmons and Transgender Status

In drafting the Complaint on behalf of Richard Simmons, and in arguing against the *Enquirer*'s anti-SLAPP motion to dismiss, I was torn over how to present and argue the divide between the American realistic and idealistic positions, and what to make of the evolution of defamation law as it has progressed in the race cases and cases involving sexual orientation.

On one hand, realistically, there was overwhelming evidence of discrimination and prejudice against transgender persons. In the words of the Southern District of New York, discrimination and persecution against transgender people "is not yet history":

> First, transgender people have suffered a history of persecution and discrimination. As the Second Circuit put it with respect to gay people, this is "not much in debate." . . . Moreover, this history of persecution and discrimination is not yet history. Plaintiff cites data indicating that transgender people report high rates of discrimination in education, employment, housing, and access to healthcare.[43]

In *Simmons*, I put before the California Superior Court the reality on the street:

- Nearly half (46%) of respondents were verbally harassed in the past year because of their transgender identity.
- Nearly half (47%) of respondents were sexually assaulted at some point in their lifetime and one in ten (10%) were sexually assaulted in the past year.
- One-third (33%) of those who saw a health care provider in the past year reported having at least one negative experience related to being transgender.
- In the past year, twenty-three percent (23%) of respondents did not see a doctor when they needed to because of fear of being mistreated as a transgender person, and 33% did not see a doctor when needed because they could not afford it.
- Thirty-nine percent (39%) of respondents experienced serious psychological distress.
- Forty percent (40%) have attempted suicide in their lifetime, nearly nine times the rate in the U.S. population (4.6%).
- More than three-quarters (77%) of those who were out or perceived as transgender at some point between Kindergarten and Grade 12 (K–12) experienced some form of mistreatment.
- In the past year, twenty-seven percent (27%) of those who held or applied for a job during that year—nineteen percent (19%) of all respondents—

43. Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (internal citations omitted).

> reported being fired, denied a promotion, or not being hired for a job they applied for because of their gender identity or expression.
> - Nearly one-quarter (23%) of respondents experienced some form of housing discrimination in the past year, such as being evicted from their home or denied a home or apartment because of being transgender.
> - Respondents experienced high levels of mistreatment and harassment by police. In the past year, of respondents who interacted with police or law enforcement officers who thought or knew they were transgender, more than half (58%) experienced some form of mistreatment.
> - More than half (57%) of respondents said they would feel uncomfortable asking the police for help if they needed it.
> - Of those who were arrested in the past year (2%), nearly one-quarter (22%) believed they were arrested because they were transgender.
> - Nearly one-third (31%) experienced at least one type of mistreatment in the past year in a place of public accommodation.[44]

I also put before the California Superior Court, President Trump's order banning transgender persons from serving in the United States military.[45] As one seasoned Pentagon journalist explained their reaction to President Trump's announcement, "it is a story about men and women and their gender identity—so personal that basic questions felt invasive. Because hanging over those questions—'are you in the process of transitioning?'—were issues so fundamental to a person's humanity that the very asking seemed a violation."[46]

Even so, I fully appreciated the moral dilemma that our suit posed for the Superior Court. Even if the Court accepted—as I was sure it would—the sad reality that transgender persons are subject to terrible prejudice and discrimination, the Court would be understandably loath to appear to aggrandize and endorse that prejudice by holding false imputations of having transitioned from male to female actionable as defamation.

My reservations proved prescient. The Superior Court rejected the realist position and accepted the idealist position. Here is the Court's key finding:

> The court does not mean to imply in its holding that the difficulties and bigotry facing transgender individuals is minimal or nonexistent. . . . However, this

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44. Trial Record, Simmons v. Am. Media, Inc., No. BC660633, 2017 WL 5325381 (Cal. Super. Sept. 01, 2017).

45. *See* Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security (Aug. 25, 2017) ("Accordingly, by the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States under the Constitution and the laws of the United States of America, including Article II of the Constitution, I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016.").

46. Helene Cooper, *A Pentagon Correspondent Keeps Sight of the Person Inside the Uniform*, N.Y. TIMES (July 30, 2017), https://www.nytimes.com/2017/07/30/insider/a-pentagon-correspondent-keeps-sight-of-the-person-inside-the-uniform-transgender.html [https://perma.cc/GEM7-BJVB].

