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# FALSE LIGHT PRIVACY: A REQUIEM

J. Clark Kelso\*

## I. INTRODUCTION

Citing some 50 cases in the space of three-and-one half pages, Dean Prosser created and gave lasting momentum to a new tort, which he dubbed "False Light in the Public Eye."<sup>1</sup> Prior to Prosser's article, the words "false light" and "privacy" are not joined together in any reported American decisions.<sup>2</sup> It is a testament to Prosser's influence (and to the influence of the American Law Institute) that the same search for decisions *after* Prosser's article was published uncovers some 378 state and 285 federal opinions containing both the phrase "false light" and the word "privacy." Judging by the numbers alone, false light privacy seems to be a juridically recognized cause of action.

The numbers do not tell the whole story, however. The privacy torts of intrusion, public disclosure of private facts, and appropriation of name or likeness, which Prosser also identified in his leading article, appear to have taken firm root. False light privacy, by contrast, continues to be the subject of substantial judicial and scholarly criticism. A few jurisdictions have rejected the tort outright.<sup>3</sup> There is also a recent scholarly call

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1. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 398-401 (1960) [hereinafter Prosser, *Privacy*].

2. The cases for this Article were found by conducting a search on Westlaw for "false light" and "privacy" in the following databases: ALLSTATES, ALLSTATES-OLD, ALLFEDS, and ALLFEDS-OLD. The pre-Prosser search uncovered only one opinion in which both "false light" and "privacy" appear, but the appearance of the phrase "false light" is many pages removed from the appearance of the word "privacy," and the case, a death-penalty appeal, has nothing to do with torts. *People v. Lisenba*, 89 P.2d 39 (Cal. 1939), *aff'd*, 94 P.2d 569 (Cal. 1939), *aff'd*, 314 U.S. 219 (1941).

3. State cases: *Brockman v. Frank*, 565 N.Y.S.2d 426 (Sup. Ct. 1991); *Renwick v. News & Observer Publishing Co.*, 312 S.E.2d 405 (N.C. 1984), *cert. denied*, 469 U.S. 858 (1984); *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475

for reconsideration of the tort, citing primarily First Amendment concerns.<sup>4</sup> These calls have, in turn, prompted a lukewarm defense of the tort by Professor Gary Schwartz.<sup>5</sup>

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(Mo. 1986); *Yeager v. Local Union 20*, 453 N.E.2d 666 (Ohio 1983); *Haynik v. Zimlich*, 498 N.E.2d 1095 (Ohio 1986).

Wisconsin's privacy statute includes only intrusion, misappropriation and public disclosure, and it is a good guess that false light therefore does not exist in Wisconsin, although the court retains power to create false light despite its absence from the statute. *Jaqueline Hanson Dee, The Absence of False Light from the Wisconsin Privacy Statute*, 66 MARQ. L. REV. 99, 101-02 (1982).

New York's Civil Rights Law also omits false light, and, in contrast to the situation in Wisconsin, the New York Civil Rights Law has been interpreted as occupying the field, thereby precluding judicial development of a privacy cause of action apart from the statute. *Stephano v. News Group Publications*, 474 N.E.2d 580 (N.Y. App. Div. 1984); *Beverly v. Choices Women's Med. Ctr.*, 532 N.Y.S.2d 400 (App. Div. 1988); *MacDonald v. Clinger*, 446 N.Y.S.2d 801 (App. Div. 1982). *But see Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978) (applying New York law).

Two jurisdictions, Nebraska and Rhode Island, have included false light in their privacy statutes. NEB. REV. STAT. § 20-201 to 211 (1987); R.I. GEN. LAWS § 9-1-28.1 (1985).

As noted below, text accompanying note 165, since false light is purely a creature of state law, state cases are the only authoritative source for finding the law of false light. Federal cases will be cited separately in the notes in the remainder of this article. In the following federal cases, courts have stated that the applicable law of the state does not recognize false light privacy: *Mitchell v. Random House, Inc.*, 865 F.2d 664 (5th Cir. 1989) (Mississippi law); *Deupree v. Iliff*, 860 F.2d 300 (8th Cir. 1988) (Missouri law); *Angelotta v. American Broadcasting Corp.*, 820 F.2d 806 (6th Cir. 1987) (Ohio law); *Brown v. American Broadcasting Co.*, 704 F.2d 1296 (4th Cir. 1983) (Virginia law); *Foretich v. Glamour*, 741 F. Supp. 247 (D.D.C. 1990) (Virginia law); *Brooks v. American Broadcasting Cos.*, 737 F. Supp. 431 (N.D. Ohio 1990) (Ohio law); *Ruzicka v. Conde Nast Publications*, 733 F. Supp. 1289 (D. Minn. 1990) (Minnesota law); *Dunn v. Town of Emerald Isle*, 722 F. Supp. 1309 (E.D.N.C. 1989) (North Carolina law); *Price v. Viking Press, Inc.*, 625 F. Supp. 641 (D. Minn. 1985) (Minnesota law), *rev'd on other grounds sub nom*, *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989) (reversed only as to ruling on defamation claim); *Herink v. Harper & Row Publishers*, 607 F. Supp. 657 (D.C.N.Y. 1985) (New York law); *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981) (Virginia law); *Ward v. Connor*, 495 F. Supp. 434 (E.D. Va. 1980) (Virginia law); *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977) (Virginia law); *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972). No attempt has been made to verify whether federal decisions have accurately predicted or stated state law.

4. See Diane L. Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364 (1989); Harvey L. Zuckman, *Invasion of Privacy - Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253 (1990).

5. Professor Gary Schwartz advocates "a limited doctrine of false light" for "nondisparaging false statements" that are "highly offensive." Gary Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885, 887, 919 (1991). This definition would exclude from false light

With over six hundred cases mentioning false light privacy by name, one would expect to find at least one or two opinions in which false light was actually necessary to a proper decision. There should be at least one opinion about which everyone could agree, "Yes, this is the essence of false light." This article will demonstrate that there is not even a single good case in which false light can be clearly identified as adding anything distinctive to the law. In the overwhelming majority of cases, false light is simply added on at the end of the complaint to give the complaint the appearance of greater weight and importance. False light is on the periphery, and the core of the case lies elsewhere, in defamation,<sup>6</sup> in misappropriation,<sup>7</sup> or in intentional infliction of emotional distress.<sup>8</sup>

That the cases easily fall into these categories is no shock. Scholars recognized early on that false light overlapped significantly with other torts.<sup>9</sup> The most obvious overlaps are between false light and defamation, on the one hand, and false

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coverage cases which more properly are treated as involving defamation. *Id.* at 900. As Professor Schwartz recognizes, when you exclude the defamation cases, there is not much left for false light, and all of the examples which he gives of limited false light involve the publication for profit of nondisparaging false statements (such as unauthorized biographies or stories which contain substantial falsehoods). *Id.* at 893-97. As noted below, all these cases can be handled through the doctrine of misappropriation (which is a much more settled and stable tort than false light).

Putting the cases to one side, there remains in defense of false light only a vaguely defined interest in a person being able to define "his sense of self within society." *Id.* at 897. Professor Schwartz explains that "[i]n a false light action, the defendant's falsehood brings about a mismatch or conflict between the plaintiff's actual identity and his identity in the minds of others, a conflict that itself can be offensive or disorienting." *Id.* at 898. Yet in the absence of harm to reputation (which may involve ultimately an injury to the plaintiff's pecuniary interests), should there be a cause of action for invading an interest as vaguely defined as a person's selfhood? This may be grist for the academic mill, but it does not seem to be the sort of concrete interest or harm that would be (or should be) of interest to our judicial system.

6. See *infra* text accompanying notes 230-80.

7. See *infra* text accompanying notes 281-318.

8. See *infra* text accompanying notes 319-37.

9. Deane, *supra* note 3, at 119-23; Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1270-75 (1976); Debra Ann Bacharach, *The Privacy Action in Texas: Its Characterization, and a Determination of Applicable Statutes of Limitations*, 29 SW. L.J. 928, 931 (1975); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 340 (1966); John W. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962).

light and intentional infliction of emotional distress, on the other hand. Few of these scholars thought that false light (or, more broadly, invasion of privacy) should simply be excised from the law, however.<sup>10</sup> After emphasizing the overlap, scholars either claimed there were significant differences between false light and the other torts (usually emphasizing that false light protects a different interest), or simply approved of creating a modern and simpler cause of action to replace defamation and the other overlapping torts.

With over six hundred cases now on the books, the dust created by the scholars has settled somewhat, and the merits of false light may be tested by a complete examination of those cases. What becomes clear upon this examination is that there is no practical need for the false light cause of action.

The traditionally recognized torts, such as defamation, misrepresentation, assault, battery, and so forth, were created by courts or legislatures. Although these two institutions obviously operate in vastly different ways, both institutions generally change the law only when there is a relatively widely-shared belief that some action is necessary. In the legislatures, widely-shared beliefs are necessary to secure majority approval. In the courts, there has traditionally been a reluctance to create causes of action unless there is a showing of genuine need. This reluctance stems in part from separation of powers con-

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10. Professor Kalven is one significant exception. He argued in his 1966 article that false light privacy was unnecessary and that if the law of defamation needed to be updated, the appropriate judicial process was to alter the rules of defamation. Kalven, *supra* note 9, at 341. See also Frederick Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D. L. REV. 1 (1959); Don R. Pember & Dwight L. Teeter, Jr., *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 90-91 (1974). A student commentator suggests that false light privacy either be reformulated to reflect the privacy interest (rather than the reputational interest) or that the tort be abandoned. Bruce A. McKenna, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113, 137-39 (1979).

Quite a few scholars complained that Prosser's categories were wrong not because they did not accurately summarize the cases, but because his definition of privacy was ultimately under-inclusive. See, e.g., Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964). So far, however, the effort by scholars to create a unitary interest in privacy that could form the basis for a single cause of action—invasion of privacy—has been largely ignored by the courts as a matter of tort law and rejected by the Supreme Court as a matter of constitutional principle. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

cerns and in part from an intellectual tradition among judges of restraint and caution.

False light was not created by the courts or the legislatures, however. It was created by Dean Prosser and sanctioned by the American Law Institute. As will be shown below, none of the cases Prosser cited in support of false light privacy come close to recognizing such a tort. False light existed only in Prosser's mind.

That false light's parentage lies not in the courts or legislatures but in the halls of academia suggests an explanation for false light's failure. Scholars do not live with the restrictions of action placed upon judges or legislators. Scholars need not act with restraint and caution, and the constitutional separation of powers does not act as a check upon what scholars propose. As a result, scholars can propose changes to the law to satisfy their own personal standards of justice, fairness, consistency or simplicity.

In the case of false light, the theory was that we could mix falsity from defamation together with unreasonable publicity and emotional distress, and that the result of this mixture would be a new and different tort. The reality is that the courts prior to Prosser did not perceive a need for this tort, and in the over six hundred decisions subsequent to Prosser, courts still have not found a reason for this tort.<sup>11</sup> Worse yet, the supposed existence of false light has confused courts and practitioners who remain uncertain as to the scope of the tort and the type of defenses which may be asserted. It is time that courts declared the experiment at an end. False light and Restatement (Second) of Torts section 652E should be rejected.

Since false light has been mentioned in over 600 decisions, how can it plausibly be maintained that false light does not actually exist? It depends, of course, upon what we mean by a cause of action "existing" in the cases. If a cause of action can be said to exist simply because a court says somewhere that it recognizes the existence of the cause of action, then false light unquestionably exists. This sort of purely formal

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11. Professor Davis, in a pre-Prosser article, nicely summed up this point as follows: "Indeed, one can logically argue that the concept of a right to privacy was never required in the first place, and that its whole history is an illustration of how well meaning but impatient academicians can upset the normal development of the law by pushing it too hard." Davis, *supra* note 10, at 23.

recognition of a cause of action by a court is not the proper test, however, as can easily be proven. Suppose that the Supreme Court of X formally recognized a cause of action called "interference with reputation," but then equated "interference with reputation" in *all* aspects with the law of defamation. In one sense—a not very interesting sense—interference with reputation would be an existing tort in the State of X.

Since formal recognition of a tort does not constitute "independent existence," what does? This article proposes that a cause of action "exists" in the cases only if one or more cases properly decided can be found in which the plaintiff either did recover or could have recovered *solely on the basis* of the supposed cause of action. Although this may seem like an overly rigorous test, after more than 600 reported decisions mentioning false light, there should be one or more cases that satisfy this test.

Part II of this article examines in detail the same set of cases Dean Prosser relied upon in his 1960 article and shows that Prosser incorrectly extracted from these cases a principle nowhere to be found in the cases themselves. Part III then reviews *all* of the cases decided in the years subsequent to Prosser's article and shows that nearly all of these cases could be decided the same way without resort to a false light cause of action. The only cases where false light clearly changes the result are a few statute of limitations decisions, the results of which are explainable by judicial hostility to limitation periods. When the smoke has cleared, there exist only two decisions in which state appellate courts have affirmed pro-plaintiff judgments solely on the basis of false light privacy.<sup>12</sup> Both cases could have been decided on defamation grounds. Significantly, in one of the cases, the supposed existence of false light privacy confused both defense counsel and the trial court, leading to a judgment probably inconsistent with constitutional requirements. It is time to end the confusion and declare that false light privacy forms no part of the common law.

## II. PROSSER'S FOLLY

As everyone knows, Prosser had a talent for finding trends in the law of torts and for reinterpreting cases—sometimes

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12. See *infra* text accompanying notes 437-72.

large numbers of cases—to fit within a new and potentially more useful classification. Prosser's articles on intentional infliction of emotional distress,<sup>13</sup> nuisance,<sup>14</sup> contributory negligence,<sup>15</sup> and strict products liability<sup>16</sup> permanently changed the face of the law of torts.

Prosser's article on the law of privacy, published in 1960, was equally influential. The influence of the article is only partly attributable to the article itself. By 1960, Prosser was widely recognized as one of the leading torts scholars in the country, and held the influential position of Reporter for the Restatement (Second) of Torts. Many believed that if Prosser said the cases stood for a particular proposition, then it must be true.

Prosser's discussion of false light privacy is a perfect example of the influence which Prosser wielded by virtue of his own reputation. Citing some 50 cases in the course of a seven paragraph discussion, Prosser proclaimed that one type of tortious invasion of privacy "consists of publicity that places the plaintiff in a false light in the public eye."<sup>17</sup> The case citations are sprinkled liberally in the footnotes. None of the cases are discussed in full in the text, and the reader must therefore be satisfied with Prosser's spin.

In the following sections, which track Prosser's paragraphs, the cases will receive a more complete treatment, and it will be seen that Prosser's spin does not represent the only spin which can be imparted. Each of the cases which Prosser cites is readily explainable on another basis that does not involve what Prosser ultimately calls false light privacy. *None* of the cases Prosser relies upon supports his ultimate conclusion that false light was an existing cause of action.

If Prosser had simply indicated that he was reinterpreting opinions in a way probably never intended by the authors of

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13. William L. Prosser, *Intentional Infliction of Mental Suffering—A New Tort*, 37 MICH. L. REV. 874 (1939).

14. William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942).

15. William L. Prosser, *Contributory Negligence as a Defense to Violation of Statute*, 32 MINN. L. REV. 105 (1948); William L. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1 (1953); William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).

16. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

17. Prosser, *Privacy*, *supra* note 1, at 398.



the opinions, Prosser's discussion would not be so misleading (and probably would not have been quite as influential). Instead, Prosser characterized the cases as already supporting his new creation. As will be seen, for Prosser to claim, as he did, that false light privacy "has made a rather nebulous appearance in a line of decisions" and that "in late years . . . it has begun to receive . . . independent recognition" was wishful thinking.<sup>18</sup> 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.

### A. *The Supposed First Appearance of False Light Privacy*

Prosser claims that false light privacy "seems to have made its first appearance in 1816, when Lord Byron succeeded in enjoining the circulation of a spurious and inferior poem attributed to his pen."<sup>19</sup> Prosser cites in the margin the case of *Lord Byron v. Johnston*,<sup>20</sup> the report of which is so short that it may be fully included in the footnotes here.<sup>21</sup> According to

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18. Prosser, *Privacy*, *supra* note 1, at 398.

19. Prosser, *Privacy*, *supra* note 1, at 398.

20. 35 Eng. Rep. 851 (1816).

21. The report is as follows:

Injunction, until answer or further order, to restrain the publication of a work as the Plaintiff's, upon affidavit by the Plaintiff's agents (the Plaintiff himself being abroad), of circumstances making it highly probable that it was not the Plaintiff's work; and the Defendant refusing to swear as to his belief that it was so.

The Defendant, a publisher, advertised for sale certain poems, which he represented by the advertisement to be the work of Lord Byron, on whose behalf a Bill was filed (His Lordship being himself abroad), for an Injunction to restrain the publication under the title described in the advertisement; and, on affidavits made by His Lordship's agents, both as to their belief and also as to circumstances rendering it highly probable that the work was not his Lordship's, an application was made to the Vice-Chancellor accordingly; when His Honour, upon the ground that the affidavits were not sufficiently positive, and might be contradicted, ordered that notice of the motion should be given to the Defendant.

Notice have been given pursuant to this Order, the application was now renewed before the Lord Chancellor, who approved of the course which had been taken by the Vice-Chancellor; and, upon the Defendant declining to swear as to his belief that the poem in question was actually the work of Lord Byron, granted the motion.

An Injunction was issued accordingly, to restrain the Defendant from publishing, in the Plaintiff's name, or as his work, the several poems mentioned in the advertisement, or any parts thereof, till an-

Prosser, one general principle consistent with the result in Lord Byron's case was that "falsity or fiction has been held to defeat the privilege of reporting news and other matters of public interest, or of giving further publicity to already public figures."<sup>22</sup> Alternatively, and somewhat more narrowly, Lord Byron's case fell within a series of cases involving "publicity falsely attributing to the plaintiff some opinion or utterance."<sup>23</sup>

As can be seen in footnote 21, *supra*, the report in *Lord Byron* is short and not very illuminating.<sup>24</sup> The Defendant was a publisher attempting to sell a book of poems falsely attributed to Lord Byron, the most famous English poet of the time (and one of the most famous of all times).<sup>25</sup> Lord Byron pub-

swer or further order.

Reg. Lib. B. 62 b. *Id.* (emphasis omitted)

22. Prosser, *Privacy*, *supra* note 1, at 398.

23. *Id.* For discussion of other cases involving false attribution, see *infra* text accompanying notes 30-107.

24. Lord Langdale, The Master of the Rolls, later complained that "I regret that the report of the case in *Merivale* [*Lord Byron*] does not assist me by stating the reasons for making the order." *Clark v. Freeman*, 50 Eng. Rep. 759, 762 (1848).

25. The following letter from Lord Byron to his publisher, Mr. Murray, sets forth the underlying facts of the dispute:

Venice, Dec. 9, 1816.

In a letter from England, I am informed that a man named Johnson has taken upon himself to publish some poems called a 'Pilgrimage to Jerusalem, a Tempest, and an Address to my Daughter,' & c., and to attribute them to me, adding that he had paid five hundred guineas for them. The answer to this is short: *I never wrote such poems, never received the sum he mentions, nor any other in the same quarter, nor (as far as moral or mortal certainty can be sure) ever had, directly or indirectly, the slightest communication with Johnson in my life; not being aware that the person existed till this intelligence gave me to understand that there were such people. Nothing surprises me, or this perhaps would, and most things amuse me, or this probably would not. With regard to myself, the man has merely lied; that's natural; his betters have set him the example. But with regard to you [i.e., Byron's publisher], his assertion may perhaps injure you in your publications; and I desire that it may receive the most public and unqualified contradiction. I do not know that there is any punishment for a thing of this kind, and if there were, I should not feel disposed to pursue this ingenious mountebank farther than was necessary for his confutation; but thus far it may be necessary to proceed.*

You will make what use you please of this letter; and Mr. Kinnaird, who has power to act for me in my absence, will, I am sure, readily join you in any steps which it may be proper to take, with regard to the absurd falsehood of this poor creature . . .

lished his own poems under his own name, the publication of which generated a substantial income for himself and for his publisher.<sup>26</sup> Although the report does not indicate the basis for the action in *Lord Byron*, Lord Byron's agents undoubtedly alleged that the Defendant was essentially engaged in "passing off" the Defendant's product as though it were the Plaintiff's product. Passing off—attempting to sell goods under the false claim that the goods were manufactured by another—had been recognized at common law (although not by that name), and an injunction to prevent a competitor from passing off goods as the plaintiff's was an appropriate remedy.<sup>27</sup> Subsequent cases treat *Lord Byron v. Johnston* as a passing-off case.<sup>28</sup>

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THOMAS MOORE, *THE LIFE OF LORD BYRON 581-82* (1855) (quoting letter of Lord Byron to Mr. Murray, dated Dec. 9, 1816).

Other spurious attributions of literary works to Lord Byron are described in SAMUEL C. CHEW, *BYRON IN ENGLAND 169-93* (1924).

26. The economic relationship between Lord Byron and his publisher was quite complex. Lord Byron typically refused to accept payment for his works. His publisher nevertheless kept substantial sums on account for Lord Byron and, when Byron needed the money, made payments to Lord Byron from that account. SAMUEL SMILES, *A PUBLISHER AND HIS FRIENDS—MEMOIR AND CORRESPONDENCE OF THE LATE JOHN MURRAY*, 352-56 (1891).

27. See *Southern v. How*, 79 Eng. Rep. 1243 (decided during the reign of Queen Elizabeth I). The court indicated that an action upon the case would lie by a manufacturer of fine cloth against a competitor who used the other's mark upon his inferior cloth. *Singleton v. Bolton*, 99 Eng. Rep. 661, 661 (1783). Lord Mansfield said "that if the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie." *Id.* Substitute the word "poem" for "medicine" in the quote from *Singleton*, and the decision in *Lord Byron* is easily supported by then-existing authority. See also Edward S. Rogers, *Some Historical Matter Concerning Trademarks*, 9 MICH. L. REV. 29, 40 (1910). "It is curious that most of the provisions of our modern trade mark statutes and many of the common law rules on the subject are to be found in surprisingly similar form in the mediaeval guild regulations, municipal ordinances and royal decrees." *Id.*

28. *E.g.*, *Clark v. Freeman*, 50 Eng. Rep. 759 (1848) (refusing to enjoin the distribution of advertisements and pamphlets announcing "Sir James Clarke's Consumption Pills," advertisements which falsely suggested that Sir James Clark, a prominent physician at the time, had some connection with the product). The court applied the long-standing rule against enjoining libels, holding that the equity court did not have jurisdiction to decide in the first instance whether the defendant's conduct constituted a libel. *Id.* at 761. Lord Langdale, The Master of the Rolls, also explained that "I cannot liken this case to that of *Croft v. Day*, where a man fraudulently attempted to make his own goods pass off as the goods of another, to the prejudice of that other. This the Court would not allow." *Id.* at 762. Plaintiff's counsel then cited *Lord Byron* to the court to show that it had jurisdiction to issue the injunction, but the court distinguished *Lord Byron*, making clear that in its view, *Lord Byron*, like *Croft v. Day*, was simply a passing off case:

Prosser apparently rejected this natural and obvious reading of the case by ignoring what was probably, for the court, the most important feature of the case—that is, Lord Byron's participation in the market for literary products, a participation that gave rise to a type of competitive injury over which the equity courts had jurisdiction.<sup>29</sup> Prosser's analysis thus begins by misreading *Lord Byron v. Johnston*, a misreading per-

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I do not think the cases [including *Lord Byron*] apply. If Sir James Clark [the plaintiff] had been in the habit of manufacturing and selling pills it would be very like the other cases in which the Court has interfered for the protection of property. I regret that the report of [*Lord Byron*] in Merivale [*Lord Byron*] does not assist me by stating the reasons for making the order.

*Id.* at 762.

In other words, since the defendant was not competing with Sir James Clark in the manufacture and sale of drugs, Sir James Clark could not secure an injunction against the defendant's unfair competition (an unremarkable holding repeated by courts in both England and the United States). Lord Byron, by contrast, *was* a participant in the literary market, and he could secure an injunction against the defendant's unfair competition (again, an unremarkable holding).

29. Prosser is not the only one to have misinterpreted *Lord Byron*. Professor Wigmore found *Lord Byron* to be a case *sui generis*:

The grounds of the judgment are not reported; the sale might of course interfere with the sale of genuine poems; and the false poems might detract from the plaintiff's professional repute. But the latter circumstance does not appear in the case; and the former aspect was not essential, and moreover would not be covered by any copyright, for the plaintiff had no author's copyright in these poems. The principle of this class of cases is quite independent of copyright, or of the marketable quality of the utterance ascribed to the plaintiff. It includes all cases where the defendant falsely attributes to the plaintiff's composition any statement, whether it be in book, pamphlet, or interview; whether it be of personal opinion or of fact; and whether the tenor of the statement be hateful or contemptible in the minds of readers.

John H. Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 KY. L.J., No. 8, 3, 5-6 (1916).

Professor Wigmore seems to have labored under the impression that copyright was the only established legal basis for securing an injunction in the circumstances, and that by granting an injunction, the court was defining some *new* wrong. This is simply inaccurate. As indicated above, English courts had previously recognized that a market-participant is injured when a competitor misappropriates the other's trademark. See *supra* note 27. Accordingly, Wigmore's statement that "[t]he principle of this class of cases is quite independent . . . of the marketable quality of the utterance," *id.*, is probably incorrect. Indeed, the court in *Clark v. Freeman*, 50 Eng. Rep. 759 (1848), specifically rejected Professor Wigmore's position, refusing to grant an injunction specifically because the plaintiff was *not* a participant in the marketplace. See *supra* note 28.

haps designed to suggest to the reader that the new tort being described has actually been around since 1816.

## B. *False Attribution of Opinion or Utterance*

Prosser spends the next three paragraphs in his discussion identifying three "form[s]" of false light privacy. The first paragraph identifies "publicity falsely attributing to the plaintiff some opinion or utterance."<sup>30</sup> Prosser's first example is a reference back to *Lord Byron*.<sup>31</sup> As just noted, Prosser's reading of *Lord Byron* does not withstand scrutiny. As will be seen, each of the other cases discussed in the third paragraph suffers from a similar misreading.

### 1. *Fictitious Testimonials in Advertising*

Prosser gives a "cf" cite to four cases<sup>32</sup> involving "fictitious testimonial[s] used in advertising," which Prosser says "might be . . . [a] good illustration" of false attribution of opinion or utterance.<sup>33</sup> Prosser's hesitation ("might be") and use of a "cf" cite are well advised, because each case cited is more appropriately described as involving either libel or improper commercial exploitation of plaintiff's name or likeness (a well-recognized tort quite distinct from false light).<sup>34</sup> In *Pavesich v. New England Life Insurance Co.*,<sup>35</sup> the defendant's advertisement contained two pictures, one of a happy man (the plaintiff), and the other of a sickly looking man.<sup>36</sup> Above

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30. Prosser, *Privacy*, *supra* note 1, at 398.

31. Prosser, *Privacy*, *supra* note 1, at 398.

32. Prosser, *Privacy*, *supra* note 1, at 398 n.130.

33. Prosser, *Privacy*, *supra* note 1, at 398.

34. Prosser himself recognized that these cases involved misappropriation of name or likeness for commercial benefit, and he cited the same cases in his section on appropriation. Prosser, *Privacy*, *supra* note 1, at 386, 402 nn.156-57.

35. 50 S.E. 68 (Ga. 1905).

36. *Id.* A case note heralding recognition of the "right of privacy" in Kentucky indicates that both pictures in *Pavesich* were of the plaintiff and that below the pictures "was the statement that his unhappy condition was changed to the happy one by having taken out a policy in this company." L. Meriwether Smith, *The Right of Privacy*, 4 Ky. L.J., No. 3, 22, 24 (1915). Although this misdescription of the facts in *Pavesich* is not really material to decision of the case (since there still would have been an unauthorized commercial exploitation), the author's apparent carelessness in dealing with facts may suggest an equal carelessness in describing the holding of the case as involving the "right of privacy" pure and simple. Indeed, Professor Wigmore criticized the author for not observing the distinc-

the plaintiff's picture was the advertising pitch, "Do it now. The man who did."<sup>37</sup> Above the other face was the warning, "Do it while you can. The man who didn't."<sup>38</sup> Beneath the plaintiff's picture was the following quote attributed to the plaintiff: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day (sic) my family is protected and I am drawing an annual dividend on my paid-up policies."<sup>39</sup>

The court held that the complaint properly pled both libel and invasion of privacy. In approving the cause of action for invasion of privacy, the court quoted and adopted portions of the dissenting opinion in *Roberson v. Rochester Folding Box Co.*,<sup>40</sup> a factually similar case where the majority denied the existence of a cause of action. The dissenting opinion as quoted in *Pavesich* clearly identified unauthorized commercial appropriation as the key to the cause of action:

Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form in invitum their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial or other uses for gain by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be.<sup>41</sup>

The cause of action for libel in *Pavesich* arose out of additional allegations that the plaintiff's friends and acquaintances knew the plaintiff did not have a policy of insurance with the defendant. Because of this knowledge, the testimonial

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tion between a commercial misappropriation (which may occur even though the plaintiff *had* made the statements attributed to him but simply had not authorized their use in a publication) and a cause of action for defamation (which necessarily involves falsehoods). John H. Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 KY. L.J., No. 8, 3 (1915).

37. *Pavesich*, 50 S.E. at 68.

38. *Id.*

39. *Id.*; see also *Pavesich*, 50 S.E. at 69.

40. 64 N.E. 442 (N.Y. 1902).

41. *Pavesich*, 50 S.E. at 78 (quoting *Roberson v. Rochester Folding Box, Co.*, 64 N.E. 442, 450 (N.Y. 1902) (Gray, J., dissenting)).

attributed to the plaintiff would lead these friends and acquaintances to believe that the plaintiff was "a self-confessed liar" either gratuitously or for profit, and, in either case, would "merit the contempt of all persons having a correct conception of moral principles."<sup>42</sup>

It is only by conflating the two causes of action—one for libel and the other for commercial misappropriation—that Prosser is able to discover in *Pavesich* a new cause of action for false light. Prosser extracts falsity from the libel cause of action and public use of that falsity from the misappropriation cause of action to create a new cause of action concerning publicity which places the plaintiff in a false light in the public eye. The new cause of action is of course a hybrid, and there is nothing in *Pavesich* itself to indicate that the court would have sanctioned this particular hybrid. To the contrary, the court in *Pavesich* carefully discusses the two causes of action separately, no doubt in order to maintain the purity of each.<sup>43</sup>

The three other cases in Prosser's footnote follow the same pattern. In *Foster-Milburn Co. v. Chinn*,<sup>44</sup> the defendant, manufacturer of "Doan's Kidney Pills," circulated 8,000,000 pamphlets which contained a letter endorsing the pills falsely attributed to the plaintiff, "a prominent figure in the Blue Grass country of Kentucky," and containing a picture of the plaintiff above the letter.<sup>45</sup> As in *Pavesich*, the court found that there was both a libel and an invasion of privacy. The court was careful, however, to narrowly characterize the invasion of privacy as involving "the publication of the picture of a person without his consent, as a part of an advertisement for the purpose of exploiting the publisher's business."<sup>46</sup>

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42. *Id.* at 81.

43. An example will demonstrate the fallacy which infects Prosser's reasoning. Suppose we take falsity from defamation and misrepresentation and pecuniary loss from interference with contractual relations to create a new tort called "falsely breaching a contract" which would make it tortious to give false reasons in support of a breach of contract. Even the Supreme Court of California did not go this far in *Seaman's Direct Buying Serv. v. Standard Oil Co. of Cal.*, 686 P.2d 1158, (Cal. 1984), and *Seaman's* is at the outer edge of tort law, if not entirely off the map. *OKI America, Inc. v. Microtech Int'l*, 872 F.2d 312 (9th Cir. 1989) (Kozinski, J., concurring).

44. 120 S.W. 364 (Ky. Ct. App. 1909).

45. *Id.* at 365-66.

46. *Id.* at 366.

