Illinois Gives Green Light to False Light: Berkos v. NBC, Inc.

Crista Zivanovic

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol38/iss4/9

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
ILLINOIS GIVES GREEN LIGHT TO FALSE LIGHT:
BERKOS v. NBC, INC.

INTRODUCTION

On December 19, 1983, as part of its ongoing investigative reports, a Chicago television newscast detailed new charges in connection with the Operation Greylord investigations into judicial corruption in Cook County. The newscast named Judge Christy Berkos as one of the judges presiding in a particular courtroom the day that a pay-off was allegedly made to influence a case in which Judge Berkos had found the plaintiff not guilty. Reporter Peter Karl noted that Berkos had not been charged with any wrongdoing and reported that Berkos, in a brief interview earlier that night, denied knowing either the FBI agent who made the pay-offs or the Chicago police officer who had solicited and accepted them.

Soon after, Judge Berkos sued NBC and newscaster Karl, alleging four tort claims, including libel and false light invasion of privacy. While the lower court dismissed all four claims, the Appellate Court of Illinois reversed and remanded as to Berkos's libel and false light claims. It is the appellate court's recognition of Berkos' false light claim, buried in the opinion, that makes this case significant. Berkos is the first Illinois case to recognize a cause of action for false light. The novelty of the holding is in the court's reasoning—or, rather, lack of it—in recognizing false light. Further, a close look at the common-law development of privacy in Illinois reveals that false light's roots are tenuous, raising doubt as to the holding's legitimacy.

However, even if one thinks false light should be actionable in Illinois, Berkos v. NBC, Inc., is not an appropriate case in which to recognize it. The Berkos case involved a matter of public interest, and false light claims (and privacy claims in general) in Illinois generally fail when pitted against the press' competing first amendment privilege to publish matters of public interest.

---

1. Berkos v. NBC, Inc., 161 Ill. App. 3d 476, 515 N.E.2d 668 (1st Dist. 1987), appeal denied, 119 Ill. 2d 553, 522 N.E.2d 1241 (1988). Judge Berkos' four tort claims included: libel; commercial appropriation of name and likeness (one of four recognized forms of tort of invasion of privacy); publicity which unreasonably places another in a false light before the public (another form of invasion of privacy); and intentional infliction of emotional distress. The lower court dismissed all four claims. The Illinois Appellate Court affirmed the lower court's dismissal of Berkos' claims for commercial appropriation of name and likeness, and intentional infliction of emotional distress. However, the court reversed and remanded as to Berkos' libel and false light privacy claims.

2. 161 Ill App. 3d 476, 515 N.E.2d 668 (1st Dist. 1987).

3. See, e.g., Leopold v. Levin, 45 Ill. 2d 434, 259 N.E.2d 250 (1970) (Illinois Supreme Court dismissed plaintiff's three privacy claims because plaintiff was public figure whose affairs
Because libel law is perceived by the courts and commentators to be similar to privacy law, this Casenote will begin with a brief review of that doctrine. Indeed, plaintiffs in Illinois often assert libel and false light claims together, as did Judge Berkos. Moreover, the competition of interests in libel actions (the plaintiff’s desire to protect an unsullied reputation and the press’ first amendment freedom to publish what it chooses), parallels the tension in false light between a plaintiff’s right not to be portrayed falsely and the press’ first amendment right to publish matters of public interest.

Next, this Casenote will examine invasion of privacy and the four different torts that comprise it: commercial appropriation of name and likeness; public disclosure of private facts; intrusion upon seclusion; and, publicity which unreasonably places another in a false light before the public. This Casenote will emphasize the last of these four, the tort of false light. An understanding of all four privacy torts is necessary because false light’s emergence in Illinois is enmeshed with the development of the other three invasion of privacy torts.

This Casenote will focus on the Berkos court’s recognition of false light, questioning whether the opinion properly reflects the development of privacy, and especially false light, in Illinois. Finally, this Casenote will briefly address the Berkos decision’s possible impact in Illinois.

I. BACKGROUND

A. Libel and False Light: First Amendment Standards

The first amendment stands for freedom of expression in both speech and the press. Preceding the development of first amendment law was the

were matter of public record and legitimate public interest); Adreani v. Hansen, 80 Ill. App. 3d 726, 400 N.E.2d 679 (1st Dist. 1980) (privacy right is limited in areas of legitimate public interest); Cassidy v. ABC, Inc., 60 Ill. App. 3d 831, 377 N.E.2d 126 (1st Dist. 1978) (privacy claim dismissed because police officer’s conduct on duty is matter of public concern); Buzinski v. Do-All Co., 31 Ill. App. 2d 191, 175 N.E.2d 577 (1st Dist. 1961) (privacy right is limited in areas of legitimate public interest); Bradley v. Cowles Magazines, Inc., 26 Ill. App. 2d 331, 168 N.E.2d 64 (1st Dist. 1960) (mother’s privacy claim against magazine dismissed because, inter alia, report on her son was matter of public interest).