> court finds that even if there is a sizeable portion of the population who would view being transgender as negative, the court should not, in the words of our cousins in Massachusetts, "directly or indirectly, give effect to these prejudices." . . . Similar to . . . that court's reasoning regarding the prejudices facing homosexuals, "[i]f this Court were to agree that calling someone" transgender "is defamatory per se—it would, in effect, validate that sentiment and legitimize relegating [transgender people] to second-class status." Such a finding is consistent with holdings that misidentifying one's race, medical condition, or sexual orientation is not libelous per se simply because there exist a portion of the population that expresses prejudice towards those groups.[47]

Anticipating the plausible force of these arguments, I had a backup plan, which I included in my draft of the Complaint and argued passionately before the Superior Court. Even if not actionable as defamation, I argued, Simmons should still be able to maintain an action for false light invasion of privacy.

III. THE FALSE LIGHT CONUNDRUM

A. The Insult to Human Dignity

As an advocate, I am deeply attuned to the ethical obligations incumbent on me not to advance frivolous positions. As a professional, I also strive to keep a professional distance between me and my clients, guarding against allowing my professional judgment to be clouded by personal affinities and passions for the cause. Yet lawyers are human, and I often find myself unable to entirely resist emotional investment in the cases I take on.

I became emotionally invested in the Richard Simmons case, in part out of empathy for my client, and in part out of outrage at the callous behavior of the *Enquirer*. I took it as especially rich that the *Enquirer* had the duplicitous temerity to act as if it was the standard-bearer for human rights and equality for transgender persons. This was a farce.

The *Enquirer* was no beacon of transgender equality. The *Enquirer*'s sensationalist portrayal of Simmons's alleged shocking sex surgery, breast implants, hormone treatments, and consultations on medical castration was cynically calculated to mock, deride, and insult transgender persons. The articles also contained such statements as "[Richard Simmons] has been 'EXPOSED!'" and that "[Richard Simmons] is living in a 'BIZARRE WORLD' as a woman."[48] The *Enquirer* bragged of "exposing" Simmons or used the word "bizarre" to characterize his alleged new life as a trans woman. The *Enquirer* at once cynically and deliberately published falsehoods about Simmons to sell magazines, touting to the world its revelations as "shocking" and "bizarre," intentionally pandering to societal prejudice, and then righteously pretended in its argument to the court that such societal prejudice did not exist.

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47. Simmons v. Am. Media, Inc., 2017 WL 5905904, at *9 (Cal. Super. Sept. 1, 2017).
48. Complaint at 9, Simmons v. Am. Media, Inc., 2017 WL 5905904 (Cal. Super. Sept. 1, 2017).

Yet this was a wrong in search of a remedy. If defamation would not do, what might?

B. False Light Elements

The tort of "false light invasion of privacy" has been controversial since its inception. Some jurisdictions recognize it, while some do not.[49] This recitation in the Restatement (Second) Torts was adopted by countless state and federal courts:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> (b) the actor has knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[50]

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49. *See* SMOLLA, *supra* note 3, at §§ 10:28–10:28.50 (collecting and analyzing cases rejecting the false light tort).

50. RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977). *See also* Morgenstern v. Fox Television Stations of Phila., 2008, WL 4792503, at *10 (E.D. Pa., 2008) (citing RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977); Fanelle v. LoJack Corp., 79 F. Supp. 2d 558, 563 (E.D. Pa. 2000)) ("One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if (a) the false light claim in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."); Corey v. Pierce County, 154 Wash. App. 752, 762 (Wash. Ct. App. Div. 1 2010) (noting that a false light claim arises when "someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed"); Sandholm v. Kuecker, 405 Ill. App. 3d 835, 850–51 (Ill. App. Ct. 2d Dist. 2010) (citing Duncan v. Peterson, 835 N.E.2d 411, 422–23 (Ill. App. 2005)) ("A false light claim must allege that: (1) the defendant's actions placed the plaintiff in a false light before the public; (2) the false light would be highly offensive to a reasonable person; and (3) the defendant acted with actual malice, that is, with knowledge of the falsity of the statement or with a reckless disregard for whether the statement was true or false."); Byers v. Snyder, 44 Kan. App. 2d 380, 381 (2010) ("The elements of a claim for false light are (1) that publication of some kind must be made to a third party, (2) that the publication must falsely represent the person, and (3) that representation must be highly offensive to a reasonable person."); Krajewski v. Gusoff, 53 A.3d 793, 806 (Pa. Super 2012) ("In contradistinction to a claim of invasion of privacy for publicity given to private life, . . . [a claim of] false light invasion of privacy does not require proof that the matter giving rise to the plaintiff's claim be restricted to one of private concern[;] . . . 'recovery in tort for disclosure of public, as well as private, facts, is warranted to protect a claimant's right to be free from being placed in a false light . . . which may be caused by the discriminate publication of such facts."); Armstrong v. Thompson, 80 A.3d 177, 188 (D.C. 2013) ("To succeed on a claim of false light invasion of privacy, a plaintiff must show: '(1) publicity (2) about a false statement, representation, or imputation (3) understood to be of and concerning the plaintiff, and (4) which places the plaintiff in a false light that would be offensive to a reasonable person.'") (internal quotations and citations omitted); Graboff v. Colleran Firm, 744 F.3d 128, 136 (3d Cir. 2014) ("Pennsylvania has adopted the definition of false light invasion of privacy from the Restatement (Second) of Torts, which imposes liability on a person who publishes material that 'is not true, is highly offensive to a reasonable person, and is publicized with knowledge or in reckless disregard of its falsity,'") (internal citations omitted); Vogel v. W. T. Grant Co., 327 A.2d 133, 135–36 (Pa. 1974)

What matters in all of this is that the existence of reputational harm, or defamatory meaning, is not an element of the false light tort. Indeed, this is the *sole* reason for the false light tort's existence: to supply a remedy in the unusual case in which a falsity is highly offensive though it portrays the plaintiff in a positive or neutral light—or in Richard Simmons's case, portrays the plaintiff in a manner that courts engaged in the "right thinking" idealistic approach to defamatory meaning refuse to deem actionable.

I argued that Richard Simmons's Complaint was the classic example of a case in which a false light claim could and should survive if the defamation claim was dismissed. Simmons alleged, and a reasonable jury could find, that to be portrayed as having undergone a sex change and as transitioning from one gender to another in a lurid, exploitative, and sensationalist manner was highly offensive to a reasonable person, whether or not the portrayal was defamatory. There were, however, complications posed by constitutional law, common law, and common sense.

(adopting Restatement Second, Torts definitions for all four invasion of privacy claims); Carson v. Palombo, 18 N.E.3d 1036, 1048 (Ind. Ct. App. 2014) ("Invasion of privacy by false light is 'publicity that unreasonably places the other in a false light before the public.' . . . Like a claim of defamation, the plaintiff cannot succeed on a claim of invasion of privacy by false light if the alleged communication is accurate or true. One who has established a cause of action for invasion of privacy is entitled to recover damages for (1) the harm to her interest in privacy from the invasion; (2) her mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and (3) special damage of which the invasion is a legal cause."); Desert Palm Surgical Grp., P.L.C. v. Petta, 343 P.3d 438, 449–50 (Ariz. Ct. App. 2015) (citing Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 786 (Ariz. 1989)) ("False light invasion of privacy is recognized in Arizona as a tort separate from defamation. . . . The distinction between defamation and false light invasion of privacy is, however, subtle. . . . To establish a claim for false light invasion of privacy, a plaintiff must show (1) the defendant, with knowledge of falsity or reckless disregard for the truth, gave publicity to information placing the plaintiff in a false light, and (2) the false light in which the plaintiff was placed would be highly offensive to a reasonable person in the plaintiff's position."); Dobias v. Oak Park and River Forest High School Dist. 200, 257 N.E.3d 551, 574 (Ill. App. Ct. 2016) ("To state a cause of action for false-light invasion of privacy, a plaintiff must allege that: (1) the plaintiff was placed in a false light before the public as a result of the defendants' actions; (2) the false light in which the plaintiff was placed would be highly offensive to a reasonable person; and (3) the defendant acted with actual malice, that is, with knowledge that the statements were false or with reckless disregard for whether the statements were true or false.") (citations omitted); Peffer v. Thompson, 754 Fed.Appx. 316, 320 (6th Cir. 2018) (quoting Duran v. Det. News, Inc., 504 N.W.2d 715, 720–21 (Mich. Ct. App. 1993)) ("To maintain an action for false light invasion of privacy in Michigan, 'a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position.'"); Martin v. Finley, 349 F. Supp. 3d 391, 423 (M.D. Pa. 2018) ("The tort of false light invasion of privacy is related to defamation. Pennsylvania has adopted the Restatement (Second) of Torts standard, which imposes liability on a person who publishes material that is not true, is highly offensive to a reasonable person, and is publicized with knowledge or in reckless disregard of its falsity.") (cleaned up); Ali v. Woodbridge Township School District, 957 F.3d 174, 183 (3d Cir. 2020) (quoting Romaine v. Kallinger, A.2d 284, 289 (N. J. 1988)) ("Similarly, New Jersey recognizes 'invasions of privacy involving publicity that unreasonably places the other in a false light before the public.'").