The court in *Fairfield v. American Photocopy Equipment Co.*,<sup>47</sup> explained that the suit was "an action for damages for the unauthorized use by defendant of plaintiff's name in advertising its product and for an injunction."<sup>48</sup> No more need be said about this case to show that it falls squarely within *Pavesich*. Finally, *Manger v. Kree Institute of Electrolysis*<sup>49</sup> arose under the New York Civil Rights Law that by its explicit terms is limited to misappropriation of name or likeness for "advertising purposes or for the purposes of trade."<sup>50</sup>

Prosser next identifies an "Oregon case in which the name of the plaintiff was signed to a telegram to the governor urging political action which it would have been illegal for him, as a state employee, to advocate."<sup>51</sup> In the case cited, *Hinish v. Meier & Frank Co.*,<sup>52</sup> the defendant signed the plaintiff's name (without the plaintiff's consent) to a telegram which opposed proposed state legislation that would have substantially damaged the defendant's business.<sup>53</sup> In particular, the defendant maintained an optical department within its stores, and the proposed legislation "would have prevented the defendant . . . from continuing to engage in the business of fitting and selling optical glasses to the public."<sup>54</sup> The plaintiff was actually a federal employee (rather than a state employee as Prosser claimed), and as a Classified Civil Service Employee of the United States Government, was prohibited by federal statute

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47. 291 P.2d 194 (Cal. Ct. App. 1955).

48. *Id.* at 196.

49. 233 F.2d 5 (2d Cir. 1956).

50. Section 51 of the New York Civil Rights Law provides as follows:

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages.

*Manger*, 233 F.2d at 7 n.1.

51. Prosser, *Privacy*, *supra* note 1, at 398.

52. 113 P.2d 438 (Or. 1941).

53. *Id.* at 439-40.

54. *Id.*



from engaging in political activities.<sup>55</sup> The plaintiff alleged that the defendant's unauthorized use of the plaintiff's name jeopardized plaintiff's employment and pension rights.<sup>56</sup>

Although Prosser highlights the fact that "it would have been illegal for him, as a state [sic] employee, to advocate" a political position,<sup>57</sup> the court was singularly unimpressed with the allegation that the defendants had jeopardized the plaintiff's employment, holding that "it cannot be assumed that he would have been penalized for misconduct of which he was not guilty."<sup>58</sup> Rather, the court held a cause of action was stated because the complaint alleged that "the defendants appropriated to themselves for their own purposes, without the plaintiff's consent and against his will, his name, his personality and whatever influence he may have possessed, and injected them into a political controversy in which, as far as appears, he had no interest."<sup>59</sup> *Hinish* is nothing more than a simple misappropriation case, quite similar to *Lord Byron*, *Pavesich*, and a host of other decisions.<sup>60</sup>

Prosser gives an "accord" cite to *Schwartz v. Edrington*,<sup>61</sup> apparently to indicate that *Schwartz* is essentially on all fours with *Hinish*, and describes *Schwartz* in a parenthetical as involving "continued circulation of petition after plaintiff had withdrawn his signature."<sup>62</sup> *Schwartz* is, however, entirely different from *Hinish* and involves more than a simple publication of a petition after plaintiff had withdrawn his signature. The petition at issue in *Schwartz* was a legal petition, the purpose of which was to transform a village into an incorporated municipality.<sup>63</sup> Pursuant to the applicable Louisiana statutes, a peti-

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55. *Id.*

56. *Id.*

57. Prosser, *Privacy*, *supra* note 1, at 398.

58. 113 P.2d at 448.

59. *Id.*

60. The court in *Hinish* did not emphasize that the defendants were using plaintiff's name for purely commercial purposes, but the facts clearly would have supported that conclusion, since the defendants were attempting to defeat legislation that would have hurt their commercial business. Moreover, lobbying is itself a commercial enterprise, and endorsements from influential people are a commodity within that market. Unauthorized use of endorsements by lobbyists thus falls well within ordinary commercial misappropriation doctrine.

61. 62 So. 660 (La. 1913).

62. Prosser, *Privacy*, *supra* note 1, at 398 n.131.

63. 62 So. at 660.

tion signed by two-thirds of the electors of a village was to be presented to the governor for approval only after the petition had been published in a local newspaper (or otherwise posted for public inspection if there was no local paper) for three weeks.<sup>64</sup> The plaintiffs signed the petition under the mistaken impression that the governing officials of the soon-to-be created municipality would be chosen at an election.<sup>65</sup> After signing the petition, the plaintiffs learned that the first set of officials would simply be appointed by the governor, and the plaintiffs asked to withdraw their signatures from the petition.<sup>66</sup> By this time, the proponents had already secured signatures from more than two-thirds of the electors, and were ready to publish the petition for the statutorily-required three weeks. The trial court enjoined the publication of the plaintiffs' names in support of the petition, citing the publication as "an invasion of their right of privacy."<sup>67</sup>

The Supreme Court of Louisiana affirmed the injunction, but said nothing in its opinion about the right of privacy. Instead, the sole issue on appeal was whether the injunction violated constitutional and common law proscriptions against enjoining speech.<sup>68</sup> In explaining why the injunction did not violate these principles, the court characterized the defendant's conduct as follows:

What they were enjoined from doing was the publication of a petition purporting to be signed by, and which was, in fact, signed by, the plaintiffs in injunction, and purporting to be their petition, but which was not their petition, because, having signed it under a misapprehension, they disowned and repudiated it, and no longer desired that to be done which it was the purpose of the petition to accomplish. And, the publication, not being an exercise by relators of the privilege of publishing their sentiments, but being an unauthorized use by them of a composition purporting to represent the sentiments of the signers was, as to the use of their names, under the control of the

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64. *Id.*

65. *Id.* at 660-61.

66. *Id.*

67. *Id.* at 661 (quoting trial court).

68. Both the United States and Louisiana Constitutions had been interpreted generally as forbidding prior restraints. *Id.* Louisiana had adopted the common law rule forbidding injunctions against libellous publications. *Id.*

signers.<sup>69</sup>

Although the court did not discuss any positive reasons in support of the injunction and limited its discussion to rejecting constitutional opposition to the injunction, several plausible reasons commend themselves, none of which involves false light. Most obviously, we may hypothesize a common law rule that an elector who signs a petition favoring conversion of a village to a municipality has an absolute right to withdraw the signature at any time prior to the actual conversion.<sup>70</sup> If there is a right to withdraw from the petition, then refusing to remove the elector's name and subsequent publication of the petition with the elector's name would be wrongful conduct warranting exercise of equity jurisdiction. This has nothing to do with false light privacy, of course; it has everything to do with public policy regarding the proper presentation of petitions to government.

## 2. *Spurious Books and Articles*

Recognizing that the above cases do not strongly support the existence of false light privacy, Prosser turns to "[m]ore typical" cases involving "spurious books and articles, or ideas expressed in them, which purport to emanate from the plaintiff."<sup>71</sup> Two cases are cited as falling into this alleged category, but neither fit. In *D'Altomonte v. New York Herald Co.*,<sup>72</sup> the plaintiff alleged causes of action for libel and violation of New York's commercial misappropriation statute. The defendant attributed to the plaintiff an article which recounted in first person a wildly exaggerated adventure in Africa along the lines of an Indiana Jones movie.<sup>73</sup> The plaintiff was a world-famous writer and authority on African culture. The intermediate appellate court held that the complaint sufficiently pled the elements of libel because, given the plaintiff's stature and reputation for honesty (as alleged in the complaint), the outrageously

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69. *Id.* at 662-63.

70. Indeed, Louisiana Revised Statutes now specifically provides that "[a]ny elector may withdraw his name from the petition by filing a signed statement of withdrawal with the registrar of voters." LA. REV. STAT. § 33:1(B)(2) (West 1988).

71. Prosser, *Privacy*, *supra* note 1, at 398-99 (footnote omitted).

72. 139 N.Y.S. 200 (App. Div. 1913), *modified*, 102 N.E. 1101 (N.Y. 1913).

73. For example, the article told of how the author stopped a Congo cannibal feast, saving a young American in the process. *D'Alamonte*, 139 N.Y.S. at 202.

exaggerated story was "calculated to hold him up to ridicule and contempt."<sup>74</sup> The court also held that the complaint stated a cause of action under New York's commercial misappropriation statute.<sup>75</sup>

The New York Court of Appeals affirmed the court's judgment with respect to the libel cause of action, but reversed the court's judgment on the commercial misappropriation statute, holding that the complaint did not fall within the statute's proscription.<sup>76</sup> The court did not explain in its short, per curiam order why the complaint did not satisfy the statute, but the clear result in the case is that the complaint stated only a cause of action for libel and did not state a claim for New York's version of invasion of privacy by commercial misappropriation. The ultimate decision in this case is thus exactly contrary to Prosser's position.

The next case cited is *Hogan v. A. S. Barnes & Co.*<sup>77</sup> This is a most remarkable case for Prosser to rely upon, because the court explicitly grounded liability in the law of unfair competition and just as explicitly *denied* that there had been any invasion of privacy at all. The defendant's agent, one Camerer, was employed to write a book titled "Golf With the Masters."<sup>78</sup> The book contained pictures of twelve famous golfers accompanied by textual analysis of various aspects of the golfers' games. The chapter titles, format and advertising for the book gave the impression that each of the golfers had some active input into the book.

Camerer had taken photographs of Ben Hogan on the putting green at Baltusrol warming up for the 1954 U.S. Open. Camerer sent Hogan a consent and release form which would have authorized Camerer to use the pictures in conjunction with the planned book. Hogan flatly refused in a short letter which read in its entirety, "Are you kidding?"<sup>79</sup> Hogan, who had previously authored a golf instruction book which had been published by the defendant, sent a letter of protest to the defendant's president, warning him not to publish pictures of

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74. *Id.* at 202-03.

75. *Id.* See *supra* note 49.

76. *D'Altomonte v. New York Herald Co.*, 102 N.E. 1101 (N.Y. 1913).

77. 114 U.S.P.Q. (BNA) 314 (Pa. 1957).

78. *Id.*

79. *Id.* at 315.

Hogan in the planned book.<sup>80</sup> Defendant published the book with Hogan's picture notwithstanding Hogan's protests.

Hogan brought suit, alleging causes of action for invasion of privacy, unfair competition, misappropriation, libel and breach of fiduciary duty.<sup>81</sup> The court rejected the privacy claim in its entirety, reasoning that invasion of privacy related to an invasion of "the right to be let alone," and that Hogan, who sought widespread public attention and acclaim, could not assert an invasion of his right to be let alone. Hogan did not really want to be let alone.<sup>82</sup>

The court embraced Hogan's unfair competition and misappropriation claims, however, and awarded Hogan substantial damages on those causes of action. The court's analysis was straightforward in this regard. Citing a line of unfair competition cases which find their inspiration in *International News Service v. Associated Press*,<sup>83</sup> the court found that Hogan's efforts as a golfer and writer created an enforceable property interest in the commercial value of Hogan's name and picture, and that the defendant's unauthorized exploitation of Hogan's name and picture constituted unfair competition.<sup>84</sup> Prosser's reliance upon this decision shows just how far Prosser was willing to go to support his new creation.<sup>85</sup>

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80. *Id.*

81. *Id.*

82. *Id.* at 315-16.

83. 248 U.S. 215 (1918).

84. 114 U.S.P.Q. at 316-20.

85. There were indeed only two things which were false about the book. First, the book falsely suggested that Hogan had authorized its publication and had actively participated in the analysis or writing. Second, the book purported to give away Hogan's "secret," which was apparently a much talked about topic among golf enthusiasts. It is clear from the court's analysis that the second falsehood was entirely irrelevant. There still would have been a recovery for unfair competition even if the author had *correctly* guessed Hogan's secret, which the author had not done. The first falsehood was of course critical to the unfair competition claim. If Hogan had authorized the book, there would have been no claim for unfair competition. This is of course true of all unfair competition claims. If the competitor had consented to the use, there would be no injury. But if this falsity is all that is required for false light, then all we have done is to rename certain unfair competition claims as false light claims.

### 3. *Unauthorized Use of Name*

Prosser closes this paragraph with a reference to cases involving "the unauthorized use of [the plaintiff's] name as a candidate for office, or to advertise for witnesses of an accident, or the entry of an actor, without his consent, in a popularity contest of an embarrassing kind."<sup>86</sup>

*State ex rel. La Follette v. Hinkle*<sup>87</sup> is a misappropriation of name case. Prosser describes the case as involving an unauthorized use of the plaintiff's name "as a candidate for office," but that description is inaccurate. La Follette was running for President under the Progressive party's banner, and the Progressive party had submitted to Washington's Secretary of State a list of national electoral candidates to appear upon the ballot. The defendants, desiring to run a progressive slate for state offices, created a state political party called "the La Follette State party."<sup>88</sup> The state party did not nominate any electoral candidates who would have competed with the Progressive party's candidates.<sup>89</sup> La Follette joined the Progressive party in seeking to enjoin the Secretary of State from certifying the La Follette State party's nominations, thus keeping those nominations from appearing on the ballot.<sup>90</sup>

The court granted the injunction, but only in part. Citing the rights of every citizen "to vote for whomsoever he pleases," the court permitted the names submitted by the La Follette State party to appear on the ballot.<sup>91</sup> Mr. La Follette claimed, however, that the state party's use of his name was unauthorized, and the court granted relief on this basis, ordering that the words "La Follette" be dropped from the state party's name.<sup>92</sup> The court's rationale was simple:

Nothing so exclusively belongs to a man or is so personal and valuable to him as his name. His reputation and the character he has built up are inseparably connected with it. Others can have no right to use it without his express

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86. Prosser, *Privacy*, *supra* note 1, at 399 (footnotes omitted).

87. 229 P. 317 (Wash. 1924).

88. *Id.*

89. *Id.* at 319.

90. *Id.* at 317.

91. *Id.* at 319.

92. *Id.*

consent, and he has a right to go into any court at any time to enjoin or prohibit any unauthorized use of it.<sup>93</sup>

This quote shows quite plainly that the court was applying principles of misappropriation, and, indeed, Prosser also cites the case in the section of his article dealing with misappropriation.<sup>94</sup>

*Hamilton v. Lumbermen's Mutual Casualty Co.*<sup>95</sup> is another misappropriation of name case, albeit in a somewhat peculiar context. The plaintiff was involved in an automobile accident and suffered serious injuries. A third person was killed in the accident. The plaintiff's liability insurer, the defendant, was unable to communicate with the plaintiff for several weeks because of the plaintiff's injuries. Anticipating a possible lawsuit against its insured (a suit which it had an obligation to defend), the insurance company ran an advertisement in a local paper to solicit possible witnesses to the accident. Believing, probably correctly, that witnesses would be reluctant to call an insurance company, the advertisement was drafted in the first person and was purportedly signed by the insured.<sup>96</sup> In fact, however, the insured had not authorized the use of his name in the advertisement, and the address and phone number which appeared in the advertisement were those of an insurance company employee.<sup>97</sup>

The decision could easily have been grounded in the law of unauthorized commercial use of one's name (like *Pavesich*

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93. *Id.*

94. Prosser, *Privacy*, *supra* note 1, at 405 n.180.

95. 82 So. 2d 61 (La. App. 1955).

96. *Id.* at 62. The advertisement provided as follows:

Auto Accident  
May 12, 1952

If you witnessed the automobile accident in which I was involved on the Belle Chasse Highway, just below Gretna, on the afternoon of Monday, May 12, or if you know of anyone who witnessed it, or if you have any information whatsoever concerning the accident, I would appreciate it if you would either write me at the address given below or telephone me collect. I am especially anxious to contact the gentlemen who drove back to Gretna to summon the police and ambulance.

Fred G. Hamilton  
5110 Bienville Ave., New Orleans  
24 La., Telephone Audubon 6122

*Id.*

97. *Id.*

and a host of other cases), and Prosser cited *Hamilton* in his section on misappropriation.<sup>98</sup> The court's discussion does not proceed along such clear lines since the court preferred to quote extensively from the plaintiff's brief for its legal analysis.<sup>99</sup> The plaintiff's brief was, unfortunately, an analytic mess whose sole purpose apparently was to establish that there was a cause of action for invasion of privacy (a proposition that was not really at issue since there had already been several opinions from the Louisiana Supreme Court which recognized various privacy causes of action).<sup>100</sup> The case is best considered on narrow grounds concerning unauthorized use of plaintiff's name or portraiture in an advertisement, a cause of action quite distinct from false light privacy.

Finally, we have *Marks v. Jaffa*<sup>101</sup> to consider. The case involves no falsehood whatsoever, and its inclusion in the false light section of Prosser's article is curious. The plaintiff was a famous actor who had recently entered law school, apparently in an effort to change careers.<sup>102</sup> The defendant, a newspaper publisher, wished to publish the plaintiff's picture and name next to the picture and name of another famous actor and invite the readers to cast votes concerning the comparative popularity of the two actors.<sup>103</sup> The defendant originally sought the plaintiff's permission, but the plaintiff objected to the contest. The defendant held the contest notwithstanding the plaintiff's objections, and the plaintiff sought an injunction.<sup>104</sup> If there was a falsehood, it was only the possibility that readers might believe the plaintiff had consented to participate in the contest. The plaintiff did not allege the creation of this false impression, however, and the court's opinion may be searched in vain for reference to such a falsehood. Instead, the court held that a private person—which for this court included a famous actor who had recently entered law school in anticipation of becoming a member of the bar—had the right to object to being placed involuntarily in public contests which

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98. Prosser, *Privacy*, *supra* note 1, at 403 n.164.

99. *Hamilton*, 82 So. 2d at 63-65.

100. *Id.* at 64 (citing Louisiana cases).

101. 26 N.Y.S. 908 (Super. Ct. 1893).

102. This of course may be less of a career change than most people think.

103. *Id.* at 909.

104. *Id.*



purported to judge such matters as comparative popularity, "honesty or morality, or any other virtue or vice he was supposed to possess; and the victim selected would either have to vindicate his character in regard to the virtue or vice selected, or be declared inferior to his competitor—a comparison which might prove most odious."<sup>105</sup> The remainder of the opinion emphasizes the intrusion upon the private life of the plaintiff who, apparently in the court's eyes, had withdrawn from the public spotlight in favor of "the privacy of [his] home[.]"<sup>106</sup> Even if the court's decision were to withstand a proper constitutional analysis,<sup>107</sup> the decision has nothing to do with false light privacy. It is more properly treated as involving intrusion, public disclosure of private facts, or commercial appropriation of name or picture.

### C. *Unauthorized Use of Picture*

In the next paragraph, Prosser identifies "[a]nother form" of false light privacy involving "the use of the plaintiff's picture to illustrate a book or an article with which he has no reasonable connection."<sup>108</sup> Before looking at the cases in detail, it is worth remarking that the unauthorized use of the plaintiff's picture in a book or article would seem most naturally to involve a misappropriation of name or portraiture which, as already noted, is a well-recognized branch of the law of unfair competition (or, alternatively, is a well-recognized invasion of privacy).<sup>109</sup> The fact that the author of the book or article thought it would somehow improve the overall quality of the final product to include photographs indicates that the photographs have a commercial value, and the unauthorized use constitutes unfair competition or invasion of privacy by misappropriation.

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105. *Id.*

106. *Id.*

107. Serious constitutional issues would be created by imposing liability upon a newspaper for conducting a popularity poll concerning public figures. *Cf. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

108. Prosser, *Privacy*, *supra* note 1, at 399.

109. To the extent that the book or article contains defamatory material, the case will also be grounded in libel. It is of course the coincidence of facts giving rise to both libel and commercial misappropriation that Prosser exploits in creating a false light privacy tort.

If the subject of a photograph is legitimately newsworthy, the law of unfair competition and principles of free speech ordinarily combine to make the publication not actionable. If the subject of the photograph bears no reasonable connection to the article, then even if the article is newsworthy, the subject of the photograph is not, and the author or publisher may not assert free speech principles against the claim of misappropriation. Under this analysis, the lack of a reasonable connection does not indicate that the plaintiff has been placed in a false light; rather, the lack of reasonable connection takes away from the publisher a recognized interest in reporting newsworthy events (reporting which includes publication of related pictures). The core of the cause of action under this analysis is not that the defendant has falsely created the impression that the plaintiff is somehow connected to the subject matter of the article, but the misappropriation of the plaintiff's picture for commercial purposes. As will be seen, the cases which Prosser cites are more consistent with this misappropriation analysis than with Prosser's suggested false light tort. Prosser ignored the appropriation aspect of these cases, however, choosing to emphasize the false impression that might have been created. He lumped all of these cases together in one sentence as follows:

But when the face of some quite innocent and unrelated citizen is employed to ornament an article on the cheating propensities of taxi drivers, the negligence of children, profane love, "man hungry" women, juvenile delinquents, or the peddling of narcotics, there is an obvious innuendo that the article applies to him, which places him in a false light before the public, and is actionable.<sup>110</sup>

In *Peay v. Curtis Publishing Co.*,<sup>111</sup> the plaintiff, a taxi-cab driver in Washington D.C., pled counts in libel and invasion of privacy when the defendant published her photograph in *The Saturday Evening Post* in conjunction with an article describing Washington D.C. cab drivers as "ill-mannered, brazen, . . . contemptuous of their patrons . . . [and] dishonest."<sup>112</sup> Although the text of the article constituted only

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110. Prosser, *Privacy*, *supra* note 1, at 399 (footnotes omitted).

111. 78 F. Supp. 305 (D.D.C. 1948).

112. *Fowler v. Curtis Publishing Co.*, 78 F. Supp. 303, 304 (D.D.C. 1948) (a

a non-actionable group libel,<sup>113</sup> the court held that the plaintiff could state an individual cause of action for libel because her picture had been included in conjunction with the article. Thus, the jury was presented with a factual question concerning whether the ordinary reader would infer that the text of the article actually applied to the plaintiff.<sup>114</sup>

The court also approved the plaintiff's second cause of action for invasion of privacy. The court clearly viewed the case as involving nothing more than an unauthorized appropriation of the plaintiff's picture. It cited the early cases like *Pavesich* which involved, in the court's words, "the unauthorized utilization of photographs or pictures of the plaintiff in connection with advertising matter," and noted that "[s]everal of the decisions . . . apply the same principle to different unsanctioned uses of names or portraits of private individuals."<sup>115</sup> It also cited section 867 of the Restatement of Torts, which identified having one's "likeness exhibited to the public" without proper authorization as tortious conduct.<sup>116</sup> Most important, the court nowhere indicates in its privacy discussion that the truth or falsity of the impression created by the picture has anything to do with whether a cause of action for invasion of privacy was properly pled. According to the court, privacy is invaded when a person's picture is widely publicized without their consent.

Next is *Leverton v. Curtis Publishing Co.*,<sup>117</sup> which is one of the strongest cases in support of false light privacy. When she was ten years old, the plaintiff was struck by an automobile driven by a careless driver. A newspaper photographer happened to be passing the scene of the accident and snapped a picture of the plaintiff as she was being lifted from the pavement by a bystander. The picture was published the following day in conjunction with a newspaper account of the accident. Some twenty months later, the picture was published again,

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companion case to *Peay*).

113. *Id.*

114. *Peay*, 78 F. Supp. at 305.

115. 78 F. Supp. at 307.

116. RESTATEMENT (FIRST) OF TORTS § 867, superseded by RESTATEMENT (SECOND) OF TORTS § 652A-I (1976), provided in full as follows: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." *Id.*

117. 192 F.2d 974 (3d Cir. 1951).

this time in conjunction with a newspaper story titled, "They Ask To Be Killed," an article which emphasized pedestrian carelessness.

Plaintiff originally pled libel and invasion of privacy, but dropped the libel cause of action during trial.<sup>118</sup> The jury awarded damages for invasion of privacy, and the defendant appealed.<sup>119</sup> The court began its analysis by noting that the newspaper was privileged to publish the picture in conjunction with the original story about the accident, a point conceded by the plaintiff.<sup>120</sup> The plaintiff argued that the twenty-month lapse of time had caused the defendant's privilege to vanish, a proposition the court rejected.<sup>121</sup> The court nevertheless affirmed the judgment, finding that the defendants had abused the privilege of reporting newsworthy events by publishing the plaintiff's picture in conjunction with an article that "had nothing at all to do with her accident."<sup>122</sup> According to the court, the article related to "pedestrian carelessness," and there was no evidence to show that the plaintiff had been careless. The use of the picture was therefore not justified by the privilege to report newsworthy events.

Properly analyzed, *Leverton* is another misappropriation of likeness case, quite similar to *Peay v. Curtis Publishing Co.*, discussed above. In both cases, the pictures bore an insufficient relation to the subject matter of the article to justify their inclusion. The court in *Leverton* explicitly denied that the case involved an appropriation for a commercial use, and that explains why *Leverton* was one of Prosser's best cases.

A close examination of *Leverton's* discussion of appropriation indicates clearly, however, that the court misapprehended the doctrine. The court accepted the general proposition that "[p]eople who run newspapers and magazines as commercial enterprises, run them to make profit if they can,"<sup>123</sup> but, citing *Sidis v. F-R Publishing Corp.*,<sup>124</sup> the court held that "[t]he

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118. *Id.* at 978.

119. *Id.* at 974.

120. *Id.* at 976.

121. *Id.* at 977.

122. *Id.*

123. *Id.*

124. 113 F.2d 806 (2d Cir. 1940).

publication in this case was not an appropriation for a commercial use."<sup>125</sup>

The *Leverton* court obviously did not understand *Sidis*. The court in *Sidis* was faced with a claim under New York's appropriation statute, which required that the use of a picture be "for advertising purposes, or for the purposes of trade."<sup>126</sup> The picture in *Sidis* was of a former child prodigy who had rejected fame and sought to live reclusively. The picture was published along with an article titled, "Where Are They Now?" The court interpreted New York's appropriation statute to exclude "the publication of a newspaper, magazine, or book which imparts truthful news or other factual information to the public."<sup>127</sup> The court emphasized that a news publisher is immune from suit under New York's law "so long as he confines himself to the unembroidered dissemination of facts."<sup>128</sup> Fictionalization, by contrast, fell within the New York statute's scope.<sup>129</sup> The story in *Sidis* was completely accurate, and so the defendant could not be held liable for a misappropriation.

If the court in *Leverton* had properly understood *Sidis*, it would have concluded that using the plaintiff's picture to illustrate an *unrelated* news story was just the sort of fictionalization recognized in *Sidis* as being actionable as a commercial misappropriation of the plaintiff's likeness.<sup>130</sup>

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125. *Leverton*, 192 F.2d at 977.

126. *Sidis*, 113 F.2d at 810.

127. *Id.* (emphasis added).

128. *Id.* (citations omitted).

129. The court reemphasized this point as follows: "[the publisher] is immune from the interdict of §§ 50-51 so long as he confines himself to the unembroidered dissemination of facts. Publishers and motion picture producers have occasionally been held to transgress the statute in New York, but in each case the factual presentation was embellished by some degree of fictionalization." *Id.* (emphasis added, citations omitted).

130. The court in *Leverton* also purported to rely upon an article by Wilfred Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713, 720 (1948). Feinberg explains the analysis in *Sidis* in terms of a balancing between the commercial use of the photograph and the informational content of the article and photograph. According to Feinberg, when the informational content of an article and picture is sufficiently important (e.g., is newsworthy), the courts have denied the existence of a commercial use (or have, alternatively, held that the commercial use is justified in light of the value of the communication).

This analysis does not suggest, however, that all news stories printed in newspapers are non-commercial. To the contrary, Feinberg recognizes both the commercial nature of publishing and the public interest favoring certain types of publication (e.g., news). There is little informational value in false or fictionalized

Thus, although *Leverton* is one of Prosser's strongest cases, it supports Prosser only because the court's analysis in *Leverton* was seriously flawed. The *Leverton* court correctly held that the defendant had done something wrong, but the court incorrectly rejected misappropriation as the basis for its decision.

*Gill v. Curtis Publishing Co.*<sup>131</sup> is one of California's leading privacy cases. The defendant's employee secretly took a picture of the plaintiffs, husband and wife, while they were seated at stools in their own confectionery and ice cream concession. The husband had his arm around his wife and his cheek next to hers. This picture was published in the defendant's magazine in conjunction with an article about love. The caption for the picture read, "Publicized as glamorous, desirable, 'love at first sight' is a bad risk."<sup>132</sup> Love at first sight was described in the article as being based solely upon sexual attraction and as being the "wrong" kind of love.<sup>133</sup>

*Gill*, like *Leverton*, most naturally falls within misappropriation of likeness, and the California court in its analysis emphasized the elements of the misappropriation doctrine, though the court did not identify the doctrine by name.<sup>134</sup> Of particular interest is the following analysis:

Assuming [the article] to be within the range of public interest in dissemination of news, information or education, and in a medium that would not be classed as commercial—for profit or advertising—there appears no necessity for the use in connection with the article without their consent, of a photograph of plaintiffs. The article, to fulfill its purpose and satisfy the public interest, if any, in the subject matter discussed, could, possibly, stand alone without any picture. In any event, the public interest did not require the use of any particular person's likeness nor that of plaintiffs without their consent. The likeness is only illustrative of a part of the article, like a schematic diagram in a scientific dissertation, except that there is far less nec-

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reports, however, and when a newspaper uses someone's picture in a fictionalized manner, the use is most definitely a form of commercial misappropriation.

131. 239 P.2d 630 (Cal. 1952).

132. *Id.* at 632.

133. *Id.*

134. The lower court opinion was clearer in this respect than the opinion from the Supreme Court. See *Gill v. Curtis Publishing Co.*, 231 P.2d 565 (Cal. Ct. App. 1951).

essary pertinency.<sup>135</sup>

Stated more simply, the point is that even if the story were newsworthy and thus privileged, the picture of the plaintiffs was unrelated to the news or information contained in the story. The picture did not share the elements of newsworthiness that gave the article its privileged status. Accordingly, as in *Levertov* and *Sidis*, it was appropriate to hold the defendant responsible for its misappropriation.

The next six cases cited by Prosser were from New York. It is clear that the cases do not support the existence of false light privacy because New York's law on invasion of privacy is limited to misappropriation of name or likeness pursuant to the New York Civil Rights Law.<sup>136</sup> Each case deals with a misappropriation of name or likeness combined with an action for libel. It would unnecessarily burden this already lengthy discussion to treat these cases in the text. The cases are therefore discussed in the margin.<sup>137</sup>

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135. 239 P.2d at 634.

136. N.Y. CIV. RIGHTS LAW, §§ 50-51 (McKinney 1976).

137. The first case does not even live up to its billing as a New York privacy case. *Martin v. Johnson Publishing Co.*, 157 N.Y.S.2d 409 (Sup. Ct. 1956), was a libel action pure and simple and did not involve New York's limited misappropriation doctrine. Having found the photograph libellous (because it was published in conjunction with a lurid story), the court in the final paragraph of its short opinion explained its measure of damages as follows:

Invasion of her privacy and holding plaintiff up to possible scorn and ridicule, particularly by a repetition of a publication of the identical picture in another lurid setting, must be compensated for. She is the mother of young children. Her husband is a member of the police force of the community in which plaintiff lives.

*Id.* at 411-12.

Although the court mentions privacy in this paragraph, the court is using the word to describe a measure of damages and not as an indication of a cause of action based upon an invasion of privacy.

In *Semler v. Ultem Publications*, 9 N.Y.S.2d 319 (City Ct. 1938), the defendant published a photograph of the plaintiff, a professional model, without securing the proper consent, a clear misappropriation. In *Russell v. Marboro Books*, 183 N.Y.S.2d 8 (Sup. Ct. 1959), Jane Russell recovered damages under New York's misappropriation statute and for libel when the defendant modified pictures which Russell had consented to have published. The original picture was of Russell reading a book in one bed with a man reading a book in an adjoining bed. Among other sins, the defendant modified the picture to put Russell in the same bed with the male model. The court held that the consent did not extend to the modification. *Id.*

In *Metzger v. Dell Publishing Co.*, 136 N.Y.S.2d 888 (Sup. Ct. 1955), the court affirmed a jury verdict (conditioned on plaintiffs' stipulation to reduce the

#### D. *Inclusion of Name or Picture in Rogues' Gallery*

Prosser's final set of examples involve "the inclusion of the plaintiff's name, photograph and fingerprints in a public 'rogues' gallery' of convicted criminals, when he has not in fact been convicted of any crime."<sup>138</sup> Falsely claiming that a person has been convicted of a crime falls within that class of statements which are defamatory *per se*, and if the defendants in these cases had been private individuals (rather than the state), a claim for defamation would clearly have been appropriate.<sup>139</sup> In all but one of the cases cited, the plaintiff sought an injunction against a local or state police department to prevent them from taking and disseminating mug shots.<sup>140</sup> Relief was denied in most of the cases,<sup>141</sup> and the remaining cases are explainable on the ground that government may not systematically defame persons who have been arrested for crime by publicly portraying them as having already been convicted.<sup>142</sup>

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verdict) in an action for libel and violation of the New York statute when the defendant published a picture of the plaintiffs innocently standing outside of a building discussing the World Series in conjunction with an article on street gangs. The court in *Callas v. Whisper, Inc.*, 198 Misc. 829 (1950), *aff'd*, 105 N.Y.S.2d 1001 (App. Div. 1951), held that no cause of action was stated under New York's statute and dismissed plaintiff's suit. In *Thompson v. Close-Up, Inc.*, 98 N.Y.S.2d 300 (App. Div. 1950), the plaintiff's picture was published in conjunction with an article on dope-peddling, and the court held that the plaintiff had a cause of action under the New York statute because the plaintiff had no connection with dope-peddling and, therefore, the use of the picture did not further any interest in newsgathering or reporting and was, instead, "merely to increase the circulation of the magazine, which is to say, for purposes of advertising or trade." *Id.*

138. Prosser, *Privacy*, *supra* note 1, at 399.

139. BRUCE W. SANFORD, *LIBEL AND PRIVACY*, § 4.12.1, at 120 (2d ed. 1991).

140. The exception is *Vanderbilt v. Mitchell*, 67 A. 97 (N.J. Ct. Err. & A pp. 1907), where the court granted a mandatory injunction ordering the county clerk to remove the plaintiff's name as father from a birth certificate. The mother had falsely claimed the plaintiff was the father, and the appearance of his name on the birth certificate was virtually unassailable proof of his status, a status which carried with it significant legal and financial obligations.

141. *Downs v. Swann*, 73 A. 653 (Md. 1909); *Norman v. City of Las Vegas*, 177 P.2d 442 (Nev. 1947); *Mabry v. Kettering*, 117 S.W. 746 (Ark. 1909), *second appeal*, 122 S.W. 115 (Ark. 1909); *Bartletta v. McFeeley*, 152 A. 17 (N.J. Ch. 1930), *aff'd*, 156 A. 658 (N.J. 1931); *McGovern v. Van Riper*, 54 A.2d 469 (N.J. Ch. 1947). In these cases, the plaintiffs sought to prevent the police from sharing with other law enforcement agencies information which would identify the plaintiff (such as the plaintiff's picture, fingerprints, etc.).

142. *Itzkovitch v. Whitaker*, 39 So. 499 (La. 1950); *State ex rel. Mavity v.*



### E. *Prosser's Summary*

The final three paragraphs in Prosser's discussion attempt to put false light privacy in a broader context. For our purposes, the most important claim Prosser makes is that "[t]he false light need not necessarily be a defamatory one" and that "[t]he privacy cases do go considerably beyond the narrow limits of defamation, and no doubt have succeeded in affording a needed remedy in a good many instances not covered by the other tort."<sup>143</sup> Prosser cites no cases in support of these propositions, however, and as can be seen from the cases discussed above, none of the cases Prosser cites in the false light section of his article provides meaningful support.

It is true that recovery can be had for publishing a photograph in the absence of an action for defamation. Thus, the cases cited in Prosser's article do go beyond defamation, but they do not go in the direction of false light. Instead, the cases which go beyond defamation go in the direction of commercial misappropriation, a tort which, unlike false light, does not require that a false impression be created.

None of the cases Prosser cited purported to create a new tort with the characteristics of false light privacy. Prosser created false light privacy only by treating the cases in the manner of a smorgasbord in which Prosser could pick and choose various elements from each cause of action to create a new dish on the menu. Falsity comes from defamation, and widespread publicity comes from misappropriation and another privacy tort, public disclosure of private facts. Putting these together, Prosser came up with publicity that places the plaintiff in a false light in the public eye, a tort which no court had found a need to create.

## III. PROSSER'S PEDIGREE

### A. *The First Post-Prosser Article Cases*

Prosser took his new tort to the American Law Institute for inclusion in the Restatement (Second) of Torts in 1967, seven years following publication of his article. During those

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Tyndall, 66 N.E.2d 755 (Ind. 1946).

143. Prosser, *Privacy*, *supra* note 1, at 400-01.

seven years, Prosser's new classification was cited some eleven times by the courts.<sup>144</sup> Although Prosser's classification was cited, *none* of these cases held that a cause of action was either stated or proved for false light privacy. No plaintiff recovered a dime under false light privacy.

At the same time, however, the cases did not reject Prosser's new creation outright. Instead, on the allegations or proven facts of each case, the courts simply found one or more reasons to deny recovery or avoid the question whether false light existed. For example, in *Werner v. Times-Mirror Co.*,<sup>145</sup> the first case to use Prosser's "false light" terminology, the court held only that California's newspaper retraction statute, Civil Code section 48a, applied to a complaint alleging false light privacy, and since there was no allegation of compliance with the statute, the court affirmed a demurrer to the complaint.<sup>146</sup> In *Truxes v. Kenco Enterprises*,<sup>147</sup> the court held as a matter of law that the photograph of the plaintiff, a postal employee, in conjunction with a story emphasizing that federal employees have a later retirement age than state employees, did not place the plaintiff in a false light (since his photograph would be interpreted by an ordinary reader as simply an example of the fact that federal employees can be older than state employees). In *Brink v. Griffith*,<sup>148</sup> an appeal from a judgment in favor of the plaintiff for defamation and false light, the court held that it did not have to decide whether false light

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144. *Werner v. Times-Mirror Co.*, 14 Cal. Rptr. 208 (Ct. App. 1961); *Peterson v. Idaho First Nat. Bank*, 367 P.2d 284 (Idaho 1961); *Yoder v. Smith*, 112 N.W.2d 862 (Iowa 1962); *Carlisle v. Fawcett Publications*, 20 Cal. Rptr. 405 (Ct. App. 1962); *Truxes v. Kenco Enters.*, 119 N.W.2d 914 (S.D. 1963); *Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529 (1964); *Brink v. Griffith*, 396 P.2d 793 (Wash. 1964); *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964); *Brauer v. Globe Newspaper Co.*, 217 N.E.2d 736 (Mass. 1966); *Cabaniss v. Hipsley*, 151 S.E.2d 496 (Ga. App. 1966); *Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.S.C. 1966).

145. 14 Cal. Rptr. 208 (Ct. App. 1961).

146. Although the court technically did not need to address the question whether false light privacy existed independently of defamation, the court's reliance on § 48a strongly suggests that false light did not have an independent existence. Section 48a, by its express terms, applies only in cases of "libel in a newspaper, or of a slander by radio broadcast." CAL. CIV. CODE § 48a(1). Thus, in order for § 48a to apply, it must be true that a false light claim is an action for "libel" or "slander," at least for purposes of § 48a. *But see* *Kinsey v. Macur*, 165 Cal. Rptr. 608 (Ct. App. 1980), discussed *infra* at text accompanying notes 453-72.

147. 119 N.W.2d 914 (S.D. 1963).

148. 396 P.2d 793 (Wash. 1964).

existed, since even if it did exist, the plaintiff could have only one recovery.

These cases do not establish the existence of false light privacy. They establish only that courts were well aware of what Prosser had proposed, but that they had, as yet, found no reason to affirm a pro-plaintiff judgment on false light privacy grounds.

### B. *The American Law Institute Falls in Line*

Despite the absence of even a single case awarding a plaintiff damages for false light privacy, Prosser took his creation with him to the American Law Institute in 1967. As could be expected, Prosser used his article as the basis for what ultimately became Chapter 28A in the Restatement (Second) of Torts dealing with Invasions of Privacy. As originally proposed, section 652E, titled "Publicity Placing Person in False Light," provided as follows:

One who gives to another publicity which places him before the public in a false light of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy.<sup>149</sup>

Prosser modestly claimed in a special "Note to Institute" that Professor Wigmore had "first distinguished" false light privacy in an article published in 1916.<sup>150</sup> As will shortly be seen, Wigmore did not propose in his article an independent cause of action for false light (or anything remotely resembling false light). Prosser may have hoped to convince the Institute with his citation to Wigmore that false light was something more than the creation of the Reporter himself.<sup>151</sup>

Professor Wigmore's article was titled "The Right Against False Attribution of Belief or Utterance."<sup>152</sup> The article was

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149. A.L.I., RESTATEMENT (SECOND) OF TORTS 120, (Tentative Draft No. 13, 1967).

150. *Id.* A "Note to Institute" is published only in the Tentative Drafts and is not published in the final draft.

151. Professor E. Allan Farnsworth, reporter for the RESTATEMENT (SECOND) OF CONTRACTS, has observed that "it scarcely behooves the Reporter of a restatement to proclaim too often that he is engaged in innovation." E. Allan Farnsworth, *Ingredients in the Redaction of The Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 6 (1981).

152. John H. Wigmore, *The Right Against False Attribution of Belief or Utterance*,

prompted by a Kentucky decision, *Foster-Milburn Co. v. Chinn*,<sup>153</sup> and a student note commenting on that decision.<sup>154</sup> Wigmore correctly noted that the decision in *Foster-Milburn* had two bases: (a) "the publication of the plaintiff's picture for advertising purposes,"<sup>155</sup> and (b) "the false attribution to the plaintiff of a testimonial for the defendant's" product.<sup>156</sup> Wigmore described the first base as falling squarely within the right of privacy.<sup>157</sup> Wigmore just as clearly described the second base, which Prosser claimed in his comments constituted the first recognition of false light privacy, as being "a distinct right, *and belongs under the head of defamation*."<sup>158</sup>

Near the end of his article, Professor Wigmore does indeed speak of a right of privacy which protects against false attributions of opinions. The first example Professor Wigmore gives concerns an address which he made "before the Young Men's Christian Association on 'The Legal Profession,'" and a newspaper report made without his consent. The report falsely attributed to the speaker the assertion that "a man need not

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4 KY. L.J., No. 8, 3 (May 1916).

153. 120 S.W. 364 (Ky. 1909). The case is discussed above at text accompanying notes 44-46.

154. L. Meriwether Smith, *The Right of Privacy*, 4 KY. L.J., No. 3, 22 (Dec. 1915).

155. Wigmore, *supra* note 152, at 3.

156. Wigmore, *supra* note 152, at 3.

157. "The right of privacy protects against the publication or exposure of facts—of things which truly exist but ought [not] to be published, *e.g.*, one's facial features, family history, etc." Wigmore, *supra* note 152, at 3. Professor Wigmore appears not to have recognized in his article the existence of a cause of action for commercial misappropriation, and this explains his willingness to categorize unauthorized use of pictures for advertising purposes as a species of privacy. Professor Wigmore's confusion is especially apparent in his discussion of *Lord Byron v. Johnston*, 35 Eng. Rep. 851 (1816). See *supra* note 152, at 5. Wigmore correctly noted that "the [defendant's] sale might of course interfere with the sale of genuine poems," *supra* note 152, at 5, which should have suggested a cause of action for commercial misappropriation or unfair competition. According to Wigmore, however, the possible interference was "not essential" to decision of the case. Wigmore gives no support for this statement, and none can be given, because, as can be seen above, the report for the case is so sparse that it is virtually impossible to determine what was essential for the decision and what was not. We do know, however, that subsequent English decisions have read *Lord Byron* as requiring potential competitive injury, contrary to Wigmore's suggestion. *Clark v. Freeman*, 50 Eng. Rep. 759 (1848).

158. Wigmore, *supra* note 152, at 3 (emphasis added).

be honest to be a successful lawyer.'"<sup>159</sup> Wigmore explains why, in his view, this type of report should be actionable:

I am entitled to be judged in public by my *actual* opinions and utterances. To have false ones ascribed to me is an injury to my feelings of self respect. And that is the injury against which I am entitled to be protected. The right of privacy is really a right to be protected against a certain kind of injury to feelings. And that is the feature common to that right and the present one. The right to be protected against defamation, i.e., against loss of repute and patronage among other persons, does not here reach the essence of the wrong.<sup>160</sup>

Although Wigmore thought this type of false attribution *should* be actionable, he forthrightly conceded in his article that such a liability could not be supported "by any decisions."<sup>161</sup>

Prosser's claim that Wigmore recognized false light privacy as existing in the case law was contrary to fact, and no case had ever sanctioned an award of damages based upon false light privacy when Prosser brought his new tort to the Institute. It might be supposed that given the extraordinary lack of judicial or scholarly support for Prosser's creation, one or more members of the American Law Institute would have risen in protest, complaining that the Reporter was going far beyond anything found in the cases.<sup>162</sup> In the event, however, Prosser did not have to answer even a single question about false light privacy. He gave a brief explanation of what the section was intended to do, and he moved on to the next top-

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159. Wigmore, *supra* note 152, at 8.

160. Wigmore, *supra* note 152, at 8 (emphasis in original).

161. Wigmore, *supra* note 152, at 7. In terms of the law of defamation, Wigmore may simply have been 75 years ahead of his time. In *Masson v. New York Magazine*, 111 S. Ct. 2419 (1991), the Supreme Court held that falsely quoting a speaker could, in some circumstances, give rise to liability for defamation consistent with the First Amendment.

162. Probably the most famous such battle over cases at the Institute involved §§ 45 & 90 of the RESTATEMENT OF CONTRACTS. Promissory estoppel was initially not going to be included in the Restatement. It was pointed out in a heated debate at the Institute, however, that there were many cases the results of which could be explained *only* by resort to promissory estoppel, and § 90 ultimately was adopted. The story is compellingly told in GRANT GILMORE, *THE DEATH OF CONTRACT* 57-66 (1974).

ic.<sup>163</sup> The section came back before the Institute two more times with only drafting revisions to reflect the changing constitutional landscape, and there was again no discussion directed at the existence of the tort.<sup>164</sup>

*C. Post-Restatement (Second) Cases from State Courts*

There are now over 600 cases which mention false light privacy by name. There are just over 350 reported decisions from the state courts and over 250 reported decisions from federal courts. Because the common law of false light privacy, if it exists at all, can properly be found only in decisions from state courts,<sup>165</sup> the discussion in the text will focus primarily on the state decisions. Citations to federal decisions may be found principally in the footnotes.

We are looking for a decision in which false light privacy was the sole basis and could have been the only basis for a plaintiff judgment. Decisions in which false light privacy was only one of many theories in support of a judgment do not prove the independent existence of the tort. With this simple test in mind, the state decisions fall into the following categories, as will be shown: (1) cases mentioning false light privacy in the opinion even though the plaintiff did not allege false light privacy; (2) cases in which false light overlaps with libel; (3) cases in which false light overlaps with misappropriation of name or picture; (4) cases in which false light overlaps with emotional distress claims; (5) statute of limitations decisions in false light cases; (6) federal decisions where false light is the sole basis for recovery; and (7) state decisions in which false light is the sole, non-overlapping cause of action.

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163. 44 A.L.I. PROCEEDINGS, 274-77 (1968).

164. Tentative Draft No. 21 was discussed at 52 A.L.I. PROCEEDINGS 99-198 (1975); Tentative Draft No. 22 was discussed at 53 A.L.I. PROCEEDINGS 64-156 (1976).

165. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). No one has ever argued that there exists as a matter of federal common law a cause of action for false light privacy. Federal courts dealing with false light claims are therefore deciding cases under state law, and a federal court determination of state law is of course of exceedingly little precedential value.

### 1. Cases Not Involving False Light Privacy Claims

About one quarter of the 600 or so cases which mention false light privacy by name do not even involve claims of false light privacy by the plaintiff. These hundred and fifty or so cases involve defamation claims,<sup>166</sup> emotional distress claims,<sup>167</sup> wrongful termination,<sup>168</sup> reverse freedom of infor-

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166. State cases: *Winters v. Greeley*, 545 N.E.2d 422 (Ill. App. 1989); *Zinda v. Louisiana Pac. Corp.*, 440 N.W.2d 548 (Wis. 1989); *Hall v. Citizens Ins. Co. of Am.*, 368 N.W.2d 250 (Mich. Ct. App. 1985); *Schupmann by Schupmann v. Empire Fire & Marine Ins. Co.*, 589 S.W.2d 101 (Mo. App. 1985); *Little Rock Newspapers v. Dodrill*, 660 S.W.2d 933 (Ark. 1983); *Boyles v. Mid-Florida Television Corp.*, 431 So. 2d 627 (Fla. Dist. Ct. App. 1983); *Mark v. Seattle Times*, 635 P.2d 1081 (Wash. 1981), *affirming*, *Mark v. King Broadcasting Co.*, 618 P.2d 512 (Wash. Ct. App. 1980); *Baker v. Burlington N., Inc.*, 587 P.2d 829 (Idaho 1978); *Green Valley School v. Cowles Florida Broadcasting*, 327 So. 2d 810 (Fla. Dist. Ct. App. 1976); *Sindorf v. Jacron Sales Co.*, 341 A.2d 856 (Md. Ct. App. 1975), *aff'd*, 350 A.2d 688 (Md. Ct. App. 1976); *A.S. Abell Co. v. Barnes*, 265 A.2d 207 (Md. Ct. App. 1970).

Federal cases: *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119 (6th Cir. 1990); *Reuber v. Food Chem. News*, 899 F.2d 271 (4th Cir. 1990); *Kassel v. Gannett Co.*, 875 F.2d 935 (1st Cir. 1989); *Dworkin v. Hustler Magazine*, 867 F.2d 1188 (9th Cir. 1989); *Paul v. Aetna Cas. & Sur. Co.*, 831 F.2d 1127 (5th Cir. 1988), *aff'd without published opinion*; *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), *rev'd sub nom.*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985); *Bichler v. Union Bank & Trust Co.*, 745 F.2d 1006 (6th Cir. 1984) (en banc); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984); *Hunt v. Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983); *Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980); *Tureen v. Equifax, Inc.*, 571 F.2d 411 (8th Cir. 1978); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977); *Baggs v. Eagle-Picher Indus.*, 750 F. Supp. 264 (W.D. Mich. 1990); *White v. Fraternal Order of Police*, 707 F. Supp. 579 (D.D.C. 1989); *Garcia v. Williams*, 704 F. Supp. 984 (N.D. Cal. 1988); *Grimsley v. Guccione*, 703 F. Supp. 903 (M.D. Ala. 1988); *Zerman v. Sullivan & Cromwell*, 677 F. Supp. 1316 (S.D.N.Y. 1988); *Dean Witter Reynolds, Inc. v. Ness*, 677 F. Supp. 866 (D.S.C. 1988); *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501 (D. Minn. 1988); *McGinniss v. Employers Reinsurance Corp.*, 648 F. Supp. 1263 (S.D.N.Y. 1986); *Dowd v. Calabrese*, 589 F. Supp. 1206 (D.D.C. 1984); *Shermco Indus. v. Secretary of the Air Force*, 584 F. Supp. 76 (N.D. Tex. 1984); *Apostle v. Booth Newspapers*, 572 F. Supp. 897 (W.D. Mich. 1983); *Carey v. Hume*, 390 F. Supp. 1026 (D.D.C. 1975); *American Credit Corp. v. United States Casualty Co.*, 49 F.R.D. 314 (N.D. Cal. 1969).

167. State cases: *Doe v. Dyer-Goode*, 566 A.2d 889 (Pa. Super. Ct. 1989); *Figured v. Paralegal Technical Servs.*, 555 A.2d 663 (N.J. Super. Ct. 1989); *Ballaron v. Equitable Shipyards*, 521 So. 2d 481 (La. Ct. App. 1988); *Anderson v. Fisher Broadcasting Cos.*, 712 P.2d 803 (Or. 1986); *Killilea v. Sears Roebuck & Co.*, 499 N.E.2d 1291 (Ohio Ct. App. 1985); *Hall v. Citizens Ins. Co. of Am.*, 368 N.W.2d 250 (Mich. Ct. App. 1985); *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984); *Boyles v. Mid-Florida Television Corp.*, 431 So. 2d 627 (Fla. Dist. Ct. App. 1983); *Duhammel v. Star*, 653 P.2d 15 (Ariz. Ct. App. 1982); *Loft v. Fuller*, 408 So. 2d

mation act claims,<sup>169</sup> false imprisonment,<sup>170</sup> copyright infringement,<sup>171</sup> civil rights violations,<sup>172</sup> or other privacy

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619 (Fla. Dist. Ct. App. 1981); *Fry v. Ionia Sentinel-Standard*, 300 N.W.2d 687 (Mich. Ct. App. 1980); *Davis v. First Nat. Bank of Ariz.*, 605 P.2d 37 (Ariz. Ct. App. 1979); *Kelly v. Franco*, 391 N.E.2d 54 (Ill. App. Ct. 1979); *Jeffers v. City of Seattle*, 597 P.2d 899 (Wash. Ct. App. 1979); *Fletcher v. Florida Pub. Co.*, 319 So. 2d 100 (Fla. Dist. Ct. App. 1975); *Cluff v. Farmers Ins. Exchange*, 460 P.2d 666 (Ariz. Ct. App. 1969).

Federal cases: *Reuber v. Food Chem. News*, 899 F.2d 271 (4th Cir. 1990); *Dworkin v. Hustler Magazine*, 867 F.2d 1188 (9th Cir. 1989); *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1978), *rev'd sub nom.*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501 (D. Minn. 1988); *Muratore v. M/S Scotia Prince*, 656 F. Supp. 471 (D. Me. 1987); *Wood v. National Computer Sys.*, 643 F. Supp. 1093 (W.D. Ark. 1986); *Houghton v. New Jersey Mfrs. Ins. Co.*, 615 F. Supp. 299 (E.D. Pa. 1985); *Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872 (S.D. Ga. 1983); *Apostle v. Booth Newspapers*, 572 F. Supp. 897 (W.D. Mich. 1983); *Kedra v. City of Philadelphia*, 454 F. Supp. 652 (E.D. Pa. 1978).

168. State cases: *Roe v. Craddock*, 555 N.E.2d 1155 (Ill. App. Ct. 1990); *Luedtke v. Nabors Alaska Drilling*, 768 P.2d 1123 (Alaska 1989); *Ballaron v. Equitable Shipyards*, 521 So. 2d 481 (La. Ct. App. 1988); *Haith v. Model Cities Health Corp. of Kansas City*, 704 S.W.2d 684 (Mo. Ct. App. 1986); *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 278 S.E.2d 607 (S.C. 1981).

Federal cases: *Garcia v. Williams*, 704 F. Supp. 984 (N.D. Cal. 1988); *Hudson v. S.D. Warren Co.*, 608 F. Supp. 477 (D.C. Me. 1985); *Wells v. Thomas*, 569 F. Supp. 426 (E.D. Pa. 1983); *Rogers v. International Business Mach. Corp.*, 500 F. Supp. 867 (W.D. Pa. 1980).

169. State cases: *Detroit Free Press v. Oakland County Sheriff*, 418 N.W.2d 124 (Mich. Ct. App. 1987); *Napper v. Georgia Television Co.*, 356 S.E.2d 640 (Ga. 1987); *Forsberg v. Hous. Auth. of City of Miami Beach*, 455 So. 2d 373 (Fla. 1984); *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. Ct. App. 1983); *Tobin v. Mich. Civil Serv. Comm'n*, 331 N.W.2d 184 (Mich. 1982); *City of Grand Forks v. Grand Forks Herald*, 307 N.W.2d 572 (N.D. 1981); *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976).

Federal cases: *Kneeland v. National Collegiate Athletic Ass'n*, 650 F. Supp. 1076 (W.D. Tex. 1986); *Marzen v. United States Dep't of Health & Human Servs.*, 632 F. Supp. 785 (N.D. Ill. 1985); *Providence J. Co. v. FBI*, 460 F. Supp. 778 (D.C.R.I. 1978).

170. State cases: *Walls v. City of Columbus*, 461 N.E.2d 13 (Ohio Ct. App. 1983).

Federal cases: *Kedra v. City of Philadelphia*, 454 F. Supp. 652 (E.D. Pa. 1978).

171. Federal cases: *Baltimore Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977); *Rosenfeld v. W.B. Saunders*, 728 F. Supp. 236 (S.D.N.Y. 1990); *Nash v. CBS, Inc.*, 704 F. Supp. 823 (N.D. Ill. 1989); *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533 (D.C. Tex. 1980).

172. Federal cases: *Small v. Inhabitants of City of Belfast*, 796 F.2d 544 (1st Cir. 1986); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69 (8th Cir. 1976); *Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872 (D.C. Ga. 1983); *Spencer v. Gen. Tel. Co. of Pa.*, 551 F. Supp. 896 (D.C. Pa. 1982); *Garrity v. Thomson*, 81 F.R.D. 633 (D.C.N.H. 1979); *Kedra v. City of Philadelphia*, 454 F. Supp. 652 (D.C.



claims, such as intrusion,<sup>173</sup> misappropriation of name or

Pa. 1978); *Collin v. Smith*, 447 F. Supp. 676 (D.C. Ill. 1978); *Vanasco v. Schwartz*, 401 F. Supp. 87 (D.C.N.Y. 1975).

173. State cases: *Miller v. Motorola, Inc.*, 560 N.E.2d 900 (Ill. App. 1990); *Doe v. Dyer-Goode*, 566 A.2d 889 (Pa. Super. Ct. 1989); *Figured v. Paralegal Technical Servs.*, 555 A.2d 663 (N.J. Super. Ct. 1989); *Hudson v. Montcalm Pub. Corp.*, 379 S.E.2d 572 (Ga. Ct. App. 1989); *Wolf v. Regardie*, 553 A.2d 1213 (D.C. Ct. App. 1989); *Stessman v. American Black Hawk Broadcasting Co.*, 416 N.W.2d 685 (Iowa 1987); *Hall v. Post*, 355 S.E.2d 819 (N.C. Ct. App. 1987), *rev'd*, 372 S.E.2d 711 (N.C. Ct. App. 1988); *Batts v. City of Baton Rouge*, 501 So. 2d 302 (La. Ct. App. 1986); *DeAngelo v. Fortney*, 515 A.2d 594 (Pa. Super. Ct. 1986); *Candebat v. Flanagan*, 487 So. 2d 207 (Miss. 1986); *Melvin v. Burling*, 490 N.E.2d 1011 (Ill. App. 1986); *Texas Dept. of Mental Health & Mental Retardation v. Texas State Employees Union*, 708 S.W.2d 498 (Tex. App. 1986), *rev'd*, 746 S.W.2d 203 (Tex. Sup. Ct. 1987); *Trout v. Umatilla County Sch. Dist.*, 712 P.2d 814 (Or. App. 1985); *Werner v. Kiewer*, 710 P.2d 1250 (Kan. 1985); *Donnel v. Lara*, 703 S.W.2d 257 (Tex. App. 1985); *Humphers v. First Interstate Bank of Oregon*, 696 P.2d 527 (Or. 1985); *Schupmann by Schupmann v. Empire Fire and Marine Ins. Co.*, 689 S.W.2d 101 (Mo. App. 1985); *Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377 (Pa. Super. Ct. 1984); *Dunlap v. McCarty*, 678 S.W.2d 361 (Ark. 1984); *House v. Sports Films & Talents*, 351 N.W.2d 684 (Minn. Ct. App. 1984); *N.O.C., Inc. v. Schaefer*, 484 A.2d 729 (N.J. Super. Ct. 1984); *Sofka v. Thal*, 662 S.W.2d 502 (Mo. 1983); *Lewis v. Dayton Hudson Corp.*, 339 N.W.2d 857 (Mich. Ct. App. 1983); *Gerard v. Parish of Jefferson*, 424 So. 2d 440 (La. Ct. App. 1982); *Jones v. Hudgins*, 295 S.E.2d 119 (Ga. Ct. App. 1982); *MacKerron v. Madura*, 445 A.2d 680 (Me. 1982); *Sustin v. Fee*, 431 N.E.2d 992 (Ohio Op. 1982); *Tobin v. Michigan Civil Serv. Comm'n*, 331 N.W.2d 184 (Mich. 1982); *Mark v. Seattle Times*, 635 P.2d 1081 (Wash. 1981); *Mark v. King Broadcasting Co.*, 618 P.2d 512 (Wash. Ct. App. 1980); *Cape Publications v. Bridges*, 387 So. 2d 436 (Fla. Ct. App. 1980); *Montgomery Ward v. Shope*, 286 N.W.2d 806 (S.D. 1979); *Davis v. First Nat'l Bank of Ariz.*, 605 P.2d 37 (Ariz. Ct. App. 1979); *Jaubert v. Crowley Post-Signal*, 375 So. 2d 1386 (La. 1979); *Geisberger v. Willuhn*, 390 N.E.2d 945 (Ill. Ct. App. 1979); *Kelly v. Franco*, 391 N.E.2d 54 (Ill. Ct. App. 1979); *Jeffers v. City of Seattle*, 597 P.2d 899 (Wash. Ct. App. 1979); *Corcoran v. Southwestern Bell Tel. Co.*, 572 S.W.2d 212 (Mo. Ct. App. 1978); *Cassidy v. American Broadcasting Cos.*, 377 N.E.2d 126 (Ill. Ct. App. 1978); *Norris v. King*, 355 So. 2d 21 (La. Ct. App. 1978); *Gonzales v. Southwestern Bell Tel. Co.*, 555 S.W.2d 219 (Tex. Ct. App. 1977); *Bank of Indiana v. Tremunde*, 365 N.E.2d 295 (Ill. Ct. App. 1977); *Nelson v. Maine Times*, 373 A.2d 1221 (Me. 1977); *Berthiaume's Estate v. Pratt*, 365 A.2d 792 (Me. 1976); *Vespa v. Safety Fed. Sav. and Loan Ass'n*, 549 P.2d 878 (Kan. 1976); *Froelich v. Werbin*, 548 P.2d 482 (Kan. 1976); *Hollander v. Lubow*, 351 A.2d 421 (Md. 1976); *Hines v. Columbus Bank & Trust Co.*, 223 S.E.2d 468 (Ga. Ct. App. 1976); *Fletcher v. Florida Pub. Co.*, 319 So. 2d 100 (Fla. Ct. App. 1975); *McNutt v. New Mexico State Tribune Co.*, 538 P.2d 804 (N.M. 1975); *Dotson v. McLaughlin*, 531 P.2d 1 (Kan. 1975); *Froelich v. Adair*, 516 P.2d 993 (Kan. 1973); *Bradshaw v. Michigan Nat'l Bank*, 197 N.W.2d 531 (Mich. Ct. App. 1972); *Cluff v. Farmers Ins. Exchange*, 460 P.2d 666 (Ariz. App. 1969); *Household Finance Corp. v. Bridge*, 250 A.2d 878 (Md. 1969); *Lambert v. Dow Chem. Co.*, 215 So. 2d 673 (La. Ct. App. 1968).

Federal cases: *McSurely v. McClellan*, 753 F.2d 88 (D.C. Cir. 1985); *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978); *Tureen v. Equifax, Inc.*, 571 F.2d 411 (8th Cir. 1978); *Fowler v. S. Bell Tel. and Tel. Co.*, 343 F.2d 150 (5th Cir. 1965);

likeness,<sup>174</sup> or public disclosure of private facts.<sup>175</sup> Virtually

*Baggs v. Eagle-Picher Indus.*, 750 F. Supp. 264 (W.D. Mich. 1990); *Grimsley v. Guccione*, 703 F. Supp. 903 (M.D. Ala. 1988); *Bussen v. Southern Cent. Bell Tel. Co.*, 682 F. Supp. 319 (S.D. Miss. 1987); *Muratore v. M/S Scotia Prince*, 656 F. Supp. 471 (D. Me. 1987); *Socialist Workers Party v. Attorney Gen. of U.S.*, 642 F. Supp. 1357 (D.C.N.Y. 1986); *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282 (N.D. Ill. 1986); *Shermco Indus. v. Secretary of the Air Force*, 584 F. Supp. 76 (D.C. Tex. 1984); *Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872, (D.C. Ga. 1983); *Bi-Rite Enters. v. Button Master*, 555 F. Supp. 1188 (D.C.N.Y. 1983); *Spencer v. General Tel. Co. of Pennsylvania*, 551 F. Supp. 896 (D.C. Pa. 1982); *Barr v. ARCO Chem. Corp.*, 529 F. Supp. 1277 (S.D. Tex. 1982); *Beard v. Akzona, Inc.*, 517 F. Supp. 128 (D.C. Tenn. 1981); *Rogers v. IBM*, 500 F. Supp. 867 (D.C. Pa. 1980); *Birnbaum v. United States*, 436 F. Supp. 967 (D.C.N.Y. 1977); *Morris v. Danna*, 411 F. Supp. 1300 (D.C. Minn. 1976); *American Credit Corp. v. United States Casualty Co.*, 49 F.R.D. 314 (N.D. Ga. 1969); *Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.C.S.C. 1966).