C. First Amendment Considerations

1. Alvarez

The *Enquirer*'s first line of argument was that imposition of liability for false light would violate the Supreme Court's decision in the "stolen valor" case, *United States v. Alvarez*.[51] *Alvarez* held that the First Amendment protects false statements of fact not connected to any palpable harm, such as a false statement about having received military honors. The *Alvarez* plurality opinion expressly carved out and distinguished defamation and invasion of privacy, however, describing "cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation."[52] The plurality opinion then proceeded to distinguish defamation cases by emphasizing that First Amendment values are protected in defamation actions by the "requirements of a knowing falsehood or reckless disregard for the truth."[53] Even more pointedly, the concurrence of Justice Breyer, joined by Justice Kagan, explicitly emphasized that *Alvarez* did not disturb pre-existing defamation or invasion of privacy doctrines.[54] These doctrines included tort recovery for "false light" and the "emotional-dignitary-privacy related" harms those torts exist to redress. The concurrence even cited with approval Restatement § 652E:

> Defamation statutes focus upon statements of a kind that harm the reputation of another or deter third parties from association or dealing with the victim. See *id*., §§ 558, 559. Torts involving the intentional infliction of emotional distress (like torts involving placing a victim in a false light) concern falsehoods that tend to cause harm to a specific victim of an emotional-, dignitary-, or privacy-related kind. See *id*., § 652E.[55]

In short, *Alvarez* held that a free-floating abstract false statement of fact could not be proscribed under the First Amendment. However, it plainly left room for false statements producing more palpable harm, such as false statements otherwise actionable as defamation or invasion of privacy.

2. Emotional Distress

A second First Amendment principle, however, cautions against the imposition of liability merely because the speech at issue is deemed offensive to mainstream sensibilities or would cause severe distress. In one sense, this is arguably the core principle of all First Amendment law, the "bedrock principle underlying the First

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51. 567 U.S. 709 (2012).
52. *Id*. at 719. (Kennedy, J., plurality).
53. *Id*. at 719–20.
54. *See* id. at 734–35 (Breyer J., joined by Kagan, J., concurring).
55. *Id*. at 734 (Breyer J., joined by Kagan, J., concurring) (citing RESTATEMENT (SECOND) OF TORTS §§ 558, 559, 652E (AM. L. INST. 1977)).

Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[56]

In the context of tort liability, the principle is most famously displayed in *Hustler Magazine, Inc. v. Falwell*.[57] There, the Court held that Reverend Jerry Falwell could not recover damages for intentional infliction of emotional distress against *Hustler Magazine* and its publisher Larry Flynt for a crude parody depicting Falwell as having sex with his mother in an outhouse.[58]

In 2011, in *Snyder v. Phelps*,[59] the Supreme Court extended the reach of *Hustler*, holding that the First Amendment protected the notoriously vicious homophobic protests of the Westboro Baptist Church at military funerals from liability for intentional infliction of emotional distress. The speech indisputably caused severe distress to the family of Matthew Snyder in their grief and sorrow over the burial of their son. In holding the speech protected by the First Amendment, the Court emphasized that the protests took place in public forums (streets and sidewalks outside the funeral area) and were on matters of public concern. Tracking *Hustler*, the Court rejected the assertion that a jury verdict could be based upon the jury's assessment that the conduct of the Westboro Church members was outrageous:

> The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was "outrageous." "Outrageousness," however, is a highly malleable standard with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[60]

3. Distinguishing False Light

How, in light of decisions such as *Alvarez*, *Hustler*, and *Snyder*, can the false light tort survive? *Alvarez* stands for the proposition that a free-floating lie untethered to any palpable harm (such as perjury, fraud, defamation, or invasion of privacy) is protected under the First Amendment. *Hustler* and *Snyder* stand for the proposition that the mere capacity of highly offensive or outrageous speech to inflict severe distress on its targets does not justify abridgment of that speech, at least when the subject is a matter of public concern and the speech occurs in a public forum. One might think that false light is doomed.

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56. Texas v. Johnson, 491 U.S. 397, 414 (1989).

57. *See* Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988).

58. *See* RODNEY SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL (1988).

59. *See* Snyder v. Phelps, 562 U.S. 443 (2011).

60. *Id.* at 458 (quoting *Hustler*, 484 U.S. at 55).

The doctrinal answer is simple. The logical and policy answers are perhaps less so. Doctrinally, false light survives, notwithstanding the likes of *Alvarez*, *Hustler*, and *Synder*.

Begin with a reprise of *Alvarez*, which specifically carved out from the compass of its ruling a falsehood forming the predicate for tort liability. The concurring opinion of Justices Breyer and Kagan included false light claims within that exemption. Thus, a statement giving rise to false light liability is not a free-floating lie but a lie tied to tortious conduct.

Consider next that the Supreme Court explicitly approved of recovery for the false light tort in *Time, Inc. v. Hill*.[61] Subsequently, in *Cantrell v. Forest City Publishing Co.*,[62] the Supreme Court affirmed a false light verdict in favor of plaintiffs for a story that did not damage their reputations but did cause "them to suffer outrage, mental distress, shame, and humiliation."[63] These cases hold that First Amendment interests are fully protected in false light claims by the requirement that the plaintiff prove actual malice.

Finally, and easily overlooked, is the Supreme Court's holding in *Time, Inc. v. Firestone*.[64] The decision in *Firestone* is most well-known for its holding that Mary Alice Firestone, who was married to Russell Firestone, the scion of one of America's wealthier industrial families, should be deemed a private figure for purposes of her defamation claim against *Time*. The article was a brief story about the Firestone divorce:

> DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."[65]

Sometimes overlooked, however, is an important subsidiary holding in the *Firestone* case of doctrinal importance to the false light conundrum.

For damages flowing from defamation, all states permit both *external* damage, the harm to that "relational interest" caused by injury to reputation, and *internal damage*, the emotional and mental anguish and distress suffered by the victim because of the defamatory statement.[66] Provided that the requisite fault is established, both types of recovery are permitted.[67]

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61. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967).
62. *See* Cantrell v. Forest City Pub. Co., 419 U.S. 245 (1974).
63. *Id.* at 248.
64. 424 U.S. 488 (1976).
65. *Id.* at 452.
66. *See* SMOLLA, *supra* note 3, at § 9:24.
67. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[T]he more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.").

As a matter of state common law, however, states differ on whether recovery for internal emotional distress is permissible without first establishing injury to reputation. Some decisions permit emotional distress damages only "parasitically" to damages based upon proof of reputational injury, while other decisions permit evidence of emotional distress standing alone to suffice as a basis for an award of actual damages.[68]

Florida happens to be one of the states that does not require proof of injury to reputation as a predicate to recovery of internal mental anguish damages. On the eve of trial, Mary Alice Firestone dropped any claim for injury to her reputation, seeking only recovery for the internal emotional distress caused by the libel. This presented the question of whether such stand-alone recovery for emotional distress was constitutionally permissible. The Supreme Court's clear answer was "yes:"

> Petitioner's theory seems to be that the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in Gertz. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.[69]

This holding in *Firestone* goes a long way toward clinching the doctrinal arguments about the constitutional propriety of permitting recovery in false light cases for distress inflicted upon the victim, even in the absence of reputational injury. Indeed, once a plaintiff drops any claim for external reputational harm and seeks damages only for the distress caused by the defamatory statement, the defamation claim becomes conceptually all but indistinguishable from false light.