174. State cases: *Staruski v. Continental Tel. Co. of Vt.*, 581 A.2d 266 (Vt. 1990); *Slocum v. Sears Roebuck & Co.*, 542 So. 2d 777 (La. Ct. App. 1989); *Hudson v. Montcalm Publishing Corp.*, 379 S.E.2d 572 (Ga. 1989); *Candebat v. Flanagan*, 487 So. 2d 207 (Miss. 1986); *Haith v. Model Cities Health Corp. of Kansas City*, 704 S.W.2d 684 (Mo. Ct. App. 1986); *Anderson v. Fisher Broadcasting Cos.*, 712 P.2d 803 (Or. 1986); *LeFlore v. Reflections of Tulsa*, 708 P.2d 1068 (Ok. 1985); *Faber v. Condecor, Inc.*, 477 A.2d 1289 (N.J. Super. Ct. 1984); *Lawrence v. A.S. Abell Co.*, 475 A.2d 448 (Md. 1984); *Venturi v. Savitt, Inc.*, 468 A.2d 933 (Conn. 1983); *Martin Luther King, Jr., Ctr. for Social Change v. American Heritage Prods.*, 296 S.E.2d 697 (Ga. 1982); *Loft v. Fuller*, 408 So. 2d 619 (Fla. Ct. App. 1981); *Hirsch v. S.C. Johnson & Son*, 280 N.W.2d 129 (Wis. 1979); *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979); *Norris v. King*, 355 So. 2d 21 (La. Ct. App. 1978); *Nelson v. Maine Times*, 373 A.2d 1221 (Me. 1977); *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977); *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62 (N.J. Super. Ct. 1967).

Federal cases: *Dworkin v. Hustler Magazine*, 867 F.2d 1188 (9th Cir. 1989); *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), *rev'd*, 485 U.S. 46 (1988); *Carson v. Here's Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983); *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Products*, 694 F.2d 674 (11th Cir. 1983); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977); *Carson v. National Bank of Commerce Trust & Sav.*, 501 F.2d 1082 (8th Cir. 1974); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974); *Rosenfeld v. W.B. Saunders*, 728 F. Supp. 236 (S.D.N.Y. 1990); *Nash v. CBS, Inc.*, 704 F. Supp. 823 (N.D. Ill. 1989); *Mendonsa v. Time, Inc.*, 678 F. Supp. 967 (D.R.I. 1988); *Zerman v. Sullivan & Cromwell*, 677 F. Supp. 1316 (S.D.N.Y. 1988); *Benally v. Hundred Arrows Press*, 614 F. Supp. 969 (D.N.M. 1985); *Friends of Phil Gramm v. Americans for Phil Gramm in '84*, 587 F. Supp. 769 (E.D. Va. 1984); *Bi-Rite Enter. v. Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983); *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533 (W.D. Tex. 1980); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

*Varnish v. Best Medium Publishing Co.*, 405 F.2d 608 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969), involved a sensationalized and fictionalized story based partly

upon an actual newsworthy event. The court does not clearly indicate whether the invasion of privacy theory being used is misappropriation or false light. The court's citation to *Aquino v. Bulletin Co.*, 154 A.2d 422 (Pa. Super. Ct. 1959), as "a case quite similar to this one," 405 F.2d at 612, suggests that misappropriation is the proper characterization since *Aquino* emphasized, citing New York authorities, that a sensationalized and fictionalized news report was more for purposes of trade than for reporting the news.

175. State cases: *Young v. Jackson*, 572 So. 2d 378 (Miss. 1990); *Miller v. Motorola, Inc.*, 560 N.E.2d 900 (Ill. Ct. App. 1990); *Roe v. Craddock*, 555 N.E.2d 1155 (Ill. Ct. App. 1990); *Zinda v. Louisiana Pac. Corp.*, 440 N.W.2d 548 (Wis. 1989); *Hudson v. Montclam Publishing Corp.*, 379 S.E.2d 572 (Ga. Ct. App. 1989); *Wolf v. Regardie*, 553 A.2d 1213 (D.C. Ct. App. 1989); *Hall v. Post*, 355 S.E.2d 819 (N.C. Ct. App. 1987), *rev'd*, 372 S.E.2d 711 (N.C. 1988); *Ballaron v. Equitable Shipyards*, 521 So. 2d 481 (La. Ct. App. 1988); *Maheu v. CBS, Inc.*, 247 Cal. Rptr. 304 (Ct. App. 1988); *Anderson v. Fisher Broadcasting Cos.*, 712 P.2d 803 (Or. 1986); *Trout v. Umatilla County Sch. Dist.*, 712 P.2d 814 (Or. Ct. App. 1985); *Werner v. Kliewer*, 710 P.2d 1250 (Kan. 1985); *Killilea v. Sears, Roebuck & Co.*, 499 N.E.2d 1291 (Ohio Ct. App. 1985); *Harris by Harris v. Easton Publishing Co.*, 483 A.2d 1377 (Pa. Super. Ct. 1984); *Boyles v. Mid-Florida Television Corp.*, 431 So. 2d 627 (Fla. Dist. Ct. App. 1983); *Ramsey v. Georgia Gazette Publishing Co.*, 297 S.E.2d 94 (Ga. Ct. App. 1982); *Jones v. Hudgins*, 295 S.E.2d 119 (Ga. Ct. App. 1982); *Roshto v. Hebert*, 413 So. 2d 927 (La. Ct. App. 1982), *rev'd*, 439 So. 2d 428 (La. 1983); *Tobin v. Michigan Civil Serv. Comm'n*, 331 N.W.2d 184 (Mich. 1982); *Fry v. Ionia Sentinel-Standard*, 300 N.W.2d 687 (Mich. Ct. App. 1980); *Cape Publications v. Bridges*, 387 So. 2d 436 (Fla. Dist. Ct. App. 1980), *cert. denied*, 464 U.S. 893 (1983); *Baker v. Burlington N., Inc.*, 587 P.2d 829 (Idaho 1978); *Corcoran v. Southwestern Bell Tel. Co.*, 572 S.W.2d 212 (Mo. Ct. App. 1978); *Rush v. Maine Sav. Bank*, 387 A.2d 1127 (Me. 1978); *Norris v. King*, 355 So. 2d 21 (La. Ct. App. 1978), *cert. denied*, 439 U.S. 995 (1978); *Beaumont v. Brown*, 257 N.W.2d 522 (Mich. 1977) (Coleman, J., dissenting); *Nelson v. Maine Times*, 373 A.2d 1221 (Me. 1977); *Hollander v. Lubow*, 351 A.2d 421 (Md. Ct. App. 1976), *cert. denied*, 426 U.S. 936 (1976); *Rawlins v. Hutchinson Publishing Co.*, 543 P.2d 988 (Kan. 1975); *Midwest Glass Co. v. Stanford Dev. Co.*, 339 N.E.2d 274 (Ill. Ct. App. 1975); *Fletcher v. Florida Publishing Co.*, 319 So. 2d 100 (Fla. Dist. Ct. App. 1975) (McCord, J., dissenting), *rev'd*, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977); *McNutt v. New Mexico State Tribune Co.*, 538 P.2d 804 (N.M. Ct. App. 1975), *cert. denied*, 540 P.2d 248 (N.M. 1975); *Hendry v. Conner*, 226 N.W.2d 921 (Minn. 1975); *Vogel v. W.T. Grant Co.*, 327 A.2d 133 (Pa. 1974); *Taylor v. K.T.V.B., Inc.*, 525 P.2d 984 (Idaho 1974); *Household Finance Corp. v. Bridge*, 250 A.2d 878 (Md. Ct. App. 1969); *Earp v. City of Detroit*, 167 N.W.2d 841 (Mich. Ct. App. 1969); *Lambert v. Dow Chem. Co.*, 215 So. 2d 673 (La. Ct. App. 1968).

Federal cases: *McSurely v. McClellan*, 753 F.2d 88 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1005 (1985); *Reuber v. Food Chem. News*, 899 F.2d 271 (4th Cir. 1990), *vacated*, 922 F.2d 197 (4th Cir. 1990); *Ross v. Midwest Communications*, 870 F.2d 271 (5th Cir. 1989), *cert. denied*, 493 U.S. 935 (1989); *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (10th Cir. 1981); *Tureen v. Equifax, Inc.*, 571 F.2d 411 (8th Cir. 1978); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69 (8th Cir. 1975), *cert. denied*, 429 U.S. 855 (1976); *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Doe v. McMillan*, 459 F.2d 1304 (D.C. Cir. 1972) (Wright, J., dissenting), *modified*, 412 U.S. 306 (1973); *Baggs v. Eagle-Picher Indus.*, 750 F. Supp. 264 (W.D. Mich. 1990); *Heath v. Playboy Enters.*, 732 F. Supp. 1145

all of these cases cite or quote either the Restatement (Second) of Torts section 652A,<sup>176</sup> Prosser's privacy article,<sup>177</sup> or one of the editions of Prosser & Keeton on Torts. The reference to "false light" has nothing to do with resolution of the cases, but in the course of discussing or quoting something that is relevant to the case, "false light" is incidentally included.

Unfortunately, the mere act of repeatedly quoting the Restatement or Prosser tends to bring an aura of reality to false light privacy. In this way, false light privacy is introduced into the law of a state in cases involving other, more well-established torts. The development of false light privacy in the State of Texas is a perfect example of how a cause of action can slip into the law of a state without careful consideration.

There are now fourteen published decisions from Texas courts which mention false light privacy. False light first appeared in *Industrial Foundation of the South v. Texas Industrial Accident Board*,<sup>178</sup> a reverse Freedom of Information Act case. The case arose under Texas' Open Records Act, and the issue was whether certain records held by the Texas Industrial Accident Board concerning workmen's compensation claims were

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(S.D. Fla. 1990); *White v. Fraternal Order of Police*, 707 F. Supp. 579 (D.D.C. 1989), *modified*, 909 F.2d 512 (D.C. Cir. 1990); *Wood v. National Computer Sys.*, 643 F. Supp. 1093 (W.D. Ark. 1986), *aff'd*, 814 F.2d 544 (8th Cir. 1990); *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282 (N.D. Ill. 1986); *Davis v. Monsanto Co.*, 627 F. Supp. 418 (S.D. W.Va. 1986); *Houghton v. New Jersey Mfrs. Ins. Co.*, 615 F. Supp. 299 (E.D. Pa. 1985), *rev'd*, 795 F.2d 1134 (3rd Cir. 1986); *Wells v. Thomas*, 569 F. Supp. 426 (E.D. Pa. 1983); *Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872 (S.D. Ga. 1983); *Garrity v. Thomson*, 81 F.R.D. 633 (D.C.N.H. 1979); *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976).

176. Section 652A provides, in relevant part, as follows:

(2) The right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another, as stated in 652B; or (b) appropriation of the other's name or likeness, as stated in 652C; or (c) unreasonable publicity given to the other's private life, as stated in 652D; or (d) publicity that unreasonably places the other in a false light before the public, as stated in 652E.

RESTATEMENT (SECOND) OF TORTS § 625A (1976).

Courts often quote § 652A in full in order to establish that there is a cause of action for invasion of privacy generally or for intrusion, appropriation or unreasonable publicity. It is of course unnecessary to quote § 652A(2)(d), dealing with false light, in these cases, but human nature being what it is, courts take the path of least resistance and quote the entire section.

177. Prosser, *Privacy*, *supra* note 1.

178. 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

"public" and therefore subject to disclosure.<sup>179</sup> The defendant claimed, among other things, that disclosure would violate the common law privacy rights of the workmen's compensation claimants.<sup>180</sup> The court noted that it had previously recognized a common law right of privacy which encompassed "the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."<sup>181</sup> The court then discussed whether disclosure of Industrial Accident Board records would constitute the wrongful publicizing of one's private affairs, holding that a fact question was presented on this issue for determination by the trial court.<sup>182</sup>

Since unwarranted publicity of private matters had been previously recognized in Texas jurisprudence, it was entirely unnecessary for the court to rely upon either the Restatement (Second) of Torts or Prosser. The court obviously felt, however, that citing both of these respected sources would strengthen its opinion, and the court listed Prosser's four categories of privacy, including false light privacy.<sup>183</sup> False light privacy was not relevant to the court's decision, and apart from the citation to Prosser's article, false light privacy was not discussed in the case.

The next reference to false light is in *Wolfe v. Arroyo*,<sup>184</sup> a failed attempt to create in Texas a meaningful cause of action for wrongful prosecution of a civil action. The plaintiff, a medical doctor, had been previously sued by the defendant for malpractice.<sup>185</sup> The malpractice action ended with a take-nothing summary judgment in favor of the doctor.<sup>186</sup> The doctor then filed what in most other jurisdictions would have been an action for abuse of process or malicious prosecu-

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179. 540 S.W.2d at 672.

180. *Id.* at 682.

181. *Id.* (quoting *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973)).

182. *Id.* at 682-86.

183. *Id.* at 682.

184. 543 S.W.2d 11 (Tex. Ct. App. 1976).

185. *Id.*

186. *Id.*

tion.<sup>187</sup> Texas does not recognize an ordinary action for malicious prosecution, however. Recognizing the importance of open access to its courts, the Supreme Court of Texas had previously held that a suit for malicious prosecution could be brought only if there had been a seizure of the person or of property.<sup>188</sup> Attempting to avoid this rule, the plaintiff creatively pled his case as one involving "constructive contempt" of court and invasion of privacy.<sup>189</sup>

The court of appeals rejected the pleading. According to the court, constructive contempt simply does not exist. Contempt involves violation of a court order, and there was no allegation that the defendant had violated any court order by filing the action for malpractice. In discussing the privacy claim, the court cited Texas' leading privacy case, *Billings v. Atkinson*,<sup>190</sup> and Prosser's four categories.<sup>191</sup> Correctly describing the state of Texas case law on privacy, the court noted that Texas cases had recognized intrusion and appropriation of name or picture, but that no Texas cases had considered public disclosure of private facts or false light.<sup>192</sup> The court did not attempt to put the plaintiff's suit into any of the four categories, holding that an absolute privilege attached to communications in a judicial proceeding, including the allegations contained in the defendant's prior complaint for malpractice.<sup>193</sup>

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187. *Id.*

188. *Pye v. Cardwell*, 222 S.W. 153 (Tex. 1920). A recent decision summarizes Texas law on this point as follows: "Texas law requires special injury for malicious prosecution, that is, actual interference with the defendant's person (such as an arrest or detention) or property (such as an attachment, an appointment of a receiver, a writ of replevin or an injunction)." *Sharif-Munir Davidson Dev. Corp. v. Bell*, 788 S.W.2d 427, 430 (Tex. Ct. App. 1990).

189. 543 S.W.2d at 12.

190. 489 S.W.2d 858 (Tex. 1973).

191. 543 S.W.2d at 13.

192. *Id.* Publicity of private facts had also been discussed in *Industrial Foundation of the South v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), but the court in *Industrial Foundation* did not actually have before it a civil tort suit. Unwarranted publicity of private facts was being raised solely as a bar to disclosure of documents by the Texas Industrial Accident Board. *Id.* at 682. Moreover, although the decision in *Industrial Foundation* was first issued on July 21, 1976, a petition for rehearing was not denied until October 6, 1976. The decision in *Wolfe* was rendered on October 13, 1976. The court in *Wolfe* may be excused for not citing *Industrial Foundation* in its discussion of Texas privacy law.

193. 543 S.W.2d at 13-14.

The next case, *Gonzales v. Southwestern Bell Telephone Co.*,<sup>194</sup> involved unauthorized intrusion by a telephone company employee into the plaintiff's residence for the purpose of disconnecting service while the plaintiff was absent.<sup>195</sup> Relying upon intrusion cases from other jurisdictions, since no Texas case on point existed, the court held that a cause of action for intrusion had been proven.<sup>196</sup> False light already begins to take on an independent existence in Texas in this case, however, because the court cites *Industrial Foundation*<sup>197</sup> as recognizing Prosser's four categories of privacy.<sup>198</sup>

The next step in the process of creation was *Moore v. Charles B. Pierce Film Enterprises*,<sup>199</sup> which involved a claim against a movie producer.<sup>200</sup> The movie dramatized a series of unsolved murders in Texas in the 1940's, and the complaint alleged that one of the victims portrayed in the movie was the plaintiff's deceased sister.<sup>201</sup> The complaint alleged intrusion and false light privacy.<sup>202</sup> Citing Prosser and the Restatement (Second) of Torts, the court claimed that it was "generally recognized" that the right of privacy encompassed Prosser's four categories.<sup>203</sup> Ultimately, it was unnecessary for the court to have recognized *any* right to privacy in the case, since the court held that an action for invasion of privacy, even if it existed, could be alleged by the deceased sister's brother (who was not mentioned in the movie at all).<sup>204</sup> As will shortly be seen, however, the court's inclusion of false light in the list of "generally recognized" torts would prove to be significant.

*H.C. Gill v. H.D. Snow*<sup>205</sup> arose out of a land dispute between two neighbors. Snow filled an old gravel pit on his property and when a nearby creek flooded, Gill's property was damaged.<sup>206</sup> Gill and Snow were unable to resolve their dif-

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194. 555 S.W.2d 219 (Tex. Ct. App. 1977).

195. *Id.* at 220.

196. *Id.* at 221-22.

197. 540 S.W.2d 668.

198. 555 S.W.2d at 221.

199. 589 S.W.2d 489 (Tex. Ct. App. 1979).

200. *Id.* at 490.

201. *Id.* at 489.

202. *Id.*

203. *Id.* at 490.

204. *Id.* at 491.

205. 644 S.W.2d 222 (Tex. Ct. App. 1982).

206. *Id.* at 223.

ferences privately, and Gill took out a one-page advertisement in the local paper which included, among other things, a reprint of a letter sent to Snow by the Texas Water Development Board expressing concern about Snow's landfill.<sup>207</sup> Snow sued for invasion of privacy, alleging intrusion, false light, and public disclosure of private facts.<sup>208</sup> The court cited *Billings*, *Moore* and the Restatement (Second) of Torts in support of its conclusion that there existed four types of privacy torts.<sup>209</sup> The court reversed the plaintiff's judgment and rendered judgment in favor of the defendant as a matter of law, finding that the evidence did not support an intrusion (because there was no physical or similar invasion), false light (because there was no evidence that anything in the advertisement was false), or public disclosure (because the advertisement was based for the most part on information contained in public records).<sup>210</sup>

It is fair to characterize Texas law at this point as not recognizing false light privacy. The court in *Billings* did not list false light as part of privacy. The *Industrial Foundation* court mentioned Prosser's four categories, but did not indicate approval or disapproval. The court in *Wolfe v. Arroyo* correctly noted that false light had not yet been approved or discussed by any Texas case. *Gonzales* began the process of incorporation by citing *Industrial Foundation* as though the court had recognized false light privacy. *Moore* and *Snow* gave added impetus by treating false light privacy as though it had achieved the status of a recognized tort.

We now come to *National Bonding Agency v. Demeson*,<sup>211</sup> the first case in Texas arguably to recognize false light privacy by affirming a jury verdict involving false light. It appears that the defendant had caused to be published a wanted poster with the plaintiff's name and picture, describing plaintiff as "a bond jumper and referring to her sexual habits."<sup>212</sup> The complaint also alleged that the defendant's agent had "forced their way into her residence, holding her and her children hostage,

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207. *Id.*

208. *Id.* at 224.

209. *Id.* at 223-24.

210. *Id.* at 224.

211. 648 S.W.2d 748 (Tex. Ct. App. 1983).

212. *Id.* at 749 n.1.



threatening them, and not allowing them to leave,"<sup>213</sup> and that the agents "had set fire to her car."<sup>214</sup>

The plaintiff pled causes of action for libel and slander, invasion of privacy (including intrusion, false light and public disclosure of private facts), assault and false imprisonment, intentional infliction of mental distress and intentional trespass to chattel.<sup>215</sup> The jury apparently found in favor of the plaintiff on "several of these torts" (unfortunately, we don't know from the court's opinion which torts the jury accepted and which were rejected), but awarded damages only for the invasion of privacy (although we don't know for which branch of invasion of privacy).<sup>216</sup>

The defendant appealed primarily on the ground that Texas did not recognize a cause of action for invasion of privacy.<sup>217</sup> This was of course a preposterous claim in light of *Billings* and other cases, which the court cited in its opinion rejecting the defendant's argument.<sup>218</sup> The court did not, however, take the time to distinguish the various privacy claims which had been recognized or to discuss any of the evidence in the case with an eye to identifying which type of privacy claim was presented. Instead, the court simply cited Prosser's four categories, and then held that "[o]n the authority of *Billings*, *supra*, . . . [plaintiff] has stated a tort actionable in Texas, to wit: the intentional invasion of the right of privacy."<sup>219</sup> The reader is left wondering if the case really involved false light at all. The court does not indicate that the poster was false, and *Billings* did not indicate that false light privacy was a cause of action.

Skipping over several unexceptional cases,<sup>220</sup> we come to

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213. *Id.* n.3.

214. *Id.* n.4.

215. *Id.* at 749.

216. *Id.*

217. *Id.* The court of appeals was hampered in its decision (as was the appellant's counsel) by the failure of the appellant to file a statement of facts which would have contained excerpts from the trial transcript, among other important pieces of the record. Because of the absence of a statement of facts, the appellant was limited to arguing that the special issues given to the jury did not correctly state Texas law. *Id.*

218. *Id.* at 749-50.

219. *Id.* at 750.

220. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. Ct. App. 1983) (open records act case); *Floyd v. Park Cities People, Inc.*, 685 S.W.2d 96

*Covington v. The Houston Post*,<sup>221</sup> which clearly recognized false light privacy as an independent tort in Texas. Plaintiff's photograph was published in conjunction with an article about another person of the same name. The article indicated that civil and criminal proceedings were pending against "Margaret Covington;" unfortunately, the Margaret Covington against who the proceedings were pending was not the Margaret Covington whose picture was printed. She brought an action against The Houston Post for libel and false light privacy.

The libel action was dismissed on summary judgment because the suit was filed more than one year after the publication, and Texas has a one-year statute of limitations for libel.<sup>222</sup> The plaintiff obviously pled false light in an attempt to avoid the statute of limitations. The first question which the court in *Covington* should have asked is whether false light had previously been recognized by Texas cases. It did not ask that question, however. Instead, it simply stated as an accepted fact that "[i]nvasion of privacy consists of four distinct torts," including false light.<sup>223</sup> In support of this premise, the court cited *Snow*, *Moore*, Prosser's treatise, the Restatement (Second) of Torts, and *Wood v. Hustler Magazine*,<sup>224</sup> a federal decision which relied upon *Industrial Foundation* and *Snow* in support of the proposition that "Texas courts recognize [all] four forms of privacy invasion."<sup>225</sup> Having found that false light privacy existed, the court next held that a two-year statute of limitations applied to false light privacy in light of the supposedly different interest being protected and a Texas rule of strictly construing statutes of limitation.<sup>226</sup>

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(Tex. Ct. App. 1985) (no cause of action for publication in newspaper of accurate picture of plaintiff's front yard); *Donnel v. Lara*, 703 S.W.2d 257 (Tex. Ct. App. 1985) (intrusion case involving telephone harassment); *Texas Dept. of Mental Health & Mental Retardation v. Texas State Employees Union*, 708 S.W.2d 498 (Tex. Ct. App. 1986), *rev'd on appeal*, 746 S.W. 203 (Tex. 1988) (intrusion case involving mandatory polygraph).

221. 743 S.W.2d 345 (Tex. Ct. App. 1988).

222. *Id.* at 346.

223. *Id.*

224. 736 F.2d 1084, *reh'g denied*, 744 F.2d 94 (5th Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985).

225. *Id.* at 1088.

226. 743 S.W.2d at 347-48. *Accord* *Clarke v. Denton Publishing Co.*, 793 S.W.2d 329 (Tex. Ct. App. 1990) (limitations period for libel does not apply to false light cause of action). These decisions were contrary to the result suggested

The experience in Texas with false light has been repeated in other jurisdictions and with respect to other torts. A court mentions a rule or an interest in passing—pure dicta. The next court treats the passing remark as more than dicta, and new rules and new causes of action are created, sometimes incorrectly.<sup>227</sup> One way to avoid this sort of error is for the second court to read prior opinions very carefully to separate the wheat from the chafe. This may be expecting too much of the second court, however, especially when the dicta appears in an opinion from a higher court or the highest court in the jurisdiction.

The better way to reduce this type of error is for the first court to be more careful in drafting its initial opinion. Say only what is truly necessary for the holding, and say no more. Omit those troublesome footnotes which may largely be drafted by clerks in any event. Don't try to make every decision a treatise on the law. Decide the case before the court and no more.

In Texas' case, the court's false light dicta in *Industrial Foundation of the South v. Texas Industrial Accident Board*<sup>228</sup> has been transformed into a holding in *Covington v. The Houston Post*<sup>229</sup> that a litigant may avoid the libel statute of limitations simply by repleading the same facts and calling it false light.

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in a 1975 article analyzing limitations periods for privacy actions under Texas law. Bacharach, *supra* note 9, at 949.

It is contended by this author that the torts of public disclosure and false light are so similar to the defamation action that, if considered afresh by the legislature, the same considerations should govern and these three actions should all have the same [one-year] statute of limitations.

Bacharach, *supra* note 9, at 849.

For a discussion of other statute of limitations cases, see *infra* text accompanying notes 335-50.

227. Cf. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 254 (1988) (retreating from dicta in prior California Supreme Court decisions which had been widely interpreted by the lower courts as approving the existence of a cause of action for wrongful termination). See generally Lawrence C. Levine, *Judicial Backpedaling: Putting the Brakes on California's Law of Wrongful Termination*, 20 PAC. L.J. 993, 1021 n.108 (1989).

228. 540 S.W.2d 668 (Tex. 1976).

229. 743 S.W.2d 345 (Tex. Ct. App. 1988).

## 2. *The Defamation Cases*

False light privacy appears most closely related to the action for defamation. An action for defamation lies to redress unprivileged, false statements of fact communicated to third persons which harms one's reputation.<sup>230</sup> The action for false light privacy lies, in theory, when the defendant has given publicity about another which "places the other before the public in a false light."<sup>231</sup> Simply inspecting these two sentences, one can see that a possible difference between defamation and false light is that defamation requires harm to reputation while false light apparently does not require harm to reputation. Other harm, and more particularly, emotional distress standing alone, is apparently sufficient for false light.<sup>232</sup>

Comment b to Section 652E confirms that this is the intended effect of the black-letter:

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.<sup>233</sup>

Courts attempting to distinguish libel from false light privacy have most often seized upon this supposed distinction.

Although Section 652E appears to assert that false light privacy protects an interest independent from libel, the comments to Section 652H, concerning damages, clearly state that "[o]ne who is publicly placed in a false light, under 652E, may recover damages for the harm to his reputation from the position in which he is placed."<sup>234</sup> So for false light, the plaintiff may recover both harm to reputation and emotional harm.

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230. RESTATEMENT (SECOND) OF TORTS § 558.

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

232. Not all jurisdictions follow this rule, however. In *Fellows v. National Enquirer*, 721 P.2d 97 (Cal. 1986), the court held that an action for false light could be maintained only if the communication was (1) defamatory on its face, or (2) if not defamatory on its face, if the plaintiff could prove "special damages." See Jeanne Ellen Courtney, *Fellows v. National Enquirer: Limiting the False Light Invasion of Privacy Tort*, 19 PAC. L.J. 355 (1988).

233. RESTATEMENT (SECOND) OF TORTS § 652E, cmt. b.

234. RESTATEMENT (SECOND) OF TORTS § 652H, cmt. a.

In most defamation cases, the measure of damages will likewise include both harm to reputation and emotional harm. According to the traditional common law rules, where there has been either a libel, slander per se, or slander not per se where special damages are proven, damages will be measured by the harm to reputation plus any proven emotional distress, which is recoverable as a form of parasitic damages.<sup>235</sup> Section 623 of the Restatement (Second) of Torts so provides: "One who is liable to another for a libel or slander is liable also for emotional distress and bodily harm that is proved to have been caused by the defamatory publication." Thus, harm to reputation and emotional distress are recoverable in both defamation and false light. There is a complete overlap in the measure of damages.

The similarities between defamation and false light are so marked that some courts have concluded that if a cause of action for defamation is pled, a cause of action for false light privacy is duplicative and may be dismissed from the case. That, for example, was the holding in *Kapellas v. Kofman*,<sup>236</sup> the California Supreme Court's first exposure to false light privacy. *Kapellas* arose out of an editorial published by the defendant critical of the plaintiff, who was then seeking a position on the city council. The editorial, entitled "Children's Welfare Must Come First," criticized the plaintiff's decision to seek office notwithstanding her status as mother of six.<sup>237</sup> Plaintiff filed suit in three counts, the first for libel on her own behalf, the second for libel on behalf of her children, and the third for invasion of privacy on behalf of her children.<sup>238</sup> The trial court granted a demurrer to all three counts,<sup>239</sup> and the plaintiff appealed.

The Supreme Court of California held that the first two causes of action were properly stated, and it reversed the trial court's judgment granting a demurrer.<sup>240</sup> As to the third count for invasion of the children's privacy, the court distinguished between false light and unreasonable publicity. Con-

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235. BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 9.6.3, 367-68 (1987).

236. 459 P.2d 912 (Cal. 1969).

237. *Id.* at 914-15 n.2.

238. *Id.* at 914-15.

239. *Id.*

240. *Id.* at 916-21.

cerning unreasonable publicity of private facts, the court held that a cause of action was stated and that this was distinct from the cause of action for libel.<sup>241</sup> The cause of action for false light did not fare so well, however. Relegating its discussion of false light to a footnote, the court found "the [false light] action is in substance equivalent to the children's libel claim," and the court held that "[s]ince the complaint contains a specific cause of action for libel, the privacy count, if intended in this light, is superfluous and should be dismissed."<sup>242</sup> Other courts have come to a similar conclusion.<sup>243</sup>

Courts also have almost uniformly held that the same substantive defenses—both common law and constitutional—which apply to defamation actions also apply to false light claims.<sup>244</sup> As will be seen below, some courts have seized upon the theoretical difference between false light and defamation to give the plaintiff a way around a statute of limitations defense, but the results in these cases have little to do with the substance of false light privacy and much to do with judicial hostility to limitations defenses.<sup>245</sup>

Because the overlap between defamation and false light is so pronounced even in theory, it is no surprise that false light and defamation almost always go hand in hand, and the cases involving allegations of both defamation and false light are the single largest class of false light cases.<sup>246</sup> The great majority of

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241. *Id.* at 921.

242. *Id.* at 921 n.16.

243. State cases: *Hester v. Barnett*, 723 S.W.2d 544 (Mo. App. 1987); *Selleck v. Globe Int'l*, 212 Cal. Rptr. 838 (Ct. App. 1985) (following *Kapellas*). See also *Pearce v. Courier-Journal*, 683 S.W.2d 633 (Ky. App. 1985) (noting that because of the complete overlap in damages recoverable, there could be only one recovery).

Federal cases: *Renner v. Donsbach*, 749 F. Supp. 987 (W.D. Mo. 1990); *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490 (D.D.C. 1987).

244. See cases cited in *Fellows v. National Enquirer*, 721 P.2d 97 (Cal. 1986). See also Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 334 (1979); Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1274-75 (1976).

245. See *infra* text accompanying notes 335-50.

246. State cases: *Near East Side Community Org. v. Hair*, 555 N.E.2d 1324 (Ind. Ct. App. 1990); *Aisenson v. American Broadcasting Co.*, 269 Cal. Rptr. 379 (Ct. App. 1990); *Murray v. Schlosser*, 574 A.2d 1339 (Conn. Super. Ct. 1990); *Schaffer v. Zekman*, 554 N.E.2d 988 (Ill. App. Ct. 1990); *S & W Seafoods Co. v. Jacor Broadcasting*, 390 S.E.2d 228 (Ga. Ct. App. 1989); *Yancey v. Hamilton*, 786 S.W.2d 854 (Ky. 1989); *Henry v. Taft Television & Radio Co.*, 774 S.W.2d 889 (Mo. Ct. App. 1989); *Yovino v. Fish*, 539 N.E.2d 548 (Mass. Ct. App. 1989); *Jones v. Palmer Communications*, 440 N.W.2d 884 (Iowa 1989); *Hoppe v. Hearst Corp.*,

770 P.2d 203 (Wash. Ct. App. 1989); *Thomason v. Times Journal*, 379 S.E.2d 551 (Ga. Ct. App. 1989); *Lovgren v. Citizens First Nat'l Bank of Princeton*, 534 N.E.2d 987 (Ill. App. Ct. 1989); *Elm Medical Lab. v. RKO Gen.*, 532 N.E.2d 675 (Mass. 1989); *Yakowicz v. McDermott*, 548 A.2d 1330 (Pa. Commw. Ct. 1988); *Easter Seal Soc'y v. Playboy Enters.*, 530 So. 2d 643 (La. Ct. App. 1988); *Van Duyn v. Smith*, 527 N.E.2d 1005 (Ill. App. Ct. 1988); *Cox v. Hatch*, 761 P.2d 556 (Utah 1988); *Walko v. Kean College*, 561 A.2d 680 (N.J. Super. Ct. 1988); *Celebrezze v. Dayton Newspapers, Inc.*, 535 N.E.2d 755 (Ohio Ct. App. 1988); *Larsen v. Philadelphia Newspapers*, 543 A.2d 1181 (Pa. Super. Ct. 1988); *Blake v. Gannett Co.*, 529 So. 2d 595 (Miss. 1988); *Ganassi v. Buchanan Ingersoll, P.C.*, 540 A.2d 272 (Pa. Super. Ct. 1988); *Romaine v. Kallinger*, 537 A.2d 284 (N.J. 1988); *Rowland v. Union Hills Country Club*, 757 P.2d 105 (Ariz. Ct. App. 1988); *Ohio Sav. Ass'n v. Business First of Columbus*, 540 N.E.2d 320 (Ohio Ct. App. 1988); *Spears v. McCormick & Co.*, 520 So. 2d 805 (La. Ct. App. 1987); *Jones v. Taibbi*, 512 N.E.2d 260 (Mass. 1987); *Godbehere v. Phoenix Newspapers*, 746 P.2d 1319 (Ariz. Ct. App. 1987), *vacated*, 783 P.2d 781 (Ariz. 1989); *Berkos v. National Broadcasting Co.*, 515 N.E.2d 668 (Ill. App. Ct. 1987); *Morganroth v. Whitall*, 411 N.W.2d 859 (Mich. Ct. App. 1987); *Burton v. NCNB Nat'l Bank of N. Carolina*, 355 S.E.2d 800 (N.C. Ct. App. 1987); *Deitz v. Wometco West Michigan TV*, 407 N.W.2d 649 (Mich. Ct. App. 1987); *Muslow v. A.G. Edwards & Sons*, 509 So. 2d 1012 (La. Ct. App. 1987); *Lakian v. Globe Newspaper Co.*, 504 N.E.2d 1046 (Mass. 1987); *Fisher v. Detroit Free Press*, 404 N.W.2d 765 (Mich. Ct. App. 1987); *Hudak v. Fox*, 521 A.2d 889 (N.J. Super. Ct. 1987); *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987); *Early Detection Ctr., P.C. v. New York Life Ins. Co.*, 403 N.W.2d 830 (Mich. Ct. App. 1986); *Hirsch v. Cooper*, 737 P.2d 1092 (Ariz. Ct. App. 1986); *Haynik v. Zimlich*, 498 N.E.2d 1095 (Ohio C.P. 1986), *rereported*, 508 N.E.2d 195 (Ohio Misc. 2d 1986); *LaMon v. City of Westport*, 723 P.2d 470 (Wash. Ct. App. 1986); *Hall v. Pizza Hut, Inc.*, 396 N.W.2d 809 (Mich. Ct. App. 1986); *Wecht v. PG Pub. Co.*, 510 A.2d 769 (Pa. Super. Ct. 1986); *Fasching v. Kallinger*, 510 A.2d 694 (N.J. Super. Ct. 1986); *McCammon & Assocs. v. McGraw-Hill Broadcasting Co.*, 716 P.2d 490 (Colo. Ct. App. 1986); *Hagler v. Democrat-News, Inc.*, 699 S.W.2d 96 (Mo. Ct. App. 1985); *Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985); *Sawabini v. Desenberg*, 372 N.W.2d 559 (Mich. Ct. App. 1985); *Selleck v. Globe Int'l*, 212 Cal. Rptr. 838 (Ct. App. 1985); *Pearce v. Courier-Journal*, 683 S.W.2d 633 (Ky. Ct. App. 1985); *Buller v. Pulitzer Publishing Co.*, 684 S.W.2d 473 (Mo. Ct. App. 1984); *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610 (Cal. 1984); *Zartman v. Lehigh County Humane Soc'y*, 482 A.2d 266 (Pa. Super. Ct. 1984); *McNabb v. Oregonian Publishing Co.*, 685 P.2d 458 (Or. Ct. App. 1984); *Arent v. Hatch*, 349 N.W.2d 536 (Mich. Ct. App. 1984); *Ledl v. Quik Pik Food Stores*, 349 N.W.2d 529 (Mich. Ct. App. 1984); *Crump v. Beckley Newspapers*, 320 S.E.2d 70 (W. Va. 1984); *Yeager v. Local Union 20*, 453 N.E.2d 666 (Ohio 1983); *Renwick v. News & Observer Publishing Co.*, 304 S.E.2d 593 (N.C. Ct. App. 1983), *rev'd*, 312 S.E.2d 405 (N.C. 1984); *Walls v. City of Columbus*, 461 N.E.2d 13 (Ohio Ct. App. 1983); *Byrd v. Hustler Magazine*, 433 So. 2d 593 (Fla. Ct. App. 1983); *Weatherall v. Dep't of Health & Human Resources*, 432 So. 2d 988 (La. Ct. App. 1983); *National Bonding Agency v. Demeson*, 648 S.W.2d 748 (Tex. Ct. App. 1983); *Jones v. Calder*, 187 Cal. Rptr. 825 (Ct. App. 1982), *aff'd*, 465 U.S. 783 (1984); *Goodrich v. Waterbury Republican-America*, 448 A.2d 1317 (Conn. 1982); *Thorpe v. Danby*, 448 A.2d 676 (Pa. Commw. Ct. 1982); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981); *Board of Trustees of Leland Stanford Jr. Univ. v. Superior Court*, 174 Cal. Rptr. 160 (Ct. App. 1981); *Anderson v. Low Rent Housing Comm'n*, 304 N.W.2d 239 (Iowa 1981); *Williams v.*

Church's Fried Chicken, 279 S.E.2d 465 (Ga. Ct. App. 1981); Forsher v. Bugliosi, 608 P.2d 716 (Cal. 1980); Hodsdon v. Whitworth, 266 S.E.2d 561 (Ga. Ct. App. 1980); Adreani v. Hansen, 400 N.E.2d 679 (Ill. App. Ct. 1980); Dodrill v. Arkansas Democrat Co., 590 S.W.2d 840 (Ark. 1979); Brown v. Boney, 255 S.E.2d 784 (N.C. Ct. App. 1979); Harrison v. Washington Post Co., 391 A.2d 781 (D.C. Cir. 1978); Lester v. Trust Co. of Georgia, 241 S.E.2d 633 (Ga. Ct. App. 1978); Winegard v. Larsen, 260 N.W.2d 816 (Iowa 1977); Devlin v. Greiner, 371 A.2d 380 (N.J. Super. Ct. 1977); Bitsie v. Walston, 515 P.2d 659 (N.M. Ct. App. 1973); Burke v. Triangle Publications, 302 A.2d 408 (Pa. Super. Ct. 1973); Harnish v. Herald-Mail Co., 286 A.2d 146 (Md. 1972); Kapellas v. Kofman, 459 P.2d 912, (Cal. 1969); Reed v. Ponton, 166 N.W.2d 629 (Mich. Ct. App. 1968); Patton v. Royal Indus., 70 Cal. Rptr. 44 (Ct. App. 1968).

Federal cases: White v. Fraternal Order of Police, 909 F.2d 512 (D.C. Cir. 1990); Aids Counseling & Testing Ctrs. v. Group W Television, Inc., 903 F.2d 100 (4th Cir. 1990); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262 (10th Cir. 1989); Price v. Viking Penguin, Inc., 881 F.2d 1526 (8th Cir. 1989); Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989); Leidholdt v. L.F.P., Inc., 860 F.2d 890 (9th Cir. 1988); Ault v. Hustler Magazine, 860 F.2d 877 (9th Cir. 1988); Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012 (1st Cir. 1988); Rouly v. Enserch Corp., 835 F.2d 1127 (5th Cir. 1988); Moore v. Big Picture Co., 828 F.2d 270 (5th Cir. 1987); Ashby v. Hustler Magazine, 802 F.2d 856 (6th Cir. 1986); Machleder v. Diaz, 801 F.2d 46 (2d Cir. 1986); Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447 (9th Cir. 1986); O'Donnell v. CBS, Inc., 782 F.2d 1414 (7th Cir. 1986); Coughlin v. Westinghouse Broadcasting & Cable, 780 F.2d 340 (3d Cir. 1985); Bichler v. Union Bank & Trust Co. of Grand Rapids, 745 F.2d 1006 (6th Cir. 1984); Lerman v. Flynt Distrib. Co., 745 F.2d 123 (2d Cir. 1984); Coudert v. Paine Webber, Inc., 705 F.2d 78 (2d Cir. 1983); Cashgai v. Leibowitz, 703 F.2d 10 (1st Cir. 1983); Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666 (4th Cir. 1982); Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir. 1981); Tappen v. Ager, 599 F.2d 376 (10th Cir. 1979); Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977); Renner v. Donsbach, 749 F. Supp. 987 (W.D. Mo. 1990); Jacobs v. Dujmovic, 752 F. Supp. 1516 (D. Colo. 1990); Zechman v. Merrill Lynch, Inc., 742 F. Supp. 1359 (N.D. Ill. 1990); Hardge-Harris v. Pleban, 741 F. Supp. 764 (E.D. Mo. 1990); Rickman v. Cone Mills Corp., 129 F.R.D. 181 (D. Kan. 1989); Handley v. Phillips, 715 F. Supp. 657 (M.D. Pa. 1989); Mize v. Harvey Shapiro Enters., 714 F. Supp. 220 (N.D. Miss. 1989); Stewart v. Pantry, Inc., 715 F. Supp. 1361 (W.D. Ky. 1988); Seaphus v. Lilly, 691 F. Supp. 127 (N.D. Ill. 1988); Mitchell v. Random House, Inc., 703 F. Supp. 1250 (S.D. Miss. 1988); Rohda v. Franklin Life Ins. Co., 689 F. Supp. 1034 (D. Colo. 1988); Brueggemeyer v. American Broadcasting Cos., 684 F. Supp. 452 (N.D. Tex. 1988); Brueggemeyer v. Krut, 684 F. Supp. 471 (N.D. Tex. 1988); Southern Air Transp. v. American Broadcasting Cos., 670 F. Supp. 38 (D.D.C. 1987); Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490 (D.D.C. 1987); Rickman v. Cone Mills Corp., 659 F. Supp. 412 (D. Kan. 1987); Jensen v. Times Mirror Co., 634 F. Supp. 304 (D. Conn. 1986), *on motion for reconsideration*, 647 F. Supp. 1525 (1986); Hartman v. Meredith Corp., 638 F. Supp. 1015 (D. Kan. 1986); L. Cohen & Co. v. Dun & Bradstreet, Inc., 629 F. Supp. 1425 (D. Conn. 1986); Robinson v. Vitra Corp., 620 F. Supp. 1066 (D.C. Md. 1985); Bosco v. United States Army Corps of Engineers, 611 F. Supp. 449 (D.C. Tex. 1985); Coughlin v. Westinghouse Broadcasting & Cable, 603 F. Supp. 377 (D.C. Pa. 1985); Mays v. Laurant Publishing, Ltd., 600 F. Supp. 29 (N.D. Ga. 1984); Holt v. Cox Enters., 590 F. Supp. 408 (D.C. Ga. 1984); Bolduc v. Bailey, 586 F. Supp. 896 (D. Colo. 1984); Parnell v. Booth Newspapers, 572 F. Supp. 909 (W.D. Mich.



these cases resulted in a judgment for the defendant on one or another ground, such as the truth of the communications,<sup>247</sup> that the communications were not capable of bearing a defamatory meaning and were not highly offensive to a reasonable person,<sup>248</sup> or that the communications were privileged, either under common law or under the Constitution.<sup>249</sup>

There are, of course, a handful of cases in which a judgment in favor of the plaintiff was affirmed or in which the appellate court permitted an action to proceed to trial for a possible judgment in favor of the plaintiff. In the following

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1983); McCabe v. Village Voice, 550 F. Supp. 525 (D.C. Pa. 1982); Cantrell v. American Broadcasting Cos., 529 F. Supp. 746 (N.D. Ill. 1981); Fitzgerald v. Penthouse Int'l, Ltd., 525 F. Supp. 585 (D.C. Md. 1981); Roberts v. Dover, 525 F. Supp. 987 (D.C. Tenn. 1981); Dresbach v. Doubleday & Co., 518 F. Supp. 1285 (D.C. 1981); Martin v. Municipal Publications, 510 F. Supp. 255 (E.D. Pa. 1981); Cibenko v. Worth Publishers, 510 F. Supp. 761 (D.C. N.J. 1981); Gonzalez v. Leonard, 497 F. Supp. 1058 (D.C. Conn. 1980); Smith v. Esquire, Inc., 494 F. Supp. 967 (D.C. Md. 1980); Fogel v. Forbes, Inc., 500 F. Supp. 1081 (D.C. Pa. 1980); Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893 (D.C. Mich. 1980); Bromhall v. Rorvik, 478 F. Supp. 361 (E.D. Pa. 1979); Justice v. Belo Broadcasting Corp., 472 F. Supp. 145 (D.C. Tex. 1979); Lorentz v. Westinghouse Elec. Corp., 472 F. Supp. 946 (W.D. Pa. 1979); Rinsley v. Brandt, 446 F. Supp. 850 (Kan. 1977); Wilson v. Retail Credit Co., 325 F. Supp. 460 (D.C. Miss. 1971); Holmes v. Curties Publishing Co., 303 F. Supp. 522 (D.S.C. 1969); Peacock v. Retail Credit Co., 302 F. Supp. 418 (D.C. Ga. 1969).

247. See, e.g., Near East Side Community Org. v. Hair, 555 N.E.2d 1324 (Ind. Ct. App. 1990) (no allegation that statements were false); Aisenso v. American Broadcasting Co., 269 Cal. Rptr. 379 (Ct. App. 1990) (allegation that judge had lowest rating in survey was true); Ohio Sav. Ass'n v. Business First of Columbus, 540 N.E.2d 320 (Ohio Ct. App. 1988); Jones v. Taibbi, 512 N.E.2d 260 (Mass. 1987); Morganroth v. Whitall, 411 N.W.2d 859 (Mich. Ct. App. 1987); Fisher v. Detroit Free Press, 404 N.W.2d 765 (Mich. Ct. App. 1987); Byrd v. Hustler Magazine, 433 So. 2d 593 (Fla. Ct. App. 1983); Goodrich v. Waterbury Republican-America, 448 A.2d 1317 (Conn. 1982).

248. See, e.g., Neish v. Beaver Newspapers, 581 A.2d 619 (Pa. Super. Ct. 1990) (statements in series of articles about new city attorney neither capable of defamatory meaning nor highly offensive); Muslow v. A.G. Edwards & Sons, 509 So. 2d 1012 (La.Ct. App. 1987); Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985); Andreani v. Hansen, 400 N.E.2d 679 (Ill. App. Ct. 1980).

249. See, e.g., Godbehere v. Phoenix Newspapers, 783 P.2d 781 (Ariz. 1989) (statements criticizing job performance of public official); Van Duyn v. Smith, 527 N.E.2d 1005 (Ill. App. Ct. 1988) (statements made in context of abortion dispute with posters and pickets); Walko v. Kean College, 561 A.2d 680 (N.J. Super. Ct. 1988) (spoof of hotline concept with a "whoreline"); Brown v. Boney, 255 S.E.2d 784 (N.C. Ct. App. 1979). In Dodrill v. Arkansas Democrat Co., 590 S.W.2d 840 (Ark. 1979), a newspaper article falsely reported that the plaintiff had failed to pass the state bar exam. The court held that an action for libel could proceed under the Gertz standard, but that the false light claim had to be dismissed because there was no evidence of actual malice.

paragraphs, all of those cases will be discussed, and it will be seen that the false light claim in each case added absolutely nothing to the plaintiff's recovery.<sup>250</sup> The cases stand for the narrow proposition that there can be a false light recovery when there is also a defamation recovery. In light of the overlap between the two torts, this proposition is a far cry from saying that false light has an independent existence.

We begin with one of those odd cases the entertainment value of which makes it a likely candidate for inclusion in a torts casebook. The plaintiff in *Murray v. Schlosser*,<sup>251</sup> a Connecticut case, submitted her picture for publication in a local newspaper as a newlywed. The picture was apparently not very flattering to her. The defendants were two radio talk-show hosts and the radio station over which they broadcast. The talk-show hosts had a weekly feature titled "Berate the Brides" in which listeners were encouraged to call in to vote on the "Dog of the Week" based upon photographs of brides appearing in the local newspaper.<sup>252</sup> One of the hosts said of the plaintiff, based upon the picture in the newspaper, that she was "too ugly to even rate," and the other host, a woman, said something like "she did not want even her worst enemy to be with the plaintiff."<sup>253</sup>

Although the plaintiff was declared the "Dog of the Week," it was the defendants who ultimately were found to be barking up the wrong tree. Plaintiff sued, alleging causes of action for defamation, false light invasion of privacy and intentional infliction of emotional distress. The defendants responded with a motion to strike, asserting that the broadcasts were privileged by the First Amendment. The court determined that

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250. The statute of limitations cases are not included here, but are discussed in detail *infra* at text accompanying notes 335- 50.

Also not included in the text are a few federal cases in which courts rendered non-merits decisions. *Pearce v. E.F. Hutton Group*, 828 F.2d 826 (D.C. Cir. 1987) (claim alleging both defamation and false light was subject to arbitration clause); *Gialde v. Time, Inc.*, 480 F.2d 1295 (8th Cir. 1973) (dismissed for lack of appellate jurisdiction an appeal from a discovery order requiring the defendant to disclose the name of a source for a story); *Mays v. Laurant Publishing, Ltd.*, 600 F. Supp. 29 (N.D. Ga. 1984) (personal jurisdiction ruling); *Brown v. News Group Publications*, 563 F. Supp. 86 (M.D. Pa. 1983) (motion to change venue).

251. 574 A.2d 1339 (Conn. Super. Ct. 1990).

252. Winners apparently received as a prize "a case of Ken-L Ration and a dog collar." *Id.* at 1340.

253. *Id.*

the plaintiff was not a public person (that is, neither a public official nor a public figure) and that the subject matter of the communication was not of public interest.<sup>254</sup> The court also rejected the argument that the communications were privileged statements of opinion, emphasizing that since "the defendants were purportedly encouraging the listening audience to vote, the words used by [the defendants] were not votes of an opinion, but statements of conclusions."<sup>255</sup> The court tried to bolster its determination that the communications were not mere statements of opinion (such as, "This painting is ugly") by drawing upon the "common knowledge that a woman generally reaches the zenith of her attractiveness and desirability at or about the time of her marriage, and that wedding photographs capture her beauty."<sup>256</sup> According to the court, this "common knowledge" suggested that the communications were false, and since they were capable of being false, were more likely to be unprivileged statements of fact instead of privileged statements of opinion.<sup>257</sup> The court denied the motion to strike, and as of the date of this writing, the case awaits trial.<sup>258</sup>

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254. *Id.* at 1340.

255. *Id.* at 1341.

256. *Id.* at 1341.

257. This would appear to turn the fact/opinion dichotomy on its head. If a communication is an opinion, then courts treat the communication as being neither provably true nor provably false, sometimes relying upon the theory that there is no such thing as a false opinion.

If a court purports to assess the truth or falsity of a communication *before* determining whether the communication is of fact or opinion, the fact/opinion dichotomy will become circular. That is, however, exactly what the court in *Murray* did. According to the court, one of the factors used to determine whether a communication is fact or opinion is "its truth or falsity." 574 A.2d at 1341. And since the court was willing to take judicial notice of the "fact" that wedding photos capture the beauty of a woman at her "zenith," the statement that a woman in a particular wedding photo was "ugly" was necessarily a statement of fact rather than opinion.

258. The court assumed that "wedding photographs capture [a bride's] beauty." *Id.* at 1341. Yet not all photographs capture a person's beauty, and the photograph that triggered this lawsuit may well have been such a photograph. The author has been reliably informed that the plaintiff is actually an attractive young woman (and was attractive at the time of the picture) and that the picture which the plaintiff submitted to the newspaper for publication was not very flattering.

Entirely apart from whether the superior court's determination was correct as a matter of constitutional law (*see, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)), the case is a classic example of the trivialization of law. A woman sends her photograph to a newspaper to have it published. Someone sees the photograph and says that the plaintiff looks "ugly" in it. Is it truly the business of the

And what of the false light privacy claim in the case? It went entirely unmentioned in the court's opinion. Quite clearly, if there was to be recovery, it would be on *both* the defamation and the false light claims. If in fact (assuming, as the court did, that this type of statement can be a fact) the plaintiff was not ugly, then the defendants portrayed the plaintiff in a false light before the public. There is no doubt that the false light in which the plaintiff was portrayed would be highly objectionable to a reasonable person, and the plaintiff suffered severe emotional distress. The elements for false light would be met, but the false light claim would add nothing to the plaintiff's case or potential recovery.

The other state cases permitting false light claims to go forward in conjunction with defamation claims present similar considerations. Each case involves a libel in which there would be a significant risk of harm to reputation, if false. In *Yancey v. Hamilton*,<sup>259</sup> the defendant branded the plaintiff a "con artist" in a newspaper article, a communication that, if false, would clearly harm the plaintiff's reputation.<sup>260</sup> In *Jones v. Palmer Communications*,<sup>261</sup> the news-telecast concerned the plaintiff's employability as a firefighter.<sup>262</sup> *Larsen v. Philadelphia Newspapers*<sup>263</sup> arose out of newspaper articles accusing a judge of perjury and improper conduct.<sup>264</sup> *Berkos v. National Broadcasting Co.*<sup>265</sup> arose out of a television news program accusing a judge of accepting a bribe from a police officer to influence his decision in a criminal case.<sup>266</sup> In *Zartman v. Lehigh County Humane Society*,<sup>267</sup> the plaintiff, who operated a livestock auction, was accused of cruelty to animals and of maintaining unhealthy conditions at his auction site.<sup>268</sup> The bank in *Lester v. Trust Company of Georgia*<sup>269</sup> falsely told a credit bureau that the

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courts to give her relief? No doubt the talk-show program was insensitive and perhaps even cruel. But is this really the stuff of legal liability?

259. 786 S.W.2d 854 (Ky. 1989).

260. *Id.* at 855-56.

261. 440 N.W.2d 884 (Iowa 1989).

262. *Id.* at 888.

263. 543 A.2d 1181 (Pa. Super. Ct. 1988).

264. *Id.* at 1188-89.

265. 515 N.E.2d 668 (Ill. App. Ct. 1987).

266. *Id.* at 669.

267. 482 A.2d 266 (Pa. Super. Ct. 1984).

268. *Id.* at 269-70.

269. 241 S.E.2d 633 (Ga. Ct. App. 1978).

plaintiff was delinquent in making payment on a charge card account.<sup>270</sup> The defendant in *Hodson v. Whitworth*<sup>271</sup> advertised a foreclosure sale of real property without having proper authority under the deed to conduct such a sale.<sup>272</sup> In *McCall v. Courier-Journal & Louisville Times Co.*,<sup>273</sup> a criminal defense lawyer was accused of offering to "fix" a drug case or bribe a judge.<sup>274</sup> The defendant in *National Bonding Agency v. Demeson*<sup>275</sup> defamed the plaintiff by putting her picture on a "wanted" poster, describing her as a bond jumper, and referring to her sexual practices.<sup>276</sup> The plaintiff in *Crimp v. Beckley Newspapers*<sup>277</sup> was a woman coal miner whose picture was published in conjunction with an article about sexual harassment of women coal miners even though she had never suffered harassment.<sup>278</sup> There are a number of federal decisions, but each of them, like the state decisions, are obvious defamation actions.<sup>279</sup>

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270. *Id.* at 634.

271. 266 S.E.2d 561 (Ga. Ct. App. 1980).

272. *Id.* at 563.

273. 623 S.W.2d 882 (Ky. 1981).

274. *Id.* at 883-84, 887.

275. 648 S.W.2d 748 (Tex. Ct. App. 1983).

276. *Id.* at 749 & n.1.

277. 320 S.E.2d 70 (W. Va. 1984).

278. *Id.* at 75. The article included descriptions of specific incidents of sexual harassment, and the plaintiff was questioned by friends and others whether she had been victim to this type of conduct. For example, the complaint alleged that one reader asked her "whether she had ever been 'stripped, greased and sent out of the mine.'" *Id.*

279. *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 670 (4th Cir. 1982) (defendant accused the plaintiff of having engaged in espionage); *Geisler v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980) (plaintiff falsely portrayed in a novel as a transsexual who engaged in criminal conduct); *Zechman v. Merrill Lynch, Inc.*, 742 F. Supp. 1359 (N.D. Ill. 1990) (circumstances of termination implied that employee had been terminated for committing a criminal or unethical act); *Sisemore v. U.S. News & World Report*, 662 F. Supp. 1529 (D. Alaska 1987) (plaintiff portrayed as having mental disease which made him dangerous to himself or others); *Jensen v. Times Mirror Co.*, 634 F. Supp. 304 (D. Conn. 1986), *reconsidered*, 647 F. Supp. 1525 (D. Conn. 1986) (newspaper reported that one of its reporters "withheld information and that her 'ability to function' as a reporter 'was irreparably damaged'"); *Krochalis v. Insurance Co. of N. America*, 629 F. Supp. 1360 (E.D. Pa. 1985) (plaintiff allegedly accused by former employer of having engaged in criminal conduct); *Bolduc v. Bailey*, 586 F. Supp. 896 (D. Colo. 1984) (priest accused of criminal and immoral conduct); *Parnell v. Booth Newspapers*, 572 F. Supp. 909 (W.D. Mich. 1983) (photograph of plaintiff in newspaper identified her as a prostitute); *Cantrell v. American Broadcasting Cos.*, 529 F. Supp. 746 (N.D. Ill. 1981) (plaintiff accused of being co-conspirator in arson scheme); *Dresbach v.*

Each of these cases could be cited as proof that false light exists, because in each case, the court permitted the case to proceed to trial with false light as one possible theory. Yet it is plain in each case that if the offending statement was false, a prerequisite for liability under false light, then there would also be liability for defamation. The false light cause of action thus added nothing to the case that was not already there. As a practical reality, these cases do not support the *independent* existence of false light. They support only the limited proposition that if there can be liability for defamation, there can also be liability for false light.<sup>280</sup>

### 3. *The Misappropriation Cases*

The case which Prosser confidently claimed was the seed for false light privacy, *Byron v. Johnston*,<sup>281</sup> was actually a "passing off" case, which can be viewed as one species of commercial appropriation of name or picture. The defendant in *Byron* was about to (or already had) published a book purporting to

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Doubleday & Co., 518 F. Supp. 1285 (D. D.C. 1981) (passages in book accused plaintiff of being "a co-conspirator and accessory before and after the fact in the murder of his parents"); *Martin v. Municipal Publications*, 510 F. Supp. 255 (E.D. Pa. 1981) (caption under picture of plaintiff in newspaper describes him as a "closet transvestite[] from South Philly" who is "stinking drunk"); *Lorentz v. Westinghouse Elec. Corp.*, 472 F. Supp. 946 (W.D. Pa. 1979) (plaintiff accused of being "a Communist, a criminal, and a traitor"); *Holmes v. Curtis Publishing Co.*, 303 F. Supp. 522 (D.S.C. 1969) (plaintiff accused of being high stakes gambler with possible mafia connections).

The *Geisler* case, arose under New York law, and the Second Circuit Court of Appeals, relying on *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978), held that a cause of action for invasion of privacy existed in New York apart from N.Y. Civ. Rights Law §§ 50-51. *Geisler*, 616 F.2d at 638-39 & n.5. *Birnbaum* itself cited no New York authority for the proposition that New York recognized invasion of privacy apart from the Civil Rights Law. The decision in *Birnbaum* was based entirely upon the panel's prediction that the New York Court of Appeals would bring itself up to date by modifying or distinguishing *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). *Birnbaum*, 588 F.2d at 323-26. That prediction was contrary to a long line of New York authority, and subsequent decisions indicate that the Second Circuit's prediction was incorrect. *Stephano v. News Group Publications*, 474 N.E.2d 580 (N.Y. 1984); *MacDonald v. Clinger*, 446 N.Y.S.2d 801 (N.Y. App. Div. 1982).

280. One of the proffered justifications for false light was that it was needed to fill the gap in cases where the plaintiff could not prove harm to reputation in defamation. See Prosser, *Privacy*, *supra* note 1, at 400-01. The cases make it plain, however, that plaintiffs have little difficulty in establishing harm to reputation. The "gap" which false light was supposed to fill simply does not exist in practice.

281. 35 Eng. Rep. 851 (Ch. 1816).

contain the poetry of Lord Byron, who at the time was one of the most famous living poets in England. By attributing the poems to Byron, the defendant hoped to capitalize upon the market's demand for Byron's poetry. The court enjoined the attempt.

The Restatement (Second) of Torts defines the appropriation tort as follows in Section 652C: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."<sup>282</sup> Although many of the cases involve appropriation for a commercial purpose, the Restatement indicates that the tort goes beyond commercial appropriation and includes a "use of the plaintiff's name or likeness for [the defendant's] own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one."<sup>283</sup>

There are two ways in which appropriation of name or likeness can overlap with false light. First, using someone's name or likeness may suggest to the reasonable audience that the owner has consented to the use. This false impression may by itself satisfy the loose standards for false light contained in Section 652E. Conceivably, then, since appropriation requires proof that the plaintiff did not consent to the publication, every case of appropriation may also involve false light. Second, the use of the name or likeness may suggest that the person identified agrees with other material published in conjunction with the name or likeness or has the characteristics described in that related material.

Because the misappropriation tort is so well established and understood, there are relatively few cases in which a plaintiff has added a false light claim to a misappropriation claim.<sup>284</sup> Litigants apparently have not felt a need to burden a

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282. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

283. RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977). This broad view of appropriation is consistent with the interpretation by New York courts of the New York Civil Rights Law. See the discussion in *Zimmerman*, *supra* note 4, at 376-80.

284. State cases: *Merz v. Professional Health Control of Augusta*, 332 S.E.2d 333 (Ga. Ct. App. 1985); *Jonap v. Silver*, 474 A.2d 800 (Conn. Ct. App. 1984); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983); *Martinez by Martinez v. Democrat-Herald Pub. Co.*, 669 P.2d 818 (Or. Ct. App. 1983); *Bisbee v. John C. Conover Agency*, 452 A.2d 689 (N.J. Super. Ct. 1982); *Guglielmi v.*

complaint which contains a good misappropriation claim with a weak false light claim. Decisions rejecting false light claims in this context have most often done so by finding that the publicized matter is substantially true.<sup>285</sup> In one extraordinary case, the court held that Navajo sensibilities concerning publication of a person's picture in conjunction with a news story were not "ordinary sensibilities" and that, therefore, no actionable invasion of privacy had occurred.<sup>286</sup> Two California cases rejected false light claims on technical, procedural grounds.<sup>287</sup> This

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Spelling-Goldberg Prods., 140 Cal. Rptr. 775 (Ct. App. 1977), *aff'd*, 603 P.2d 454 (Cal. 1979); Rinsley v. Frydman, 559 P.2d 334 (Kan. 1977); Brown v. Capricorn Records, 222 S.E.2d 618 (Ga. Ct. App. 1975); Johnson v. Harcourt, Brace, Jovanovich, Inc., 118 Cal. Rptr. 370 (Ct. App. 1974); Bitsie v. Walston, 515 P.2d 659 (N.M. 1973).