I say "all but indistinguishable" here, anticipating a key issue that is coming up. For even when a plaintiff drops any claim for *damage* to reputation in a defamation suit, the plaintiff must still satisfy all elements of the defamation tort, which includes, at the threshold, *defamatory meaning*. Mary Alice Firestone, for example, *maintained* her claim that the *Time* article defamed her by implying adultery and promiscuity. It was only her claim for *damage* to her reputation that she dropped.

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68. SMOLLA, *supra* note 3, at § 9:24.
69. *Firestone*, 424 U.S. at 460.

D. Returning to the Conundrum

Which loops us back to Richard Simmons, and his claim for false light. If the First Amendment does not stand as a doctrinal barrier to his recovery for false light, there are still serious philosophical and policy issues to be addressed.

We may start with the simplest issue of all. What is the point of the false light tort? Why does it exist, and what possible societal interests or public policies does it vindicate? During the *Simmons* litigation, the lawyers for the *Enquirer* hit hard on this, noting that some dozen or so states (by the *Enquirer*'s count) had refused to recognize the false light tort, and that California has done or should do the same.[70]

The Restatement (Second) of Torts articulates the affirmative case for recognizing false light well:

> b. *Relation to defamation*. The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander under the rules stated in Chapter 24. In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity.
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> It is not, however, necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation.[71]

Restatement § 652E offers numerous illustrations of fact patterns in which a portrayal, though not defamatory, might nonetheless be highly offensive to a reasonable person, creating a jury issue on the question. Illustration 9 is significant:

> A is the pilot of an airplane flying across the Pacific. The plane develops motor trouble, and A succeeds in landing it after harrowing hours in the air. B Company broadcasts over television a dramatization of the flight, which enacts it in most respects in an accurate manner. Included in the broadcast, however, are scenes, known to B to be false, in which an actor representing A is shown as praying, reassuring passengers, and otherwise conducting himself in a

70. Counsel for the *Enquirer* stated in the Superior Court hearing: "The cases in New York, Florida, those [twelve] states have now said they don't recognize false light at all, period. California essentially is in the same place. It may exist on the books if you say false light, but it has to meet all the same elements of a defamation claim." Statement of Kelli Sager, Transcript of Hearing of Aug. 30, 2017, at 22, Simmons v. Am. Media, Inc., No. BC660633, 2017 WL 5325381 (Cal. Super. Sept. 1, 2017).

71. RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).

> fictitious manner that does not defame him or in any way reflect upon him. Whether this is an invasion of A's privacy depends upon whether it is found by the jury that the scenes would be highly objectionable to a reasonable man in A's position.[72]

I argued in *Simmons* that the California Supreme Court had endorsed the Restatement's position, relying on the most significant false light case in California, a case also involving the *National Enquirer*. The California Supreme Court, in its most comprehensive exposition on the false light tort in *Fellows v. National Enquirer, Inc.*,[73] declared simply: "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person."[74]

Thus, the key doctrinal swap differentiating the defamation and false light torts is the substitution of the core requirement of defamation that the false statement harms the reputation of the plaintiff for the core requirement of false light that the statement is highly offensive to a reasonable person. There will often be overlap, but not always. Here is the key passage from the California Supreme Court's opinion:

> In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. (Rest.2d Torts, § 652E, p. 394.) Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well. The substantial overlap between the two torts raised from the outset the question of the extent to which the restrictions and limitations on defamation actions would be applicable to actions for false light invasion of privacy.[75]

As an advocate, I thought this passage was doctrinally important on multiple levels. To begin, *Fellows* cited with approval Restatement (Second) of Torts § 652E. Second, the passage makes it clear that *it is not necessary that the plaintiff be defamed* to maintain a false light claim. Third, it uses the phrase "in *most* cases," not the phrase "in *all* cases," in describing the overlap. Fourth, the final sentence describes the "substantial overlap," not the "complete overlap." Fifth, the final sentence describes the important question as to the "*extent* to which" doctrines governing libel transfer to false light.