Federal cases: *Faloona by Fredrickson v. Hustler Magazine*, 799 F.2d 1000 (5th Cir. 1986); *Wagner v. Campbell County*, 695 F. Supp. 512 (D. Wyo. 1988); *Tellado v. Time-Life Books*, 643 F. Supp. 904 (D.N.J. 1986); *International Union v. Garner*, 601 F. Supp. 187 (M.D. Tenn. 1985); *Hooker v. Columbia Pictures Indus.*, 551 F. Supp. 1060 (D.C. Ill. 1982); *Cordell v. Detective Publications*, 307 F. Supp. 1212 (D.C. Tenn. 1968); *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580 (D.C. Cir. 1985). The federal cases cited here contained claims for false light privacy and misappropriation but no claim for defamation. The federal false light/defamation cases are cited above in note 279.

285. State cases: *Merz v. Professional Health Control of Augusta*, 332 S.E.2d 333 (Ga. Ct. App. 1985) (picture of plaintiff's property used in television advertisement was substantially accurate); *Martinez by Martinez v. Democrat-Herald Publishing Co.*, 669 P.2d 818 (Or. Ct. App. 1983) (true story in high school newspaper about drug use in the school with a picture of an alleged drug transaction in which the plaintiff was identifiable); *Bisbee v. John C. Conover Agency*, 452 A.2d 689 (N.J. Super. Ct. 1982) (real estate advertisement which announced sale of house, disclosed general terms of sale, and disclosed name and occupation of purchaser); *Brown v. Capricorn Records*, 222 S.E.2d 618 (Ga. Ct. App. 1975) (plaintiff's picture published on rock and roll album cover—nothing false about the picture).

Federal cases: *International Union v. Garner*, 601 F. Supp. 187 (M.D. Tenn. 1985) (plaintiffs did not contend that information publicized was in any way misleading); *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580 (D.C. Cir. 1985) (before and after plastic surgery picture of plaintiff was substantially accurate).

286. *Bitsie v. Walston*, 515 P.2d 659 (N.M. Ct. App. 1973). As part of a fund-raiser for cerebral palsy, the plaintiff's portrait had been put upon a card. The card was subsequently published in conjunction with a newspaper story about the fund-raising effort. The plaintiff was completely healthy, however, and the Navajos allegedly believed that publication of the picture in conjunction with a story about cerebral palsy would bring bad luck upon the plaintiff. The court held that publication would not offend the sensibilities of an ordinary person.

287. *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 118 Cal. Rptr. 370 (Ct. App. 1974) (false light claim dismissed for plaintiff's failure to comply with retraction statute); *Guglielmi v. Spelling-Goldberg Prods.*, 140 Cal. Rptr. 775 (Ct. App. 1977), *aff'd*, 603 P.2d 454 (Cal. 1979) (false light claim is a personal cause of action that



leaves us with only three cases to discuss in which false light and appropriation were permitted to go to trial together or resulted in a jury verdict for the plaintiff.<sup>288</sup> The first case is *Eastwood v. Superior Court*.<sup>289</sup> The National Enquirer published what Clint Eastwood alleged was a fabricated story about Eastwood's love life.<sup>290</sup> Eastwood alleged both false light and misappropriation. The defendant did not even challenge the allegations of false light, and filed a demurrer only against the misappropriation claim.<sup>291</sup> The court of appeals permitted the misappropriation claim to go forward even though the article was cast in the form of news. According to the court, if the article was knowingly false, then its publication must have been for commercial advantage.<sup>292</sup> Since the misappropriation claim was, according to the court's analysis, valid only if the article was false, the false light claim added nothing to the case. By proving the article to be false, Eastwood could recover under misappropriation all of the damages he could recover for false light, and he probably could recover *more* for the misappropriation than for the false light.

The second case is *Jonap v. Silver*.<sup>293</sup> The plaintiff was the marketing director for the defendant, a manufacturer of animal health care products. Despite the plaintiff's objections, the defendant sent a letter over the plaintiff's signature to the

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does not survive death of person portrayed in a false light).

288. A third case which may involve both appropriation and false light, *Rinsley v. Frydman*, 559 P.2d 334 (Kan. 1977), is discussed below at text accompanying notes 419-30. It is unclear whether the court found both appropriation and false light or only false light. In light of the possibility that the court approved only a false light claim, it is more appropriate to treat the case below in the section dealing with pure false light cases.

289. 198 Cal. Rptr. 342 (Ct. App. 1983).

290. In particular, the story alleged that Eastwood was having serious problems in his personal relationship with film star Sondra Locke and that he had recently spent time with Tanya Tucker. The story was titled, "Clint Eastwood in Love Triangle with Tanya Tucker." *Id.* at 345.

291. *Id.* at 344, 346. The false light claim tracked RESTATEMENT (SECOND) OF TORTS § 652E (1977), and the defendant apparently thought it was pointless to challenge the existence of false light in California.

292. The Enquirer had used the Eastwood story as a teaser on the front cover and in its television advertisements. As the court explained, "the use of Eastwood's personality in the context of a news account, allegedly false but presented as true, provided the Enquirer with a ready-made 'scoop'—a commercial advantage over its competitors which it would otherwise not have." *Eastwood*, 198 Cal. Rptr. at 349.

293. 474 A.2d 800 (Conn. Ct. App. 1984).

editor of the "Animal Nutrition and Health" magazine. The plaintiff testified that certain portions of the letter did not reflect his beliefs and that other portions were outright falsehoods.<sup>294</sup> He brought suit, alleging injurious falsehood, misappropriation, and false light. The jury awarded damages of \$24,000 for injurious falsehood, \$24,000 for misappropriation and \$32,000 for false light.<sup>295</sup> The trial court set aside the verdict on the injurious falsehood claim but entered judgment for the plaintiff on the two privacy claims.<sup>296</sup>

The defendant did not contest the sufficiency of the evidence on the misappropriation claim, challenging only the merits of the false light claim.<sup>297</sup> In affirming judgment on the false light claim, the court emphasized that the only falsity required to support liability was the false attribution of beliefs to the plaintiff which, according to the testimony, clearly had happened.<sup>298</sup> Since the false attribution was in the context of a letter to the editor in which the commercial interests of the defendant were defended, the false attribution just as clearly constituted a misappropriation of name for commercial purposes.<sup>299</sup>

Of interest in *Jonap* is the breakdown of damages. Why did the jury award only \$24,000 for injurious falsehood and misappropriation, but award \$32,000 for false light? We are left entirely in the dark about this matter. The court held that the damages for misappropriation and false light were duplicative because the damages arose out of the same single

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294. *Id.* at 806.

295. *Id.* at 803.

296. *Id.* The opinion does not indicate why the injurious falsehood verdicts were set aside.

297. *Id.*

298. The court stated:

In testifying that in his opinion certain parts of the letter were not even true, it is clear that the jury could infer that they were, therefore, not the plaintiff's beliefs or judgments. There is sufficient evidence for the jury to have found that the letter attributed to the plaintiff views which were not, in truth, his own. The jury could reasonably have found this to be highly offensive to a reasonable person because there is sufficient evidence to establish that there was a "major misrepresentation of his character, history, activities or beliefs."

474 A.2d at 806 (footnote omitted).

299. See, e.g., *Staruski v. Continental Tel. Co. of Vt.*, 581 A.2d 266 (Vt. 1990), where the defendant used an employee's picture and fabricated testimonial in advertising for the company.

transaction, and the court struck the \$24,000 award for misappropriation leaving the \$32,000 judgment intact.<sup>300</sup> Conceivably, the jury awarded \$8,000 extra for false light to compensate the plaintiff for injury to reputation which the jury might have believed was not compensable under the misappropriation cause of action. But even if true, that extra \$8,000 should have been reflected in the injurious falsehood claim. Moreover, the court held that the misappropriation claim included damages for reputation.<sup>301</sup> We are thus left wondering where the extra \$8,000 came from.

On the federal side, we have Judge Posner's opinion in *Douglass v. Hustler Magazine*,<sup>302</sup> one of many cases involving Larry Flynt.<sup>303</sup> The plaintiff, Robyn Douglass, was a model and actress. She had originally agreed to pose nude in Playboy and had executed a release authorizing Playboy to publish the photographs or "otherwise use the photographs 'for any lawful purpose whatsoever, without restrictions.'"<sup>304</sup> The photographer subsequently was hired by Hustler as its photography editor, and he brought with him a number of the nude photos of Douglass, some of which had been published by Playboy and others which had not. Hustler published the photos without securing the consent of either Douglass or Playboy.<sup>305</sup> Douglass claimed both emotional distress and lost earnings, and an expert testified that the present value of her lost earn-

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300. *Jonap*, 474 A.2d at 807.

301. The court stated:

The elements of damage establishing liability for invasion of privacy for appropriation of the plaintiff's name and those establishing liability for invasion of privacy by placing the plaintiff in a false light were duplicative. One event, the request to publish the letter and its subsequent publication, resulted in the harm alleged. Put another way, plaintiff cannot twice suffer damage to his reputation, mental distress or other harm from this one transaction. Thus, he should not twice recover damages.

*Id.* at 807.

302. *Douglass*, 769 F.2d 1128 (7th Cir. 1985).

303. See also *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Wood v. Hustler Magazine*, 736 F.2d 1084 (5th Cir. 1984); *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984).

304. 769 F.2d at 1131.

305. The photographer claimed that Douglass had executed a general release in his favor authorizing him to do whatever he wanted with the pictures. The release was never produced at trial, however, and the jury credited Douglass' testimony that she had signed a more limited release in favor only of Playboy. *Id.*

ings was \$716,565. The jury awarded compensatory damages of \$1,000,000 for both misappropriation of name or picture and false light privacy and \$1,500,000 in punitive damages (which was reduced by the trial judge to \$100,000).<sup>306</sup>

The Seventh Circuit reversed and remanded for a new trial, but indicated in its opinion that if there had not been procedural error in the trial, it would have affirmed the verdict.<sup>307</sup> The misappropriation claim was open and shut once the jury determined that Hustler had published the photos without securing the necessary consent. The plaintiff was a model and actress who made significant sums of money from appearing in print and television commercials. Hustler, like the National Equirer in the *Eastwood* case discussed above, used the Douglass pictorial as a teaser to boost its sales. Judge Posner correctly noted that "Douglass or her agents must have control over the dissemination of her nude photographs if their value is to be maximized."<sup>308</sup>

In support of her false light claim, Douglass claimed that the publication falsely portrayed her (1) as being a lesbian (because a few of the shots were of Douglass with another model in simulated sex positions and captions for these photos were suggestive) and (2) as having consented to publication of the photographs in Hustler, a vile and degrading publication.<sup>309</sup> The first basis for false light—being portrayed as a lesbian—would clearly form the basis for a defamation action, particularly since there was evidence of special damages to Douglass' business.<sup>310</sup>

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306. *Id.* at 1132.

307. The errors related to introduction of prejudicial evidence and improper jury instructions. *Id.* at 1140-46.

308. *Id.* at 1138.

309. *Id.* at 1135.

310. BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 4.12.2, at 123-25 (2nd ed. 1991). Judge Posner's analysis of this aspect of the case confirms that, as Posner himself admitted, the court was having to "enter imaginatively into a world that is not the natural habitat of judges—the world of nude modeling and (as they are called in the trade) 'provocative' magazines." *Douglass*, 769 F.2d at 1134. According to Posner, the panel did not "think that Hustler was seriously insinuating—or that its readership would think—that Robyn Douglass is a lesbian. Hustler is a magazine for men. Few men are interested in lesbians. The purpose of showing two women in apparent sexual embrace is to display the charms of two women." *Id.* at 1135. Posner's reasoning is apparently as follows: Hustler is for men; Men are not interested in lesbians or scenes depicting lesbians making love; Therefore, the pictures could not reasonably have been intended to suggest that the women being

The second basis for false light was the "degrading association with Hustler."<sup>311</sup> Posner believed that "[i]t would have been difficult for Douglass to state this claim as one for libel."<sup>312</sup> One wonders why Posner held this belief. The remainder of his analysis is not very helpful:

For what exactly is the imputation of saying (or here, implying) of a person that she agreed to have pictures of herself appear in a vulgar and offensive magazine? That she is immoral? This would be too strong a characterization in today's moral climate. That she lacks good taste? This would not be defamatory.<sup>313</sup> The point is, rather, that to be shown nude in such a setting before millions of people—the readers of the magazine—is degrading in much the same way that to be shown beaten up by criminals is degrading (although not libelous, despite the analogy to being reported to have been raped), though of course if Douglass consented to appear nude in this setting she is responsible for her own debasement and can get no judicial redress.<sup>314</sup>

There are quite a few things wrong with this analysis. In the first place, does Posner really believe *as a matter of law* that a jury could not find the imputation to be that Douglass was immoral? Can the Seventh Circuit in these circumstances take judicial notice of "today's moral climate"? Wouldn't that be a classic jury question?<sup>315</sup> Second, couldn't a jury reasonably draw the conclusion that a person who consents to appear nude in a "vulgar and offensive magazine" is similarly "vulgar and offensive"? Such an imputation would itself be defamatory. Moreover, it is well accepted that falsely accusing a person of associating with vile persons is a basis for an action in defamation.<sup>316</sup>

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photographed were lesbians. The minor premise in this syllogism may be doubtful.

311. *Id.* at 1135.

312. *Id.*

313. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773-78 (5th ed. 1984).

314. *Douglass*, 769 F.2d at 1135.

315. Posner's explanation here is especially suspect because he subsequently is able to distinguish Hustler from Playboy, primarily on grounds of decency. *Id.* at 1135-38.

316. BRUCE W. SANFORD, LIBEL AND PRIVACY § 4.12.3, at 125-26 (2nd ed. 1991).

Third, how can the impression that Douglass had *consented* to be shown in *Hustler* possibly be similar to being shown beaten up by criminals or raped? *Hustler* did not portray Douglass as a victim. It portrayed Douglass as a willing model. Posner's analogy to being a victim of crime is singularly inapt.<sup>317</sup>

In any event, the false imputation that Douglass had consented to the publication was the basis for Douglass' misappropriation claim. This aspect of the false light claim thus arose out of the same factual allegations which supported the misappropriation claim, and the false light claim thus added nothing to Douglass' recovery.<sup>318</sup>

#### 4. *Emotional Distress Cases*

As noted above, a supposedly key difference between false light privacy and defamation is that false light privacy may be established with emotional distress as the only injury while defamation supposedly requires injury to reputation.<sup>319</sup> Indeed, emotional distress appears as a compensable element of damages in *each* of the four privacy torts identified by Prosser, and the Restatement identifies mental distress as one of the typical bases for measuring damages in a privacy action.<sup>320</sup> It

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317. It is, however, an analogy that may expose what really is going on in the decision. Despite the court's recognition that the edition of *Hustler* in which Douglass' picture appeared was lawful and not obscene, *Douglass*, 769 F.2d at 1137-38, the judges on the court (like the jury) may have been emotionally affected by the disgusting nature of the magazine and have been convinced that anyone who appears in *Hustler* is a "victim." *But see Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (striking down jury verdict against *Hustler* on First Amendment grounds despite the disgusting nature of the publication).

318. Damages for false light would include, among other things, emotional distress and harm to reputation. Emotional distress would also be recoverable for misappropriation, however, and if her reputation was actually harmed, as the evidence established, an action for defamation would be the more appropriate course.

319. *See supra* text accompanying notes 230-35. I say defamation "supposedly" requires damage to reputation because the common law presumes damages to reputation for libels and slanders *per se*. Although these common law rules have been limited somewhat by the Supreme Court's First Amendment cases, the constitutional limits on defamation apply at least as strongly to false light, and perhaps are even stricter. *Zimmerman, supra* note 4, at 383-93. *Compare Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

320. RESTATEMENT (SECOND) OF TORTS § 652H(b) (1977). The primary element of damages is supposed to be "the harm to [the plaintiff's] interest in privacy re-

is of course to be expected then that in almost any action for invasion of privacy, the plaintiff could also allege intentional or negligent infliction of emotional distress ("IIED" or "NIED"), and the cases bear this out.<sup>321</sup>

Negligent infliction of emotional distress ("NIED") is itself a relatively weak cause of action,<sup>322</sup> and there have been only two reported decisions in which a plaintiff has even attempted to recover for both false light privacy and NIED. In *Flowers v. Bank of America National Trust & Savings Ass'n*,<sup>323</sup> the defendant restaurant, at the insistence of the defendant bank (which had negligently computed plaintiff's credit), refused to honor the plaintiff's credit card, leading to a public confrontation at

sulting from the invasion." *Id.* To date, there has been no adequate explanation of how a jury is supposed to measure loss of privacy in monetary terms.

321. State cases: *Murray v. Schlosser*, 574 A.2d 1339 (Conn. Super. Ct. 1990); *S & W Seafoods Co. v. Jacor Broadcasting of Atlanta*, 390 S.E.2d 228 (Ga. Ct. App. 1989); *Warfield v. Peninsula Golf & Country Club*, 262 Cal. Rptr. 890 (Ct. App. 1989); *Hoppe v. Hearst Corp.*, 770 P.2d 203 (Wash. Ct. App. 1989); *Van Duyn v. Smith*, 527 N.E.2d 1005 (Ill. App. Ct. 1988); *Walko v. Kean College*, 561 A.2d 680 (N.J. Super. Ct. 1988); *Celebrezze v. Dayton Newspapers*, 535 N.E.2d 755 (Ohio Ct. App. 1988); *Rowland v. Union Hills Country Club*, 757 P.2d 105 (Ariz. Ct. App. 1988); *Berkos v. National Broadcasting Co.*, 515 N.E.2d 668 (Ill. App. Ct. 1987); *Burton v. NCB National Bank of N. Carolina*, 355 S.E.2d 800 (N.C. Ct. App. 1987); *Deitz v. Wometco West Michigan TV*, 407 N.W.2d 649 (Mich. Ct. App. 1987); *Young v. Barker*, 405 N.W.2d 395 (Mich. Ct. App. 1987); *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987); *Early Detection Ctr., P.C. v. New York Life Ins. Co.*, 403 N.W.2d 830 (Mich. Ct. App. 1986); *Hirsch v. Cooper*, 737 P.2d 1092 (Ariz. Ct. App. 1986); *Trought v. Richardson*, 338 S.E.2d 617 (N.C. Ct. App. 1986); *Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985); *Sawabini v. Desenberg*, 372 N.W.2d 559 (Mich. Ct. App. 1985); *Pearce v. Courier-Journal*, 683 S.W.2d 633 (Ky. Ct. App. 1985); *Buller v. Pulitzer Publishing Co.*, 684 S.W.2d 473 (Mo. Ct. App. 1984); *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610 (Cal. 1984); *Flowers v. Bank of America Nat'l Trust & Sav. Ass'n*, 679 P.2d 1385 (Or. Ct. App. 1984); *Ledl v. Quik Pik Food Stores*, 349 N.W.2d 529 (Mich. Ct. App. 1984); *Yeager v. Local Union 20*, 453 N.E.2d 666 (Ohio 1983); *National Bonding Agency v. Demeson*, 648 S.W.2d 748 (Tex. Ct. App. 1983); *Jones v. Calder*, 187 Cal. Rptr. 825 (Ct. App. 1982); *Duhammel v. Star*, 653 P.2d 15 (Ariz. Ct. App. 1982); *Bureau of Credit Control v. Scott*, 345 N.E.2d 37 (Ill. App. Ct. 1976). There is only one federal decision which involved both false light and emotional distress claims but which did not include a defamation claim. *Metz v. United States*, 788 F.2d 1528 (11th Cir. 1986). The federal false light/defamation cases are cited above in note 279.

322. See discussion of authorities in Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 Wash. L. Rev. 1, 5-14 (1991).

323. 679 P.2d 1385 (Or. Ct. App. 1984).

the restaurant.<sup>324</sup> The court affirmed dismissal of the complaint for failure to state a cause of action.<sup>325</sup>

In *Deitz v. Wometco West Michigan TV*,<sup>326</sup> the plaintiff, a wealthy real estate developer, was the subject of a series of news stories which alleged, among other things, that the plaintiff had "a grip on the criminal justice system in Newaygo County," as a result of "gifts, favors, and deals with local officials."<sup>327</sup> The complaint alleged, among other things, defamation, NIED and false light privacy. The court held that a cause of action for defamation and false light privacy was adequately pled and that there existed disputed questions of fact concerning the television station's possible negligence in investigating the report.<sup>328</sup> Holding that NIED in Michigan was limited to situations involving bystanders who witness negligent personal injury to a third person, the court held that the complaint did not state a cause of action for NIED.<sup>329</sup>

Intentional infliction of emotional distress ("IIED") is more firmly established than its cousin, NIED. First given a clear statement by Dean Prosser in a 1939 article,<sup>330</sup> inten-

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324. The complaint alleged that the defendants deliberately "confiscated the card in the presence of plaintiff's guests and other patrons of the restaurant, refusing his reasonable request to make further inquiry as to the card's validity, refused to discuss the matter with him, demanded and received cash payment for the meal, called the police and caused them to remove plaintiff from the restaurant." *Id.* at 1387.

325. In Oregon, NIED is apparently available only when the defendant's conduct has "infringed some legally protected interest apart from causing the claimed distress." *Id.* at 1387 (quoting *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318 (Or. 1982)). The court held that the only other interest invaded was "plaintiff's contractual right to have the credit card honored," and the court refused to permit the breach of this contractual obligation to form the basis for an action in tort. *Id.* at 1387. IIED was not adequately pled, according to the court, because the defendants' conduct "did not exceed the outer limits of what a reasonable person should be expected to tolerate." *Id.* Public disclosure was not pled because the complaint did not allege that any private facts actually were disclosed. *Id.* at 1389. The court might also have noted that there was insufficient publicity since the disclosure, if any, was only to a few people in the restaurant. False light failed, according to the court, because there was no allegation that the defendants either had knowledge of the falsity or acted recklessly with respect to falsity, which are elements of a false light claim in Oregon. *Id.*

326. 407 N.W.2d 649 (Mich. Ct. App. 1987).

327. *Id.* at 651.

328. *Id.* at 655-56. The court found that the plaintiff was a private person and that the subject matter of the report was public, triggering the fault standard of *Certz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

329. 407 N.W.2d at 656.

330. William L. Prosser, *Infliction of Mental Suffering—A New Tort*, 37 MICH. L.



tional infliction of emotional distress has taken root nationwide. Although there are minor variations from state to state, the rough outlines of IIED are fairly well settled. The general interest protected by IIED is "peace of mind—i.e., the right to be free from socially unacceptable conduct that seriously affects another's peace of mind."<sup>331</sup> The elements generally include the following:<sup>332</sup> First, the defendant must have intended to cause emotional distress. The intent element can be satisfied by proof that the defendant either had the purpose or desire to cause emotional distress or that the defendant knew that emotional distress was substantially certain to result from the defendant's conduct. Second, most jurisdictions require that the defendant's conduct be extreme and outrageous, outside the bounds which could be tolerated by reasonable persons in society. And third, that the defendant's conduct have actually caused (and proximately caused) the plaintiff to suffer emotional distress.

Almost all of the IIED and false light cases involve, in addition, an allegation of libel.<sup>333</sup> These cases are thus proper-

REV. 874 (1939).

331. *Thing v. La Chusa*, 257 Cal. Rptr. 865, 867 (Cal. 1989).

332. See generally, W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 12, at 54-66 (5th ed. 1984). Although IIED is an intentional tort, the Restatement provides that liability may be imposed when the defendant's conduct is only reckless with respect to the possibility of causing severe emotional distress. RESTATEMENT (SECOND) OF TORTS § 46. The Supreme Court of California recently held that where the theory of liability is recklessness, the plaintiff must have been present at the scene, and the defendant must have been aware that the plaintiff was present. *Christensen v. Superior Court*, 820 P.2d 181, 203-04 (Cal. 1991). The presence requirements helps to insure that there remains a bright line between liability for an intentional tort and liability for negligent infliction of emotional distress. *Id.*, 820 P.2d at 204. For purposes of this article, the difference between recklessly causing severe emotional distress and intentionally causing severe emotional distress is an irrelevancy.

333. State cases: *Murray v. Schlosser*, 574 A.2d 1339 (Conn. Super. Ct. 1990); *S & W Seafoods Co. v. Jacor Broadcasting of Atlanta*, 390 S.E.2d 228 (Ga. Ct. App. 1989); *Hoppe v. Hearst Corp.*, 770 P.2d 203 (Wash. Ct. App. 1989); *Van Duyn v. Smith*, 527 N.E.2d 1005 (Ill. App. Ct. 1988); *Walko v. Kean College*, 561 A.2d 680 (N.J. Super. Ct. 1988); *Celebrezze v. Dayton Newspapers*, 535 N.E.2d 755 (Ohio Ct. App. 1988); *Rowland v. Union Hills Country Club*, 757 P.2d 105 (Ariz. Ct. App. 1988); *Berkos v. National Broadcasting Co.*, 515 N.E.2d 668 (Ill. App. Ct. 1987); *Burton v. NCBN Nat'l Bank of N. C.*, 355 S.E.2d 800 (N.C. Ct. App. 1987); *Deitz v. Wometco W. Mich. TV*, 407 N.W.2d 649 (Mich. Ct. App. 1987); *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987); *Early Detection Ctr., P.C. v. New York Life Ins. Co.*, 403 N.W.2d 830 (Mich. Ct. App. 1986); *Hirsch v. Cooper*, 737 P.2d 1092 (Ariz. Ct. App. 1986); *Madsen v. Erwin*, 481

ly categorized as libel cases, and no further discussion is required here. In the remaining few cases in which IIED and false light appear in the absence of a libel claim, the plaintiff has uniformly lost the false light cause of action.<sup>334</sup> False light adds nothing to these cases.

### 5. *Statute of Limitations Cases*

The natural response of a lawyer faced with the seemingly impenetrable barrier of a valid statute of limitations defense to one cause of action is to recast the case under a different cause of action with a longer limitations period. Judges who are sensitive (and perhaps overly sensitive) to the arbitrary line drawn by a statutory limitations period may sometimes respond favorably to such artful pleading. The possible existence of false light privacy has sparked its share of artfully pled complaints, and the courts are about evenly split on whether such artful pleading will be permitted.

At the outset, it is important to emphasize the obvious fact that limitations defenses are entirely statutory.<sup>335</sup> The starting point for any statute of limitations analysis is, of course, to "READ THE STATUTE."<sup>336</sup> In some states, a statute of limitations issue can be readily resolved simply by consulting the applicable statute.<sup>337</sup>

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N.E.2d 1160 (Mass. 1985); *Sawabini v. Desenberg*, 372 N.W.2d 559 (Mich. Ct. App. 1985); *Pearce v. Courier-Journal*, 683 S.W.2d 633 (Ky. Ct. App. 1985); *Buller v. Pulitzer Publishing Co.*, 684 S.W.2d 473 (Mo. Ct. App. 1984); *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610 (Cal. 1984); *Ledl v. Quik Pik Food Stores*, 349 N.W.2d 529 (Mich. Ct. App. 1984); *Yeager v. Local Union 20*, 453 N.E.2d 666 (Ohio 1983); *National Bonding Agency v. Demeson*, 648 S.W.2d 748 (Tex. Ct. App. 1983); *Jones v. Calder*, 187 Cal. Rptr. 825 (Ct. App. 1982).

334. *Warfield v. Peninsula Golf & Country Club*, 262 Cal. Rptr. 890 (Ct. App. 1989); *Young v. Barker*, 405 N.W.2d 395 (Mich. Ct. App. 1987); *Trought v. Richardson*, 338 S.E.2d 617 (N.C. Ct. App. 1986); *Duhammel v. Star*, 653 P.2d 15 (Ariz. Ct. App. 1982); *Bureau of Credit Control v. Scott*, 345 N.E.2d 37 (Ill. App. Ct. 1976).

335. There are no false light cases involving the equitable doctrine of laches.

336. See, e.g., John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333 (1976).

337. See, e.g., ILL. ANN. STAT. ch. 110, para. 13-201 (1984) ("Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued"); NEB. REV. STAT. § 20-211 (1990) ("An action for invasion of privacy must be brought within one year of the date the cause of action arose"); N.Y. CIV. PRAC. L. & R. 215(3) (McKinney 1983) (one year for "an action to recover damages for assault, battery,

Most states, however, have not amended their limitations statutes to provide specifically for false light privacy or, more generally, for invasion of privacy. By contrast, most jurisdictions have a specific limitations period for defamation, typically one or two years.<sup>338</sup> The issue is whether the defamation limitations period should apply, in which case the plaintiff loses, or whether the catch-all limitations period, which is longer, should apply.

In deciding which statute to apply, some states employ rules of statutory construction that have as their purpose or effect to preserve a plaintiff's access to the courts unless access is *clearly* foreclosed by an applicable limitations period. These courts may "strictly construe" limitations periods, for example, and reason that since false light is not specifically mentioned in any statutory provision, the catch-all limitations period applies.<sup>339</sup> Similarly, some courts have adopted a rule that if there is ambiguity about which limitations period applies, the court should select the statute with the longer period in order to preserve the plaintiff's access to the courts.<sup>340</sup>

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false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law"); Act of July 9, 1976, P.L. 586, No. 142, § 2, PA. STAT. ANN. tit. 42, § 5523 (1981) (amended 1982) (one year for "[a]n action for libel, slander or invasion of privacy"); WIS. STAT. § 893.57 (1979) ("An action to recover damages for libel, slander, assault, battery, invasion of privacy, false imprisonment or other intentional tort to the person shall be commenced within two years after the cause of action accrues or be barred").

The Uniform Single Publication Act has been adopted in at least seven states and applies to a "cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance." ARIZ. REV. STAT. § 12-651 (1952); CAL. CIV. CODE § 3425.3-.5 (West 1955); IDAHO CODE § 6-702 to 705 (1953); ILL. REV. STAT. ch. 126, § 11 (1959); N.M. STAT. ANN. § 41-7-1 (Michie 1978); N.D. CENT. CODE § 14-02-10 (1985); 42 PA. CON. STAT. ANN. § 8341 (1978).

338. A list of limitation periods for libel and slander is printed in BRUCE W. SANFORD, *LIBEL AND PRIVACY*, Appendix C at 837-41 (2nd ed. 1991).

339. State cases: *Covington v. Houston Post*, 743 S.W.2d 345, 347 (Tex. Ct. App. 1988) ("Texas construes statutes of limitations strictly"); *Allen v. Bethlehem Steel Corp.*, 547 A.2d 1105, 1108 (Md. Ct. App. 1988) ("Limitation statutes are generally strictly construed").

Federal cases: *Wood v. Hustler Magazine*, 796 F.2d 1084, 1089 (5th Cir. 1984) (Texas law); *Jensen v. Times Mirror Co.*, 634 F. Supp. 304, 315 (D. Conn. 1986) (Connecticut law).

340. *Williams v. Lee Way Motor Freight*, 688 P.2d 1294, 1297 (Okla. 1984) (an emotional distress case subsequently relied upon in *Colbert v. World Publishing Co.*, 747 P.2d 286 (Okla. 1987), a false light case).

Apart from this sort of mechanical jurisprudence, the issue in these cases generally comes down to whether false light privacy exists and, if so, whether it protects an interest distinct from any other cause of action. All of the limitation cases to date have involved false light claims brought in order to avoid the short statute of limitations applicable to a libel action, and the issue in the cases is whether false light privacy should be treated differently from libel for statute of limitations purposes.

Courts rejecting the libel limitation period naturally emphasize the differences in theory between a false light claim and a defamation claim. For example, in *Clarke v. Denton Publishing Co.*,<sup>341</sup> the court explained that there must be publicity in a false light case (whereas defamation requires only publication to one third person), that the publicity in a false light case does not have to be defamatory in order to be actionable, and that a plaintiff may recover nominal damages in false light (whereas in Texas, according to this court, special damages must be proven in a defamation action).<sup>342</sup> In *Covington v. Houston Post*,<sup>343</sup> the court noted that defamation protects one's interest in reputation, whereas false light protects not only reputation, but "the plaintiff's sensibilities."<sup>344</sup>

Courts accepting the libel limitation period emphasize the obvious similarities and overlap between false light privacy and defamation. The court in *Sullivan v. Pulitzer Broadcasting Co.*,<sup>345</sup> for example, pointed out that although false light in theory is supposed to protect an interest distinct from that protected by defamation, that theoretic difference usually disappears in practice since the plaintiff can recover the same damages for libel as for false light privacy (that is, damages for

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341. 793 S.W.2d 329 (Tex. Ct. App. 1990).

342. *Id.* at 331.

343. 793 S.W.2d 345 (Tex. Ct. App. 1987).

344. *Id.* at 347. *Accord* *Colbert v. World Publishing Co.*, 747 P.2d 286, 289 (Okla. 1987) ("In an action for libel, recovery is sought primarily for the injury to one's reputation. The focus of the action is on the effect of the publication on what others may think of the person. Under the theory of false light invasion of privacy, the interest to be vindicated is the injury to the person's own feelings.") (footnotes omitted); *Wood v. Hustler Magazine*, 736 F.2d 1084 (5th Cir. 1984); *Uhl v. Columbia Broadcasting Sys.*, 476 F. Supp. 1134 (W.D. Pa. 1979).

345. 709 S.W.2d 475 (Mo. 1986).

harm to reputation, emotional distress and humiliation).<sup>346</sup> Indeed, even in theory, the only cases in which there would not be a complete overlap between false light and defamation are false light cases where there is no injury to reputation.<sup>347</sup> As the Washington Supreme Court put it in *Eastwood v. Cascade Broadcasting Co.*,<sup>348</sup> "[w]hile all false light cases need not be defamation cases, all defamation cases are potentially false light cases."<sup>349</sup> Relying upon the substantial similarity between false light and defamation, the majority of the courts considering the issue have held that the defamation limitations period applies.<sup>350</sup> Those courts coming to a contrary conclusion should reconsider.

## 6. The Federal Cases

We have a short list of federal decisions in which false light privacy was the sole basis for recovery. These cases are being treated in this separate section because of their limited precedential value. In each of these cases, the federal courts are trying to predict what a state court would do when faced with the same case. A federal court's statement of state law—even a statement by the Supreme Court of the United States—may be ignored by the lowest state court.

The Supreme Court has decided only two cases purportedly involving false light privacy, *Time, Inc. v. Hill*<sup>351</sup> and

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346. *Id.* at 479.

347. Recognizing the overlap but also recognizing that false light may in theory exist even without a defamation action, the court in *Magenis v. Fisher Broadcasting*, 798 P.2d 1106 (Or. Ct. App. 1990), held that "when a claim characterized as false light alleges facts that also constitute a claim for defamation, the claim must be filed within the period for bringing a defamation claim." *Magenis*, 798 P.2d at 1111. This limited holding suggests that a different limitations period may apply to a false light claim that does not also state a claim for defamation.

348. 722 P.2d 1295 (Wash. 1986).

349. *Id.* at 1297.

350. State cases: *Magenis v. Fisher Broadcasting*, 798 P.2d 1106 (Or. Ct. App. 1990); *Eastwood v. Cascade Broadcasting Co.*, 722 P.2d 1295 (Wash. 1986); *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475 (Mo. 1986); *Wiener v. Superior Court*, 130 Cal. Rptr. 61 (Ct. App. 1976); *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 118 Cal. Rptr. 370 (Ct. App. 1975).

Federal cases: *Gashgai v. Leibowitz*, 703 F.2d 10 (1st Cir. 1983); *White v. Fawcett Publications*, 324 F. Supp. 403 (W.D. Mo. 1971); *Smith v. Esquire, Inc.*, 494 F. Supp. 967 (D. Md. 1980); *Robinson v. Vitro Corp.*, 620 F. Supp. 1066 (D.C. Md. 1985).

351. 385 U.S. 374 (1967).

*Cantrell v. Forest City Publishing Co.*<sup>352</sup> As will be seen, neither case actually involves what Prosser and the Restatement call false light. That the Court has mischaracterized the tort before it in these cases has been of little consequence, however, since the Court's only interest has been whether liability could be imposed consistent with the First Amendment. The details of the tort have not been terribly important.

*Time* arose under the New York Civil Rights Law and actually involved misappropriation of name or picture rather than false light.<sup>353</sup> The Court subsequently incorrectly characterized its decision in *Time* as arising under the false light rubric, however, apparently confused because the article in *Time* contained falsehoods.<sup>354</sup> This category error was unimportant since the only issue before the Court in *Time*, an appeal from a state court judgment against the defendant, was whether the judgment was consistent with constitutional standards. The Court reversed and remanded for the lower court's failure to instruct the jury that liability could be predicated only upon a showing of knowing or reckless falsehood, the *New York Times v. Sullivan* standard.<sup>355</sup> Whether the cause of action was denominated false light or misappropriation under the New York Civil Rights law was quite irrelevant to consideration of this constitutional question.

In its second case, *Cantrell v. Forest City Publishing Co.*,<sup>356</sup> the Court affirmed what was again characterized as a plaintiff's false light judgment rendered by a federal district court sitting in diversity. Because *Time* was an appeal from a state court, the Supreme Court could render a decision only on constitutional grounds. In *Cantrell*, by contrast, the entire case was before the federal courts, and we might have seen an opinion dealing with the tort aspects of the case. Unfortunately (at least for our purposes), defense counsel appears to have limited his appeal to constitutional grounds, and we are left largely to speculate about what might have happened had an appeal been taken on tort grounds as well.

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352. 419 U.S. 245 (1974).

353. Zimmerman, *supra* note 4, at 384 ("their action technically was one for commercial appropriation rather than for false light").

354. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 249 (1974).

355. 385 U.S. at 390.

356. 419 U.S. 245 (1974).

Some five months after the collapse of a bridge, in which forty-four people perished, Eszterhas, a reporter for the *Plain Dealer*, and Conway, a photographer, visited Margaret Mae Cantrell's home. Mr. Cantrell had perished in the bridge disaster, and Eszterhas wanted to write a story showing how the disaster had affected the community. Mrs. Cantrell was not at home when Eszterhas arrived, but that did not stop him from entering the home and talking with her children for a little over one hour. The *Plain Dealer* subsequently published the story with accompanying photographs which accurately showed the poverty in which the Cantrells lived. The story contained a number of inaccuracies, apparently the most significant of which was that the article implied that Mrs. Cantrell was home at the time of the interview.

The complaint pled causes of action for libel and invasion of privacy.<sup>357</sup> The libel claim apparently was not vigorously pursued, and the jury was instructed only on the privacy claim. The invasion of privacy instruction, to which defense counsel failed to object, did not follow the Restatement definitions and attempted to state invasion of privacy as though it were one tort:

[I]n this case the burden of proof is upon the plaintiffs to prove by a preponderance of the evidence their assertions of an invasion of privacy, the elements of which are: (1) An unwarranted and/or wrongful intrusion by the defendants into their private or personal affairs with which the public has no legitimate concern. (2) Publishing a report or article about plaintiff with knowledge of its falsity or in reckless disregard of the truth. (3) Defendants' acts of publishing a report or article about plaintiffs with knowledge of its falsity or in reckless disregard of the truth caused plaintiffs injury as individuals of ordinary sensibilities and damage in the form of outrage or mental suffer-

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357. Libel appeared most frequently in the substantive paragraphs of the complaint. Privacy may well have been added to the complaint in a misguided attempt to support federal jurisdiction. The first paragraph of the complaint alleges that "[j]urisdiction is based on diversity of citizenship of the parties . . . and the rights of privacy of plaintiffs under the Constitution of the United States." Petition for Writ of Certiorari, Appendix at p. 3, *Cantrell v. Forest City Publishing Co.*, cert. granted, 419 U.S. 245 (1974) (No. 73-5520). The attempt was misguided because none of the defendants were state actors subject to the restraints of the Fourteenth Amendment to the United States Constitution. State law was therefore the only source of substantive law available to the plaintiffs.

ing, shame or humiliation.<sup>358</sup>

Under this instruction, a jury could find against the defendant if it believed that (1) there was no legitimate public interest in Eszterhas, many months after a tragic accident in which Mr. Cantrell perished, entering the Cantrell's house uninvited, and interviewing Mrs. Cantrell's children and having pictures taken, all when Mrs. Cantrell was not around; (2) the story contained one or more false statements of which defendants were aware; and (3) publication of the story caused emotional distress. Under this instruction, the jury did *not* have to find that the plaintiffs had been "place[d] before the public in a false light,"<sup>359</sup> that "the false light in which the other was placed would be highly offensive to a reasonable person"<sup>360</sup> or that the emotional distress suffered was caused by the false light (rather than by the public disclosure). False light was most definitely not before the jury.

In spite of the obvious differences between what the jury was charged and the Restatement definition of false light, both the Sixth Circuit and Supreme Court concluded that the case fundamentally involved false light, although neither court seriously studied this state law question.<sup>361</sup> At the very least, the

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358. *Cantrell*, 419 U.S. at 250 n.3. The court also instructed the jury as follows: "An actionable invasion of privacy as alleged in the complaint derives from a wrongful intrusion into an individual's private activity . . . . The right of privacy is the right of an individual to be let alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public into matters with which the public is not necessarily concerned. It is the unwarranted appropriation of an individual's personality, the publicizing of an individual's private affairs with which the public has no legitimate concern in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." Petition for Writ of Certiorari, Appendix at pp. 97-98, *Cantrell v. Forest City Publishing Co.*, cert. granted, 419 U.S. 245 (1974) (No. 73- 5520). The trial court thus thought the case was about either intrusion, public disclosure or misappropriation. Falsity worked its way into the instructions only because of the First Amendment: "Calculated falsehoods do not, therefore, come within the immunity of the First Amendment rights of freedom of press and speech." *Id.* at 98.

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

360. *Id.* § 652E(a).

361. The Supreme Court noted that "there is remarkably little discussion of the relevant Ohio or West Virginia law by the District Court, the Court of Appeals, and counsel for the parties." 419 U.S. at 248 n.2. There is a reason no Ohio or West Virginia authorities were discussed—none existed. False light made its first appearance in West Virginia in conjunction with a libel claim in *Crump v. Beckley Newspapers*, 320 S.E.2d 70 (W. Va. 1983). Ohio courts had also never faced a false light claim at that time, and subsequently held that false light did



false light charged to the jury was a type of false light that bore little relationship to what was described by the Restatement. In any event, as a result of defense counsel's failure to preserve any of these purely tort arguments, the only issue before the appellate courts was whether there was any evidence from which a reasonable jury could conclude that the story was published with knowledge of its falsity (which was one of the elements charged to the jury). Eszterhas of course knew that Mrs. Cantrell was not present, and the Supreme Court held there was sufficient evidence for a jury to conclude that Eszterhas was the publishers' agent.<sup>362</sup>

Although the Court's decision was probably correct from a purely technical standpoint in view of the extremely narrow issue before the Court,<sup>363</sup> the decision is ultimately unsatisfying from a torts perspective. The most significant falsehood was apparently the implication which could be drawn from the article that Mrs. Cantrell was present at the interview, although the article did not even purport to quote Mrs. Cantrell. It is not clear whether this minor inaccuracy would constitute placing Mrs. Cantrell in a "false light" before the public, and it seems very likely that the "false light" in which she was placed, if any, would not have been highly offensive to a reasonable person.<sup>364</sup> *Cantrell* is perhaps nothing more than a good example of how sloppy lawyering at the trial level can tie the hands of even the Supreme Court of the United States.

There is only one decision from a federal court of appeals affirming a false light recovery, *Braun v. Flynt*,<sup>365</sup> and the case involved one of Larry Flynt's publications, *Chic*. The unsuspect-

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not exist in Ohio.

362. 419 U.S. at 253-54.

363. Defense counsel's failure to object to the instructions made it impossible for the Court even to consider the one interesting constitutional issue for which the Court probably had granted certiorari. That issue was whether the *Gertz* standard should apply in a false light case involving a private person/public subject matter. Because counsel failed to object to the *New York Times v. Sullivan* instruction, the Court was prevented from considering the issue, and leaving the "sole question" before the Court as "whether the Court of Appeals erred in setting aside the jury's verdict" in light of the law of the case. *Id.* at 251.

364. Professor Zimmerman has come to a similar conclusion about the merits of the tort in *Cantrell*. Zimmerman, *supra* note 4, at 389-91.

365. 726 F.2d 245 (5th Cir. 1984).

ing victim this time was Jeannie Braun, who as an employee of the Aquarena Springs amusement park worked with "Ralph, the Diving Pig." Mrs. Braun would position herself in a pool with a bottle of milk with a nipple on it, and Ralph would dive into the pool to the delight of the crowd. Mrs. Braun had signed a release authorizing Aquarena Springs to use publicity photographs showing Ralph jumping towards Mrs. Braun. The release provided that "[i]t is to be understood that all photographs are to be in good taste and without embarrassment to me and my family."<sup>366</sup>

A representative of *Chic*, a magazine in which, according to the court, "[t]he dominant theme . . . is 'female nudity,'"<sup>367</sup> contacted Aquarena Springs to ask consent to publish the publicity photo in *Chic*. The representative described *Chic* as a men's fashion magazine and did not disclose its true nature. Aquarena Springs consented to the publication, and the picture appeared in the "Chic Thrills" section of the magazine next to an essentially accurate caption.<sup>368</sup> Other pictures or cartoons in this section were, in the words of the court, "overtly sexual."<sup>369</sup>

Mrs. Braun sued Larry Flynt, alleging defamation, false light and misappropriation. The jury found in her favor on all three causes of action. The case would be a simple one classifiable above as defamation/false light if it had not been for the fact that the overlap in damages between defamation and false light caused the trial court to commit reversible error. Following Texas' special interrogatory practice, the trial court asked the jury twelve questions.<sup>370</sup> Question number four asked the jury what sum of money would compensate Mrs. Braun for the injury to her reputation, and the jury answered "5,000.00." Question number ten asked what sum of money would compensate Mrs. Braun for the invasion of her privacy, and the jury answered "\$15,000.00." Correctly noting that damages for

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366. *Id.* at 247.

367. *Id.* at 247.

368. The caption read as follows: "SWINE DIVE—A pig that swims? Why not? This plucky porker performs every day at Aquarena Springs Amusement Park in bustling San Marcos, Texas. Aquarena staff members say the pig was incredibly easy to train. They told him to learn quick, or grow up to be a juicy ham sandwich." *Id.* at 248 n.2.

369. *Id.* at 247.

370. *Id.* at 258.

false light invasion of privacy completely overlapped with damages for defamation and that the jury's verdict constituted a duplicative recovery, the Fifth Circuit ordered a new trial on damages only.<sup>371</sup> But, in order to spare the litigants the expense of a new trial, the court ordered that if Mrs. Braun would accept only the \$15,000 for invasion of privacy and would waive the \$5,000 for defamation, then the trial court could enter judgment solely for invasion of privacy.<sup>372</sup> The result is a decision which, in effect, affirms a false light invasion of privacy verdict.

The court identified several ways in which publication of the picture in *Chic* might have portrayed the plaintiff in a false light. First, "the ordinary reader automatically will form an unfavorable opinion about the character of a woman whose picture appears in *Chic* magazine."<sup>373</sup> Second, "the jury might have found that the publication implied Mrs. Braun's approval of the opinions expressed in *Chic*."<sup>374</sup>

The Fifth Circuit appears to be far out on a limb at this point in its analysis. Assuming that the picture did *not* suggest that Mrs. Braun had consented to its publication in *Chic*, an ordinary reader would form an unfavorable opinion only of *Chic*, not of Mrs. Braun. And if the photograph did not suggest her consent, no ordinary reader would believe that Mrs. Braun approved of the opinions expressed in *Chic*. Moreover, serious First Amendment concerns would be created by a rule that anyone whose name or picture appears in *Chic* or *Hustler* without their permission has a cause of action.<sup>375</sup>

Apparently recognizing that its first two explanations were doubtful, the court offered a third: "[T]he jury might have found . . . that it [i.e., the photograph] implied Mrs. Braun had consented to having her picture in *Chic*."<sup>376</sup> If indeed the photograph in context suggested that Mrs. Braun had consented to its publication, then Mrs. Braun's reputation might well have been sullied, as the jury found.<sup>377</sup> Alternatively, if she

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371. *Id.* at 252.

372. *Id.*

373. *Id.* at 254.

374. *Id.* at 254 n.11.

375. *Cf. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (Falwell could not recover damages for intentional infliction of emotional distress arising out of parody in *Hustler*).

376. 726 F.2d at 254 n.11.

377. The analysis would be similar to that discussed in another Larry Flynt

had not consented to have her publicity photo published in *Chic*, she would have a cause of action for misappropriation of name or picture, and the jury may well have found a misappropriation, although the record is confused as to this possibility.<sup>378</sup> In either event, the false light claim added nothing to the overall likelihood of recovery. Rather, the existence of the false light cause of action simply created confusion, causing the district court to ask the jury separate damage questions for defamation and invasion of privacy which ultimately created a duplicative recovery.

There exist a handful of federal district court decisions concerning only false light. Summary judgment for the defendant was granted in one case.<sup>379</sup> There are a number of decisions in which the district court denied pre-trial motions to dismiss or for summary judgment but which ultimately resulted in pro-defendant results.<sup>380</sup> These cases of course do not

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case involving *Hustler*. See *supra* text accompanying notes 302-18.

378. At this point, analysis of the decision becomes mired in technicalities. The special interrogatory given to the jury asked the following question, combining false light and appropriation of likeness: "Do you find that *Chic's* publication of Mrs. Braun's picture created a false impression of her or was an unauthorized appropriation of her picture, reputation or accomplishments?" 726 F.2d at 258. The jury answered "yes." It thus is impossible to know whether the jury found only false light, only appropriation of likeness, or both. In a motion for reconsideration, the defendant argued that there was no evidence to support a misappropriation and that a reversal was therefore required because the jury's verdict might have been based upon the misappropriation claim. The Fifth Circuit rejected this argument on the grounds that the trial focused much more on the false light claim and that there was little evidence presented on the misappropriation claim. *Braun v. Flynt*, 731 F.2d 1205 (5th Cir. 1984). This is the worst form of sophistry, of course. It was precisely the defendant's argument that there was no evidence of misappropriation and that misappropriation should therefore have never been given to the jury. But according to the court, the submission of misappropriation was harmless because there was no evidence of misappropriation presented! In fairness to the Fifth Circuit, it also noted correctly that the jury had found publication of the picture to have been defamatory and that the jury was therefore very likely to have also found the photograph to have placed the plaintiff in a false light. *Id.* at 1206.

379. *Goldman v. Time, Inc.*, 336 F. Supp. 133 (N.D. Cal. 1971).

380. *Kassel v. United States Veterans Admin.*, 682 F. Supp. 646 (D. N.H. 1988) (denying summary judgment on false light claim against government employees), *on reconsideration*, 709 F. Supp. 1194 (D. N.H. 1989) (granting summary judgment for defendants on immunity grounds in light of Federal Employees Liability Reform and Tort Compensation Act of 1988); *Tomson v. Stephan*, 705 F. Supp. 530 (D. Kan. 1989) (jury verdict for defendant on false light claim); *Ritzmann v. Weekly World News*, 614 F. Supp. 1336, 1341 (N.D. Tex. 1985) (plaintiff failed to prosecute action following dismissal by court of libel claims and caution to plain-

establish the existence of false light privacy; they establish only that federal district courts have been willing at an interlocutory stage of the proceedings to let false light privacy claims go to trial.

There remains only one district court opinion to consider. In *Dempsey v. National Enquirer*,<sup>381</sup> the *National Enquirer* and *Star* had each reported the incredible story of Henry Dempsey, who fell out of a plane but survived by clinging to the boarding ladder of the plane until his co-pilot landed. Both the *Enquirer* and the *Star* had, as is apparently their practice, exaggerated certain facts and fictionalized quotes from Dempsey. The *Star* had additionally printed a purported first-person narrative under the by-line "by Henry Dempsey."<sup>382</sup> Dempsey, however, claimed that he had not written the narrative, and the *Star* had not even interviewed him.<sup>383</sup>

The district court granted the *Enquirer's* motion to dismiss the false light claim against it, holding as a matter of law that any misrepresentations in the *Enquirer's* story were not highly objectionable to a reasonable person.<sup>384</sup> The *Star* did not make out so well, however. The court denied the *Star's* motion to dismiss, holding that by unequivocally attributing authorship to the plaintiff, the *Star* had crossed the line from non-tortious exaggeration to possibly tortious false light privacy.<sup>385</sup> The court's primary support for its holding was none other than *Lord Byron v. Johnston*,<sup>386</sup> which, as was shown above, is more properly thought of as a misappropriation case. The district court thus properly permitted the claim against the *Star* to go

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tiff that in order to succeed on remaining false light claim, plaintiff must show a "major misrepresentation" rather than "mere inaccuracy"); *Pierson v. News Group Publications*, 549 F. Supp. 635 (S.D. Ca. 1982) (denying summary judgment—defense counsel indicated in telephone interview that court granted defense motion for directed verdict after trial).

381. 702 F. Supp. 934 (D. Me. 1989).

382. *Id.* at 935.

383. *Id.*

384. *Dempsey v. National Enquirer*, 687 F. Supp. 692 (D. Me. 1988), *motion for reconsideration denied*, 702 F. Supp. 927 (D. Me. 1988).

385. *Dempsey v. National Enquirer*, 702 F. Supp. 934, 937 (D. Me. 1989).

386. 35 Eng. Rep. 851 (Ch. 1816).

forward, but on the wrong basis.<sup>387</sup> The case ultimately settled before trial for an undetermined sum.

### 7. *And the Cheese Stands Alone*

It has been a long journey to reach this point, and the reader is to be commended for his or her dedication to the topic. Over 500 cases have now been properly categorized. The statute of limitations cases stand in a class by themselves and must be viewed as decisions motivated not by tort considerations but by hostility to limitations defenses. As for the other cases, false light was mere surplusage and the presence of the false light claim did not add anything to the plaintiff's arsenal.

The cases discussed in this section are different. In each of these cases, false light ended up being the only non-overlapping basis for the recovery (or the only basis for permitting the trial to proceed). That is, these cases did not involve allegations of defamation, intentional or negligent infliction of emotional distress or misappropriation. If false light really exists, it is in these few cases that we can see its essence. The plaintiff lost in most of the cases, and there is no point in reviewing the details of these decisions in the text.<sup>388</sup>

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387. The court rather plainly misunderstood the misappropriation doctrine and actually granted the Star's motion to dismiss the plaintiff's misappropriation claim on the ground that the Star had not attempted to use Dempsey's name to advertise the Star. 702 F. Supp. at 938. The court's view of misappropriation was too narrow. The Star's use of Dempsey's name on the by-line indicates that the Star perceived that significant commercial value could be gained by publishing what purported to be an exclusive first-person narrative.

388. State cases: *Schoneweis v. Dando*, 435 N.W.2d 666 (Neb. 1989) (defendant's demurrer sustained and false light claim dismissed on first amendment considerations); *Floyd v. Park Cities People, Inc.*, 685 S.W.2d 96 (Tex. Ct. App. 1985) (summary judgment for newspaper based on truth and newsworthiness of public information); *Penwell v. Taft Broadcasting Co.*, 469 N.E.2d 1025 (Ohio Ct. App. 1984) (plaintiff, ultimately determined by police to be an innocent bystander, was arrested and defendant broadcast film of arrest—summary judgment for defendant based on truth and newsworthiness); *Gill v. Snow*, 644 S.W.2d 222 (Tex. Ct. App. 1982) (publication about land dispute between neighbors true and newsworthy and of public record); *Strutner v. Dispatch Printing Co.*, 442 N.E.2d 129 (Ohio Ct. App. 1982) (plaintiff identified as father of murder suspect—summary judgment for defendant because true and newsworthy); *McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737 (Okla. 1980) (publication in newspaper of information contained in publicly available rap sheet on plaintiff—summary judgment for defendant on truth and newsworthiness); *Moore v. Charles B. Pierce Film Enters.*, 589 S.W.2d 489 (Tex. Civ. App. 1979) (murder victim portrayed in movie—surviving brother has no cause of action for invasion of

a. *Demurrers or Motions to Dismiss Denied*

We begin with the short decision in *Dean v. Guard Publishing Co.*, an Oregon Court of Appeals opinion.<sup>389</sup> The suit arose out of a newspaper report announcing the opening of an alcohol rehabilitation center in Eugene, Oregon. Accompanying the article was a picture of the center's aversion treatment room.<sup>390</sup> There were three people in the picture, two nurses and the plaintiff. The complaint alleged that the picture as taken created the false impression that the plaintiff was a patient at the facility, when in fact, the plaintiff was simply visiting an open house at the facility.<sup>391</sup>

The complaint apparently alleged only a single cause of action: false light privacy.<sup>392</sup> The trial court dismissed the complaint, and the court of appeals reversed, permitting the action to go to trial.<sup>393</sup> The court's opinion was carefully drafted and reasoned. The court first recognized that false light had not previously been declared to exist in Oregon and

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privacy since surviving brother not mentioned in movie); *LaFontaine v. Family Drug Stores*, 360 A.2d 899 (Conn. 1976) (false report of criminal activity privately communicated to police was insufficient publicity as a matter of law to support false light claim); *Kent County Bd. of Educ. v. Bilbrough*, 525 A.2d 232 (Md. 1987), (plaintiff's prior civil rights suit did not bar presentation of false light claim in state court—court did not reach merits of false light claim).

Federal cases: *McLean v. International Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987) (summary judgment for defendant because all statements were made in course of judicial proceeding and were, therefore, absolutely privileged); *Polin v. Dun & Bradstreet, Inc.*, 768 F.2d 1204 (10th Cir. 1985) (summary judgment for defendant because distribution of credit report to only a few of defendant's subscribers did not constitute sufficient "publicity"); *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983) (summary judgment for defendant because statements were true); *Berry v. National Broadcasting Co.*, 480 F.2d 428 (8th Cir. 1973) (judgment for defendant as a matter of law because no evidence of malice); *Matlock v. Town of Harrah*, 719 F. Supp. 1523 (W.D. Okla. 1989) *rev'd, in part*, 930 F.2d 34 (10th Cir. 1991) (tort claims against town barred by governmental tort claims act).

389. 699 P.2d 1158 (Or. Ct. App. 1985).

390. In aversion treatment, the alcoholic is given both a drink of liquor and a drug which produces a nauseous reaction. The theory is that the patient ultimately associates liquor with having a nauseous reaction, and the patient then can more easily resist the temptation to drink. DAVID J. ARMOR, *ALCOHOLISM AND TREATMENT* 33 (1978).

391. 699 P.2d at 1159.

392. It may become apparent below why no cause of action for libel was alleged.

393. The court held that 'false light' is a tort in Oregon and that the plaintiff is entitled to plead in order to state a claim under that theory. *Id.*

that in previous cases mentioning false light, the Oregon courts had simply assumed that false light existed for purposes of decision.<sup>394</sup> In holding that false light exists in Oregon, the court focused both on the injury suffered by the plaintiff and the wrongful conduct by the defendant. As for the injury, the court noted that:

If the false light is detrimental, it is foreseeable that the person will suffer an injury to reputation and possibly mental distress and other harms. A person is entitled to damages as redress for those injuries just as much as he or she would be for the more traditional torts such as slander and libel.<sup>395</sup>

As for the defendant's conduct, the court noted that two different provisions of the Oregon Constitution "show a general public policy to provide redress for wrongs of this kind," specifically, for wrongs arising out of false statements of fact.<sup>396</sup> Finding that the type of injuries to be redressed by false light are similar to the type of injuries protected by other torts and that the type of harm to be deterred is similar to the type of harm deterred by other torts, the court concluded that "[r]ecognizing false light as a tort is a natural extension of previous law."<sup>397</sup>

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394. In each of the cases, the assumption that false light was actionable did not change the result because each case affirmed a judgment for the defendant. *McNabb v. Oregonian Publishing Co.*, 685 P.2d 458 (Or. Ct. App. 1984), *reh. denied*, 687 P.2d 797 (Or. 1984), *cert. denied*, 469 U.S. 1216 (1985); *Flowers v. Bank of Am.*, 679 P.2d 1385 (Or. Ct. App. 1984); *Martinez v. Democrat-Herald Publishing Co.*, 669 P.2d 818 (Or. Ct. App. 1983), *petition denied*, 672 P.2d 1193 (Or. 1983); *Lee v. Nash*, 671 P.2d 703 (Or. Ct. App. 1983), *reh. denied*, 675 P.2d 491 (Or. 1984) (defendant's motion to dismiss was reversed and remanded, since defendant did not allege absolute privilege as an affirmative defense, although if he had, he would have been protected).

395. 699 P.2d at 1160. This is of course a debatable proposition. Not all injuries are created equal for purposes of tort law. It is fair to say that physical injuries are more important than either reputational or emotional injuries, and it probably is fair to say that reputational harm has, at least historically, been of greater concern to courts than emotional harm. The limitations placed upon emotional distress claims suggest that emotional distress is placed something on a par with pure economic loss.

396. *Id.* at 1160. The court stated that "[t]he [Oregon] constitution does not require that we recognize the false light theory of invasion of privacy, but [article I, sections 8, 10] show a general public policy to provide redress for wrongs of this kind." *Id.*

397. *Id.*



The facts as stated in the court's opinion suggest that the false light consisted of a false representation that the plaintiff was an alcoholic. If this had been the actionable representation, then it would appear that a cause of action for libel could also have been pled, and this would simply be one of the hundred or so cases where false light is pled along with libel. Perhaps, however, the libel action would have been barred by the statute of limitations, although it seems likely that if this had been true, the defendant would have raised the issue. Why file only an action for false light privacy on these facts when a good libel action may exist?

The facts as stated in the court's opinion are not complete, and the "true" facts clear up the mystery somewhat. As subsequently told in a newspaper report (and essentially confirmed by defense counsel in a telephone conversation), the plaintiff actually was an alcoholic and was proven to be an alcoholic at the subsequent trial.<sup>398</sup> Thus, the only false light in which the plaintiff was portrayed was that he had entered the aversion treatment program to cure his alcoholism when in fact he had not. It would be difficult to prove that this false statement was defamatory; if anything, a statement that an alcoholic had entered a treatment program would appear to be complimentary.

If he in fact was an alcoholic, then it would appear he could have pled a cause of action for public disclosure of private facts. Disclosing in a newspaper that a private person is an alcoholic would seem to be exactly the sort of embarrassing

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398. The news report stated:

In a third ruling, the court said a jury should be allowed to decide if a photograph published by The Register-Guard newspaper in Eugene portrayed a man in a 'false light.'

The case involves a suit filed against the newspaper by Orlin Dean, who was photographed at the opening of an alcohol rehabilitation center in Eugene.

Dean, who later admitted to being an alcoholic, said he was present at the facility for the opening and that the photo presented him in a false light by implying that he was a patient at the center.

Dean's suit was thrown out by Lane County Circuit Judge Maurice Merten.

The appeals court said a jury should be allowed to decide if being portrayed as an alcoholic undergoing treatment is more offensive than actually being one.

*Appeals Court Rules on Jobless Benefits for Illegal Aliens*, Byline—Tom Towslee, UPI, Nov. 12, 1987, available in LEXIS, Nexis Library, UPI File.

story that the public disclosure tort was designed to prevent. Why didn't he plead public disclosure? Efforts to find the plaintiff's counsel met with no success, but the most natural explanation would be that the tort of public disclosure is based upon disclosure of *true* facts, and the plaintiff may well have wished to avoid admitting that he was alcoholic.

Putting aside this strategy, the issue in the case comes down to the following: Should a newspaper be held liable for publishing the picture of an alcoholic while that alcoholic is visiting a treatment center during opening ceremonies, a newsworthy event to which the press had been invited, when the only falsity lies in an implication which could be drawn from the picture that the alcoholic is a patient at the facility? We have no final judicial answer to this question because the case ultimately settled for nuisance value (around \$1,000).