Yet, there were formidable headwinds. Loose claims that false light and defamation are entirely duplicative were scattered throughout California–if a defamation

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72. RESTATEMENT (SECOND) OF TORTS § 652E, illus. 9 (AM. L. INST. 1977). The Reporter's Notes reveal that this illustration was taken from a California case, Strickler v. Nat'l Broad. Co., 167 F. Supp. 68 (S.D. Cal. 1958).

73. 42 Cal. 3d 234 (1986).

74. *Id.* at 238 (citing RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977)).

75. *Id.* at 238–39.

claim goes down, an accompanying false light claim must go down with it.[76] I argued that these sound bites should not be taken too seriously because these loose statements were merely exaggerated, harmless short-hands that captured the correct outcome in the specific case.[77]

I conceded that defamation and false light claims are often duplicative. When entirely duplicative, the false light claim is usually, properly, dismissed to avoid superfluity and double-recovery. Because a defamation claim allows recovery for both the *external* damage to reputation and the *internal* offense and anguish caused by the publication, a viable defamation claim effectively occupies the field, preempting any independent function for the false light claim.

Similarly, the elements of defamation claims and the elements of false light claims will be identical in most cases. Generally, the failure of a defamation claim will also doom a false light claim because the deficiency implicates an element common to both torts. For example, if a defamation claim is dismissed because a court finds that the published statements are substantially true, a corresponding false light claim predicated on the same statements will also fail. Falsity is an element common to both torts.[78] If a public figure defamation claim falls due to an absence of actual malice, a false light claim grounded in the same statements would also fall.[79] Actual malice is an element common to both torts. So too, both torts follow the same procedural rules, such as the applicability of the California retraction statute.[80]

In Simmons's case, however, the deficiency of his defamation claim—the judgment that under the idealist position, he could not convincingly argue that the statement was defamatory in the eyes of "right thinking" society—was *not* a deficiency germane to the elements of false light.

E. The Normative Challenge

My advocacy for Simmons could prevail only if I gave the court a convincing *normative* reason for allowing his false light claim to proceed. I failed.

I argued that the Superior Court's reasoning on what I have called here the "defamation conundrum" does not supply a convincing analysis for what I call here the "false light conundrum." For surely, common sense tells us that being falsely portrayed as having had "shocking sex surgery," breast implants, hormone

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76. *See, e.g.*, Shelton v. Bauer Publ'g Co., L.P., No. 215CV09057CASAGRX, 2016 WL 1574025, at *14 (C.D. Cal. 2016) ("Accordingly, where, as here, 'a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action.'"); *id.* at *14 (quoting Eisenberg v. Alameda Newspapers, Inc., 74 Cal. App. 4th 1359, 1385 n.13 (1999)).

77. *See, e.g.*, Sarver v. Chartier, 813 F.3d 891, 907 (9th Cir. 2016) ("This claim fails for the same reasons that Sarver's defamation claim does; we agree with the district court that, even if the film's portrayal of Sarver were somehow false, such depiction certainly would not 'highly offend' a reasonable person.").

78. *See* Partington v. Bugliosi, 56 F.3d 1147, 1161 (9th Cir. 1995).

79. *See* Reader's Digest Assn. v. Superior Ct., 37 Cal. 3d 244, 265 (1984).

80. *See* Werner v. Times-Mirror Co., 193 Cal. App. 2d 111 (1961).

treatments, and consultations on medical castration; changed a name; and to be transitioning from male to female gender could be highly offensive to an ordinary reasonable person. As *Fellows* itself recognized when deciding the extent to which defamation and false light claims should be parallel, and when they should diverge, what should matter are the *animating policies* underlying the rules: "It is also noteworthy that the American Law Institute has adopted the position that the restrictions on defamation actions should be applied to actions for false light invasion of privacy where supported by the policy behind the particular restrictive rule."[81]

Simmons, I argued, was an advocate for sexual equality—including the rights of transgender persons. So too, Simmons had often engaged in "gender bending" as part of his entertainment persona, as an ebullient *celebration* of sexual pluralism and respect. But this does not mean he might not be *subjectively* hurt by a brazen portrayal of him that made him out to be someone he was not, or that this hurt might not be considered by juries and judges as *objectively* reasonable.