We next consider *Lougren v. Citizens First National Bank of Princeton*,<sup>399</sup> another pleadings case. The plaintiff, a farmer, experienced difficulties in making payments to the bank on the mortgage on his farm. Agents for the defendant-bank pressured the plaintiff to sell his farm, but the plaintiff refused. Without instituting foreclosure proceedings and without securing the owner's consent, the bank's agents then placed in a local newspaper an advertisement under the plaintiff's name announcing the sale of the plaintiff's farm at a public auction. The advertisement did not mention the bank's name at all and did not mention that the purpose of the sale was to satisfy the plaintiff's debt obligations. The complaint alleged that the advertisement "had made it practically impossible for the plaintiff to obtain refinancing of his mortgage loan."<sup>400</sup> The complaint also alleged that the plaintiff suffered emotional distress and embarrassment on the day of the announced sale because the plaintiff was forced to explain to people who showed up at the farm that there would be no sale. The plaintiff alleged the tort of intrusion into seclusion, and the trial court dismissed the complaint for failure to state a claim.

The Supreme Court of Illinois reversed. It agreed that there was no intrusion,<sup>401</sup> but it held that the complaint prop-

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399. 534 N.E.2d 987 (Ill. 1989).

400. *Id.* at 988.

401. *Id.* at 988-89. In the court's view, the "core" of the tort of intrusion is "the offensive prying into the private domain of another." *Id.* at 989. The grava-

erly pled a cause of action for false light. The first task under the Restatement definition of this tort is to identify the false light in which the plaintiff has allegedly been placed. The court identified the false light in only one ambiguous sentence, a brevity which makes analysis of the case somewhat difficult. According to the court, "because the advertisement stated that the farm was for sale by public auction, and named the plaintiff as seller—which was clearly untrue—the defendants' actions placed the plaintiff in a false light before the public."<sup>402</sup>

To begin with, the court's sentence is syntactically ambiguous. Does the clause "which was clearly untrue" modify only the second clause in the sentence ("named the plaintiff as seller") or does it modify both the first and the second clause? In other words, was the false light merely that the plaintiff was named as seller when in fact someone else was the seller, or was the false light both that the property was being sold at public auction and that the plaintiff was the seller?

If the defendant bank had instituted foreclosure proceedings under Illinois law, it would be possible for the first clause to be true (that is, that the farm would be sold by public auction) but the second clause to be false (that is, the plaintiff was the seller).<sup>403</sup> In fact, however, the complaint alleged that the bank had not instituted foreclosure proceedings. Thus, the more likely construction of the court's sentence is that the court intended "which was clearly untrue" to modify the entire first portion of the sentence. It was "clearly untrue" that the property would be sold at public auction on the date indicated. Obviously, if the property would not be sold at public auction, it would also be untrue that the plaintiff would be selling the property.

To meet the Restatement's requirements, the court next had to find that the false light in which the plaintiff was placed

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men of the plaintiff's claim was not prying, however, but the publication of the advertisement.

402. *Id.* at 990.

403. It appears that under Illinois law, there is no "seller" at a foreclosure sale, at least no "seller" in the common sense definition of that term. The judgment in a foreclosure proceeding may direct that the property be sold at a public auction to be held by a judge or sheriff. ILL. ANN. STAT. ch. 110, para. 15-1507 (Smith-Hurd 1984 & Supp. 1991). The purchaser ultimately receives a deed of sale which simply identifies the judgment authorizing the foreclosure sale. ILL. ANN. STAT. ch. 110, para. 15-1509 (Smith-Hurd Supp. 1991).

"would be highly offensive to a reasonable person."<sup>404</sup> The comments to Section 652E put some meat upon the barebones, black-letter test. According to comment c, a reasonable person would be highly offended when the plaintiff, "as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity."<sup>405</sup> "[U]nimportant false statements" are not actionable, but "a major misrepresentation of his character, history, activities or beliefs" will be sufficient.<sup>406</sup>

Would a reasonable person be "seriously offended and aggrieved" by an advertisement falsely announcing a public auction of that person's real property? Is such an advertisement an "unimportant false statement" or a "major misrepresentation"? In one critical sense, the false advertisement of sale was quite clearly "unimportant." The advertisement by itself was of no legal force or effect. The owner was not required to sell the property simply because someone falsely advertised a public auction of it. On the other hand, the entire advertisement was false, and in that sense, it was a "major misrepresentation."

If the advertisement in *Lougren* was highly offensive, it was probably not simply because it falsely advertised a sale, but because it falsely advertised a public auction, a type of sale associated with foreclosure which, in turn, is associated with the property owner's inability to make payments on a mortgage.<sup>407</sup> More simply, by announcing a public auction of farmland, the defendant was branding the plaintiff as essentially bankrupt and unable to pay his debts. Moreover, since the defendant had not instituted foreclosure proceedings, the false

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404. RESTATEMENT (SECOND) OF TORTS § 652E(a) (1977).

405. RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (1977).

406. *Id.*

407. At this point, it may be helpful to vary the advertisement slightly. Suppose as a practical joke, a friend placed an advertisement falsely reporting that the property owner was moving to another state and was, as a result, selling his residence. In fact, the property owner was not moving and was not interested in selling. Would a reasonable person feel seriously offended or aggrieved by such an advertisement? If a reasonable person would find this sort of advertisement highly offensive, then it is difficult to conceive of any unauthorized use of a person's name in the mass media that would not be actionable, except of course for the use of names that are legitimately newsworthy. Have we become so sensitive that the mere appearance of our names in the mass media reasonably causes emotional distress?

advertisement could reasonably be viewed as an unfair debt collection practice.<sup>408</sup>

The Supreme Court of Illinois did not clearly indicate in its opinion why a reasonable person could find the false advertisement to be highly offensive. The court's entire analysis is contained in two sentences. The first sentence simply restates the complaint's allegations: "The facts alleged in the complaint indicate that the plaintiff had no intention of selling his farm, and that the placement of the advertisements and the circulation of handbills were accomplished without his knowledge or consent."<sup>409</sup> As noted above, it is difficult to believe that a reasonable person would be *highly* offended simply by a false announcement of a sale of property.

The second sentence indicates more clearly the court's focus: "Of considerable significance is the allegation that the unauthorized advertisement made it practically impossible for plaintiff to obtain refinancing of his mortgage loan."<sup>410</sup> If in fact the announcement of a sale of the property made it "practically impossible" to obtain refinancing, it was most likely because the advertisement announced a public auction rather than merely a sale, and, as noted above, a public auction implies financial distress. Thus, it seems most probable that the Supreme Court of Illinois believed a reasonable person who owned a farm and was having trouble making payments on the mortgage could be highly offended by the false announcement by the mortgagee of a public auction.

If this analysis of the court's opinion is correct, then the court was simply creating a cause of action against a mortgagee who, as part of a campaign of pressure directed at a defaulting mortgagor, falsely advertises a public auction of the property. Such a cause of action might be labelled tortious credit collection practices.

In addition to this cause of action, the complaint in *Lougren* might easily have included causes of action for libel or

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408. A consensual sale or foreclosure proceeding are the only permissible methods for a mortgagee in Illinois to liquidate the security for the mortgage. See ILL. ANN. STAT. ch. 110, para. 15- 101 (Smith-Hurd 1984) (repealed 1987) ("No real estate within this State may be sold by virtue of any power of sale contained in any mortgage, trust deed or other conveyance in the nature of a mortgage . . .").

409. *Lougren*, 534 N.E.2d at 990.

410. *Id.*

intentional interference with prospective economic advantage. Because the advertisement in effect announced the plaintiff's financial distress, the advertisement could easily have been defamatory, and the plaintiff, after the Supreme Court of Illinois' decision remanding the case, added a cause of action in libel to its complaint.<sup>411</sup> One serious problem with an action for defamation in *Lougren* is that the plaintiff apparently was in financial distress and was not making his payments; the implication of financial distress created by the advertisement may have been substantially true, in which case the plaintiff should not be able to recover either for defamation or false light.

The plaintiff also amended his complaint after remand to add a cause of action for interference with prospective economic advantage. Recall that the complaint originally alleged that the advertisement made it practically impossible to secure refinancing, and the court emphasized this allegation in its analysis. The refinancing would have been an advantageous relationship, and, according to the allegations, the advertisement interfered with the creation of that relationship. As a matter of pleading, then, intentional interference with prospective relations could be alleged. It is of course difficult to credit the allegation that it was the advertisement alone that prevented the plaintiff from securing refinancing (rather than the plaintiff's lack of economic resources), but that is a matter to be dealt with in a motion for summary judgment or at trial.

*Tollefson v. Price* is another credit collection case.<sup>412</sup> The defendant posted a notice in his store and published a similar notice as an advertisement in the local paper announcing the sale of certain "Judgment, Claims, Notes and Accounts," which were "guaranteed by the owner to be just, correct and undisputed."<sup>413</sup> The plaintiff's name appeared in the list, and the plaintiff sued, alleging embarrassment and humiliation.<sup>414</sup> The plaintiff also alleged that the notice was false in that the debt

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411. Telephone interview with Gregg N. Grimsley (August 15, 1991).

412. 430 P.2d 990 (Or. 1967).

413. *Id.* at 991.

414. The suit was actually filed by a husband and wife and only the wife's name appeared on the list. The husband alleged that he suffered humiliation and embarrassment because his wife's name appeared on the list. Without explanation, the court held that "[f]or purpose of the demurrer, if either plaintiff states a cause of action it must be overruled." *Id.*

was disputed rather than undisputed.<sup>415</sup> In holding that a cause of action for invasion of privacy was stated, the court emphasized that the purpose of the advertisement was allegedly not to collect the debt, but to harass, vex or annoy, and that invasion of privacy was, as Dean Wade had observed,<sup>416</sup> merely one aspect of the broader tort of intentional infliction of emotional distress.<sup>417</sup> False light added nothing to the plaintiff's chances for recovery. Whether the advertisement was true was not the critical issue for the court; instead, the critical issue was whether the defendant acted with an improper motive to cause the plaintiff to suffer emotional distress.<sup>418</sup>

We now consider the strange case of *Rinsley v. Frydman*.<sup>419</sup> Dr. Donald B. Rinsley was a controversial Director of the Children's Section of the Topeka State Hospital in the early 1970's.<sup>420</sup> His administration of the facility and his theories of treatment generated a storm of criticism from other health professionals. The defendant, Dr. Louis Frydman, apparently made it his business to expose the mistreatment taking place in the Children's Section, to drive patients away from the Children's Section, and to block reaccreditation of the facility by the state board.<sup>421</sup> Rinsley's amended complaint alleged interference with confidential relationships, defamation and invasion of privacy.<sup>422</sup>

The trial court granted a motion to dismiss for failure to state a claim upon which relief could be granted. It found the defamation allegations inadequate on a variety of grounds, including, most significantly, that the defendant was a public figure as a matter of law and that the complaint failed to allege malice.<sup>423</sup> The court dismissed the privacy and interference

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415. *Id.*

416. Wade, *supra* note 9, at 1124-25.

417. 430 P.2d at 991.

418. *Id.*

419. 559 P.2d 334 (Kan. 1977).

420. Dr. Rinsley was also a member of the Executive and Training Faculty in Child Psychiatry of the Menninger Foundation and an Associate Clinical Professor of Psychiatry at the University of Kansas Medical Center. *Id.* at 335. He was a self-described "nationally recognized . . . expert in the diagnosis and treatment of adolescent children." *Id.* at 336.

421. *Id.* at 337.

422. *Id.* at 336.

423. *Id.* at 337. The trial court also held that the statements did not constitute libel *per se* (the court probably meant slander *per se*), the plaintiff failed to allege

claims as well, although the grounds for the dismissal are not clearly set forth in the supreme court's opinion.<sup>424</sup>

At oral argument before the supreme court, plaintiff's confused counsel disowned the defamation cause of action and stated that the defendant's conduct "can be conceptualized as ranging on a continuum from tortious interference with confidential contractual relations, through the intrusion, appropriation, and false light forms of invasion of privacy."<sup>425</sup> The court did not appear to address itself directly to the tortious interference claim. The court indicated that there is no such claim as "tortious intermeddling," but it was unclear whether the court believed the complaint alleged more than that.<sup>426</sup>

The court's discussion of privacy was equally unilluminating. The court first cited its prior decision in *Froelich v. Adair* as recognizing the Restatement's four versions of privacy.<sup>427</sup> The court next quoted an outdated tentative draft of Section 652E dealing with false light.<sup>428</sup> With this short legal introduction, the court then analyzed the record in the following sentence: "On the posture of the amended petition as set forth in the record, subject only to the rules of notice pleading at this point, it is sufficient to withstand attack, under the appellee's motion to dismiss, based on the theory of an invasion of privacy."<sup>429</sup> We are left wondering, among other things, whether the complaint properly alleged *only* false

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special damages, and statements allegedly made to legislative committees and commissions were absolutely privileged. *Id.*

424. 559 P.2d at 337-38.

425. *Id.* at 339.

426. *Id.*

427. *Id.* (citing *Froelich v. Adair*, 516 P.2d 993 (1973)).

428. *Id.* The court relied upon the 1967 tentative draft for its definition of false light. This tentative draft differed significantly from the final draft. The final draft included a requirement that "the actor had knowledge of or acted in reckless disregard as to the falsity of the public matter and the false light in which the other would be placed." RESTATEMENT (SECOND) OF TORTS § 652E (1977). The tentative draft contained no such limitation, providing only that "[o]ne who gives to another publicity which places him before the public in a false light of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy." RESTATEMENT (SECOND) OF TORTS § 652E (Tentative Draft No. 13, 1967). The court rendered its decision on January 22, 1977. If either defense counsel or court had bothered to check the 1975 tentative draft, they would have discovered that actual malice had been added to 652E. RESTATEMENT (SECOND) OF TORTS § 652E (Tentative Draft No. 21, 1975) (liability for false light if "the actor had knowledge of the falsity or acted in reckless disregard of it").

429. 559 P.2d at 339.



light privacy, or whether it also alleged intrusion and appropriation, which were on the same "continuum" identified by plaintiff's counsel at oral argument.

One thing is clear out of all of this: the plaintiff's claim was no good. The trial court was undoubtedly correct that the plaintiff was a public figure,<sup>430</sup> and since the complaint nowhere alleged malice, the defamation claim was properly dismissed. Under either the proper constitutional standard or under the proper tentative draft of what ultimately became Section 652E, the absence of an allegation of malice should have likewise doomed the false light claim. The outdated tentative draft of 652E, which the court relied upon, did not require malice, however, and the Supreme Court of Kansas upheld the complaint despite the absence of that allegation.

If there was a valid cause of action in *Rinsley*, it was for defamation. Plaintiff's counsel abandoned the defamation claim, no doubt anticipating a problem in establishing actual malice under the applicable constitutional standard. Plaintiff's counsel then turned to an old version of 652E which did not on its face require a finding of actual malice, and the Supreme Court of Kansas (as well as defense counsel, apparently) bought it.

Finally, we review *Rafferty v. Hartford Courant Co.*, where the court denied defendant's motion for summary judgment.<sup>431</sup> The plaintiffs in the case had recently been divorced. In celebration of their new status, they held a party at a private location at which was held an "unwedding" ceremony. The plaintiffs were dressed in "peculiar garb," and the guests were dressed "a bit oddly."<sup>432</sup> A reporter and photographer were also present at the party, and the defendant-newspaper pub-

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430. This is more than mere speculation. Dr. Rinsley was the subject of criticism and attack in a book by Anthony Brandt. ANTHONY BRANDT, *REALITY POLICE: THE EXPERIENCE OF INSANITY IN AMERICA* (1975). Dr. Rinsley sued the author and publisher in federal court, alleging defamation, invasion of privacy and violation of civil rights protected by 42 U.S.C. sections 1985 and 1986. *Rinsley v. Brandt*, 446 F. Supp. 850 (D. Kan. 1977). On a motion for summary judgment, the district court held, among other things, that the plaintiff was both a public figure and a public official. *Id.* at 857. The Tenth Circuit Court of Appeals ultimately affirmed a subsequent summary judgment entered against the plaintiff on the grounds that the allegedly harmful statements were either substantially true or were non-actionable opinions. *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983).

431. 416 A.2d 1215 (Conn. 1980).

432. *Id.* at 1216.

lished a story about the ceremony, complete with pictures. One of the plaintiffs claimed that the adverse publicity cost him his job. Their lawsuit pled claims for intrusion, public disclosure of private facts and false light.<sup>433</sup>

The defendant moved for summary judgment on all claims, and the court denied the motion, finding that disputed questions of material fact remained to be decided.<sup>434</sup> In particular, it was disputed whether the defendant's reporter had been invited and whether, if invited, consent had been given to the reporter to write a story about the party. If the reporter had not been invited, then his uninvited attendance would arguably have been a physical intrusion. The court also held that there was little or no public interest in the story and that if the reporter had obtained the story illegitimately, an action for public disclosure might lie.<sup>435</sup>

Insofar as the false light claim was concerned, although the court was of the view that the article "would appear in general to be an accurate reflection of the happening," and the plaintiff failed to come forward with any evidence showing that the article was false, the court nevertheless denied summary judgment, finding that the defendant, who had the initial burden of establishing truth for purposes of the summary judgment motion, had produced no evidence to support a finding that the article was accurate.<sup>436</sup> It is most likely of course that the article was right on the money. There was no dispute that the unwedding ceremony took place. Either defense counsel failed properly to support its motion for summary judgment, or the court made a mistake. In any event, the court's opinion is singularly unhelpful here. The opinion does not identify anything about the article that was even allegedly false, and the

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433. *Id.*

434. *Id.* at 1221.

435. *Id.* at 1216. The court's reasoning here is a little faulty. If the content of the story is newsworthy, it should not matter for purposes of public disclosure of private facts whether the content was obtained through legitimate or illegitimate means. The tort of public disclosure is intended to protect only the interest in keeping private information private, and if the information is newsworthy, then it may not be deemed private. Other torts, such as intrusion, trespass or conversion, are designed to handle cases where the press uses illegitimate means to access information that is being kept secret. Improper invasions of secrecy should not be confused with public disclosure of private facts. That which is secret is not necessarily private.

436. 416 A.2d at 1217.

court does not explain how the plaintiffs were portrayed in a false light. If the story was false—if there had been no unwedding ceremony or if the participants had not worn fantastic costumes and behaved oddly—a cause of action for libel would surely have existed.

b. *Affirming Jury Verdict for False Light Privacy*

When all is said and done, research has uncovered only two state appellate decisions affirming an award of damages for false light privacy when no other overlapping cause of action arising out of the same communication had been pled or proved. The first decision, by the Supreme Court of Iowa, is *Anderson v. Low Rent Housing Commission of Muscatine*.<sup>437</sup> The plaintiff, Phyllis Anderson, was employed as a secretary in the Community Development Department of the City of Muscatine, Iowa. The plaintiff was either a whistle-blower or a busy-body and trouble maker. The plaintiff's supervisor called her a trouble maker and terminated her summarily. The jury determined that she was a whistle-blower, and it found in her favor on causes of action for libel and false light invasion of privacy.

*Anderson* is a perfect example of how a smart lawyer may be able to confuse opposing counsel and the court by carefully exploiting the multiplicity of overlapping causes of action (such as false light and defamation). There were two communications which the plaintiff alleged injured her. The first communication occurred some four months prior to the plaintiff's discharge. The offending statement was contained in a letter to the Community Development Department from the Low Rent Housing Commission (known as either the LRHC or the LHA), which served the Department. The letter, drafted by one of the defendants, said that "She [Anderson] also has become a serious source of difficulty for the LHA."<sup>438</sup> Plaintiff's counsel used this statement as the basis for a defamation claim (but *not* a false light claim). The jury found this statement to be defamatory and awarded damages against the

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437. 304 N.W.2d 239 (Iowa 1981), *cert. denied*, 454 U.S. 1086 (1981).

438. *Id.* at 245.

LHA in the amount of \$15,000 and against the drafter of the letter in the amount of \$20,000.<sup>439</sup>

The second communication occurred on the day of the plaintiff's discharge. The plaintiff's supervisor confirmed to several reporters that the plaintiff had been terminated and summarized the reasons for the dismissal, which amounted to a repetition of the charge that Anderson had created difficulties within the department.<sup>440</sup> Interestingly, plaintiff's counsel did *not* allege that these statements were defamatory. Instead, counsel alleged only that these statements put the plaintiff in a false light. The jury also found in plaintiff's favor on these claims, awarding \$10,000 in actual damages and \$10,000 in punitive damages.<sup>441</sup>

The Supreme Court of Iowa reversed and remanded the defamation award. The trial court had determined as a matter of law that the plaintiff was a public figure. Notwithstanding this finding and over the objection of the defendants, the court instructed the jury that the plaintiff had to prove actual malice only by a preponderance of evidence.<sup>442</sup> In support of this instruction, the trial court reasoned that the clear and convincing standard of proof was reserved for suits involving media defendants, and that in suits involving non-media defendants, the First Amendment was satisfied by a preponderance instruction.<sup>443</sup> The Supreme Court of Iowa reversed, holding that the distinction between media and non-media defendants was irrelevant for purposes of First Amendment restrictions upon defamation actions.<sup>444</sup>

Apparently confused by the multiplicity of causes of action and in spite of his careful objection to the preponderance instruction in the context of the defamation claim, defense

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439. *Id.* at 245.

440. *Id.* at 247-48. Anderson had been supplying information about potentially illegal allocation of federal funds to the FBI and to the press. According to the court, Anderson's supervisor, one Schott, "was quoted to the effect that he had been plagued with two problems: one involved various investigations, and the other concerned friction between employees in the community development department. Schott was also quoted as saying that the dismissal of Anderson was the action he felt could best remedy that difficulty." *Id.* at 247.

441. *Id.* at 248.

442. *Id.* at 245.

443. *Id.*

444. *Id.* at 247.

counsel failed to object when the trial court instructed the jury that the plaintiff could succeed on her false light claim by proving the elements of the tort by only a preponderance of the evidence.<sup>445</sup> Having failed to preserve the point by a timely objection, counsel apparently decided not to raise the issue on appeal, and the Supreme Court of Iowa limited its review "to those issues presented and argued by the parties."<sup>446</sup> The only issues raised on the appeal from the false light judgment related to the trial court's refusal to instruct the jury on two weak affirmative defenses, consent and waiver. The court held that the record contained no evidence which supported those defenses, and the court affirmed the judgment.<sup>447</sup>

As it turned out, plaintiff's counsel made an extremely wise decision in pleading the first communication as defamation only and pleading the second communication as false light only. Whether counsel foresaw that the choice might produce such a favorable result is open to speculation, although there is some evidence that counsel knew exactly what he was doing. By the time of the second communication, the plaintiff's name had become newsworthy, and the plaintiff was pretty clearly a public figure, definitely triggering the actual malice standard from *New York Times* and probably triggering the clear and convincing standard as well.<sup>448</sup> Counsel may have hoped that by pleading the second communication as a false light claim, defense counsel and the court would give the preponderance instruction, failing to realize that the First Amendment concerns which trigger the clear and convincing standard in defamation should operate just as strongly in the false light context.<sup>449</sup> Counsel guessed right. The trial court gave a preponderance instruction, and defense counsel failed to object.

There was also a good reason for pleading the first communication only in defamation and not including a false light

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445. *Id.* at 248.

446. *Id.*

447. *Id.* at 248-51.

448. Plaintiff's counsel of course argued that the clear and convincing standard was reserved for media defendants, but counsel probably realized that this argument was relatively weak and that he stood a good chance of having to prove the defamation claim by clear and convincing evidence.

449. Indeed, Professor Zimmerman makes a strong argument that the false light tort should be limited by constitutional rules even stricter than those which operate in the context of defamation. Zimmerman, *supra* note 4, at 435-51.

claim here. In the first place, pleading both false light and defamation together for the same communication might have alerted defense counsel and the court to the absurdity of using a clear and convincing standard for defamation and a preponderance standard for false light. Second, and probably more important for plaintiff's counsel, at the time of the first communication, the plaintiff's name had not appeared in the media, and the plaintiff had a decent chance of proving that the plaintiff was not a public figure. If the plaintiff was not a public figure, then the actual malice standard would not apply, and the plaintiff could win on either a showing of fault or less.<sup>450</sup> This would be easier than proving false light which, according to Section 652E,<sup>451</sup> *always* requires a showing of actual malice.

By exploiting the minor differences between defamation and false light, plaintiff's counsel was able to secure and hold on appeal its false light verdict. If the minor differences being exploited reflected real differences between defamation and false light, then exploiting them would be fair game. It does not make sense, however, to have a clear and convincing standard for defamation of public figures but to have a preponderance standard for portraying a public figure in a false light.

These sort of irrational differences are the inevitable result of any attempt to provide two causes of action to remedy essentially the same type of harm caused by the same type conduct. We have seen a similar problem in the area of products liability where different causes of action and theories of recovery have multiplied like rabbits. The main result of creating multiple causes of action has been years of confusion as the courts try to figure out what the differences are, if any, between, for example, design defect cases under *Restatement (second) of Torts*, section 402A (1977), and ordinary negligence.<sup>452</sup> In *Anderson*, we witness a similar type of confusion leading to an equally unsatisfactory and confusing result. Because there are two causes of action, courts feel almost com-

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450. See, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985).

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

452. *J. Clark Kelso, Brown v. Abbott Laboratories and Strict Products Liability*, 20 Pac. L.J. 1 (1988); William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983).

pelled to create *some* differences between them, even if those differences do not reflect real differences in the interests being protected or the conduct being regulated.

The second decision is from the California Court of Appeal in *Kinsey v. Macur*, a "fatal attraction" case.<sup>453</sup> The defendant, Mary Macur, had a short relationship with one of the co-plaintiffs, Bill Kinsey. Kinsey broke off the relationship and shortly thereafter married co-plaintiff Sally Allen Kinsey. Macur reacted poorly to Kinsey's marriage. She sent some thirty letters to the co-plaintiffs, their parents, some of their friends, their parents' neighbors, members of Bill Kinsey's dissertation committee at Stanford and the President of Stanford University (overall, about twenty persons received letters).<sup>454</sup> The letters somewhat hysterically accused Kinsey of being a bad person.<sup>455</sup> In addition, a number of the letters accused Kinsey of having murdered his first wife, of having spent six months in jail for that crime and of having committed rape.<sup>456</sup> The truth of the matter was that Kinsey had been accused of murdering his first wife while on a picnic in Tanzania, had spent six months in jail awaiting trial (having refused to post bail), and had been acquitted of the crime,<sup>457</sup> and the trial court found that he had not attempted to rape Macur.<sup>458</sup>

The Kinseys sought an injunction and damages for "mental anguish, suffering and expenses incurred in trying to protect the Kinseys from appellant Macur's reach."<sup>459</sup> The complaint apparently pled only a single cause of action for invasion of privacy. An injunction was agreed to by the parties, and the trial court awarded the Mr. Kinsey damages of \$5,000 for invasion of privacy.<sup>460</sup>

The court of appeals affirmed, holding that the plaintiffs had proven both public disclosure of private facts and false light.<sup>461</sup> Both public disclosure and false light require that

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453. 165 Cal. Rptr. 608 (Ct. App. 1980).

454. *Id.* at 611-12.

455. For example, the first letter to Kinsey was addressed to "the most deceitful, fucking, selfish bastard I know." *Id.* at 610.

456. *Id.*

457. *Id.* at 613.

458. *Id.* at 610.

459. *Id.*

460. *Id.*

461. *Id.* at 614.

there be "publicity" which, according to *Restatement (Second) of Torts*, "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."<sup>462</sup> It would appear initially that a communication by private letter to only 20 persons would not constitute "publicity." The court held otherwise, however, emphasizing that the defendant's purpose, as she herself expressed it in one of her letters, was to "tell the whole world what a bastard he is,"<sup>463</sup> and that the twenty or so people who received letters "had nothing in common except the possible acquaintance of Bill Kinsey,"<sup>464</sup> a circumstance which, for the court, "adequately reflect[ed] 'mass exposure.'"<sup>465</sup>

The court discussed only one additional false light issue. The defendant asserted that by failing to comply with California's retraction statute,<sup>466</sup> the plaintiffs could recover for false light only if they proved special damages, which they had failed even to allege.<sup>467</sup> This was a rather silly argument because section 48a applies by its express terms only to broadcast defamation and newspaper libels,<sup>468</sup> and does not apply to private letters. The court rejected this argument on the suspect ground that section 48a does not apply to false light suits which also involve public disclosures of private facts, since retracting the public disclosure of private facts would only exacerbate the initial disclosure.<sup>469</sup>

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462. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

463. 165 Cal. Rptr. at 612.

464. *Id.*

465. *Id.*

466. CAL. CIV. CODE § 48a (West 1982 & Supp. 1992).

467. *Werner v. Times-Mirror Co.*, 14 Cal. Rptr. 208 (Ct. App. 1961), had held that section 48a applied in a suit against a newspaper alleging both libel and false light.

468. Section 48a provides in relevant part that "[i]n any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided." CAL. CIV. CODE § 48a (West 1982 & Supp. 1992). "Radio broadcast" is defined in CAL. CIV. CODE § 48.5(4) (West 1982 & Supp. 1992) "to include both visual and sound radio broadcasting."

469. The court was correct that insofar as the tort is public disclosure, the retraction statute would not apply because, as the court said, the retraction would only repeat the initial disclosure. 107 Cal. Rptr. at 614 (quoting *Kapellas v. Kofman*, 459 P.2d 912, (Cal. 1969)). But insofar as the tort is false light, the re-



The mystery about *Kinsey* is not why there was a recovery, but why the plaintiffs did not plead libel. Among other false accusations, the defendant accused Kinsey in writing of having committed both murder and rape. Why not plead libel and recover, in addition to emotional distress damages, presumed damages for injury to reputation? The answer may be that *Kinsey* pre-dated *Dun & Bradstreet, Inc. v. Greenmoss Builders*,<sup>470</sup> and plaintiffs' counsel may have been concerned about overcoming the actual malice standard for presumed damages from *Gertz v. Robert Welch, Inc.*<sup>471</sup> and *New York Times v. Sullivan*.<sup>472</sup> The plaintiffs sought only \$10,000 in their complaint, and their prime goal in bringing the suit may have been only to get the injunction in any event. It seems clear, however, that recovery could have been had in *Kinsey* for defamation.

#### IV. CONCLUSION

The continued viability of false light privacy should be decided by examining the two cases just reviewed. These are the only cases where false light privacy shows its true colors. In the other cases, false light privacy is concealed by other, more stable, causes of action. It is much easier to permit a cause of action for false light privacy to proceed when that cause of action goes hand in hand with defamation, intentional infliction of emotional distress, misappropriation, or some other well established tort.

For my money, the few "true" false light decisions do not establish the independent vitality of a cause of action that deserves judicial recognition. Each of these cases is more properly treated as either defamation or intentional infliction of emo-

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traction statute must be held to apply. Otherwise, the plaintiff can avoid the retraction statute entirely in a case to which it otherwise would apply (i.e., newspaper libel or broadcast defamation) by the simple expedient of pleading false light and public disclosure and *not* pleading libel. The court in *Kapellas* explicitly approved the holding in *Werner v. Times-Mirror Co.*, 14 Cal. Rptr. 208 (Ct. App. 1961), that section 48a was applicable to false light claims. 459 P.2d at 921 n.17. The Supreme Court of California subsequently confirmed *Werner* in *Fellows v. National Enquirer*, 721 P.2d 97 (Cal. 1986). The *Kinsey* court should have held that the retraction statute did not apply because the letters were neither published in a newspaper nor broadcast over television or radio.

470. 472 U.S. 749 (1985).

471. 418 U.S. 323 (1974).

472. 376 U.S. 254 (1964).

tional distress or both. And in one of the cases, false light is manipulated by an astute plaintiff's counsel in such a way as to mislead and confuse both opposing counsel and court. Justice is not served by permitting this type of subterfuge. Courts around the country should follow the lead set by North Carolina, Missouri and Ohio, and declare that false light privacy is no part of the law of torts. False light privacy, may it rest in peace.