More importantly, I argued that unlike the defamation conundrum, recognition of Simmons's false light claim did not implicate the court in validating anyone's prejudice, for nobody's prejudice was involved. The court would not be tainted by endorsing prejudice; it would be enforcing protection of human dignity.

The Supreme Court of California has recognized that protection of the right to privacy is also grounded in the sanctity of human dignity:

> "One of the principal arguments advanced in support of the doctrine of privacy by its original exponents is that the increased complexity and intensity of modern civilization and the development of man's spiritual sensibilities have rendered man more sensitive to publicity and have increased his need of privacy, while the great technological improvements in the means of communication have more and more subjected the intimacies of his private life *to exploitation by those who pander to commercialism and to prurient and idle curiosity*. . . . A legally enforceable right of privacy is deemed to be a proper protection against this type of encroachment upon the personality of the individual. It has been objected that a recognition of the right of privacy would open up a vast field of litigation, some of it bordering on the absurd. But courts recognizing the right deny the validity of this objection. According to the latter view, the fact that a recognition of the right would involve many cases near the border line, and would present perplexing questions, is not a good ground for denying the existence of such right or refusing to give relief in a case where it is clearly shown that a legal wrong has been done. . . ." We believe the reasons in favor of the right are persuasive, especially in the light of the declaration by this court that "concepts of the sanctity of personal rights are specifically protected by the Constitutions, both state and federal, and the courts have properly given them a place of high dignity, and worthy of especial protection."[82]

81. Fellows v. Nat'l Enquirer, Inc., 42 Cal. 3d 234, 246 (1986).

82. Gill v. Curtis Pub. Co., 38 Cal.2d 273, 278 (1952) (quoting 41 Am. Jur. Privacy § 9) (emphasis added); Orloff v. L.A. Turf Club, 30 Cal.2d 110, 117 (1947).

If ever there were a publication insulting human dignity, if ever there were an example of "*exploitation by those who pander to commercialism and to prurient and idle curiosity*," it was the attack on Simmons by the *Enquirer*. The *Enquirer* concluded that it could make money by running false and salacious stories claiming that Mr. Simmons is transitioning. Even worse, the *Enquire*r cynically calculated that Simmons could not and would not sue, for a suit would make Simmons appear to maintain that there is something wrong with transitioning from one gender to another.

But Simmons proved to have more temerity than the *Enquirer* thought. The *Enquirer* cheaply and crassly commercialized and sensationalized an issue that ought to be treated with respect and sensitivity. Principles of freedom of speech and press may protect the *Enquirer*'s prerogative to mock and degrade the LGBTQ+ community. But even the most ardent supporter of sexual autonomy and LGBTQ+ rights is entitled to be portrayed in a truthful manner.

Before the trial court, with a leading national transgender lawyer standing next to me as supporting counsel, I closed with these words:

> What do transgender persons ultimately want and need in our country? Human dignity. They want to be treated as human beings. They want to not be looked at as freakish, as bizarre, as strange, as people that [should] be ostracized.[83]

My advocacy did not persuade the Superior Court, which ruled against Simmons on both his defamation and false light claims, awarding the *Enquirer* $221,888 in attorneys' fees under the California anti-SLAPP statute. Simmons ultimately decided to drop his appeal. It is one thing to fight for your cause. It is another to fight on with the threat of paying punishing and ever-escalating attorneys' fees to the other side if you lose.

I consider the conundrums posed, however, far from resolved in either theory or decisional law. They linger for another day.

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83. Statement of Rodney Smolla, Transcript of Hearing of Aug. 30, 2017, at 15, Simmons v. Am. Media, Inc., No. BC660633, 2017 WL 5325381 (Cal. Super. Sept. 1, 2017).