4. Berkos, 161 Ill. App. 3d 476, 515 N.E.2d 668. For other cases in which plaintiffs asserted both libel and false light, see e.g., Cantrell v. ABC, Inc., 529 F. Supp. 746 (N.D. Ill. 1981); Adreani, 80 Ill. App. 3d 726, 400 N.E.2d 679. See also RESTATEMENT (SECOND) OF TORTS § 652E comment b (1977) [hereinafter RESTATEMENT (SECOND)] (often false light invasion of privacy claim will afford an alternative or additional libel remedy, and plaintiff can proceed on either theory or both).

5. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. 1.
common law tort of libel, or defamation by the printed word. The first amendment and the common law of libel law conflict when the press, relying on its first amendment right to publish freely, prints an account that libels someone's good reputation in the community or among his peers. The tension between these competing concerns—the press' right to publish and the individual's right to maintain his good reputation—eventually led to the development of constitutional guarantees for the press articulated by the United States Supreme Court in the 1964 case New York Times v. Sullivan.

The New York Times case provided a shield for the press. It would no longer publish at its peril. Plaintiffs who fell into the category of public officials were required to prove fault as a prerequisite to establishing liability on the part of the press. The Court ruled that the Constitution requires elected public officials to prove libel under the "actual malice" standard.

6. See, e.g., Restatement (Second), supra note 4, at § 559 (discussing what constitutes defamatory communication). The Restatement (Second's) definition says that a communication is defamatory "if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Id. In the past, courts relying on the established common law of libel tried to make allowances for news reporting that published erroneous information. Some courts, recognizing that giving unequivocal protection to citizens, especially public figures, failed to accommodate a free society's interest in a free flow of ideas and access to information, attempted to balance these competing values. Generally, these courts held that a defendant published at his own risk unless he could prove the libelous statement was true or privileged. See, e.g., Owens v. Scott Publishing Co., 46 Wash. 2d 666, 284 P.2d 296 (1955) (defamatory words spoken of a person, which in themselves prejudice him, are actionable per se, unless they are either true or privileged), cert. denied, 350 U.S. 968 (1956); Peck v. Tribune Co., 214 U.S. 185 (1909) (plaintiff's photo in newspaper depicting her as a nurse who advocated malt whiskey for herself and her patients constituted libel because it was defamatory and false). For a succinct history of the evolution of common law libel and libel statutes, see R. Labunski, LIBEL AND THE FIRST AMENDMENT, LEGAL HISTORY AND PRACTICE IN PRINT AND BROADCASTING (1987). See infra note 32 (discussing definitions of statutory and common law libel).


8. 376 U.S. 254 (1964). The New York Times had published an advertisement on March 29, 1960 on behalf of the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. Id. at 257. The advertisement included some false statements about the events that had occurred in Montgomery, Alabama during the civil rights movement. Id. at 258. L.B. Sullivan, a Montgomery city commissioner, sued the Times and others for libel because, although the advertisement did not refer to Sullivan by name, he contended that the defamatory reference to "police" in fact referred to him since he was the Montgomery commissioner who supervised the police department. Id. The jury awarded Sullivan $500,000 in damages. Id. at 256. The Supreme Court reversed.

9. Id. at 283. See Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 SUP. CT. REV. 191; see generally Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 CALIF. L. REV. 935, 935-43, 948-55 (1968). Nimmer suggests that the New York Times decision indicates a third approach to interpreting protected speech under the first amendment that avoids the absolutist approach that all speech is protected, and the ad hoc balancing approach that a balance must be struck between the claims of free speech and other claims such as public order or privacy. This third approach, which Nimmer calls "definitional"
To prove actual malice, elected public officials must prove that the press published material critical of their official conduct either knowing that the information was false or in reckless disregard for the truth.\textsuperscript{10}

Underlying the Court’s opinion was the concern that money judgments against newspapers and other media for honest or negligent mistakes in publishing defamatory material about public officials would stymie the first amendment’s commitment to promoting debate on public issues that is “uninhibited, robust, and wide-open.”\textsuperscript{11} Three years later, in \textit{Curtis Publishing Co. v. Butts},\textsuperscript{12} the Supreme Court extended the actual malice rule beyond elected officials to include public figures. Because public officials and public figures now had to prove actual malice on the part of the press, the \textit{Curtis} and \textit{New York Times} decisions made it more difficult for them to prove libel claims.

The Supreme Court extended the actual malice standard to include false light claims in its 1967 decision \textit{Time, Inc. v. Hill}.\textsuperscript{13} The Hill family’s home had been invaded in 1952 by three escaped convicts who held the family prisoner for 19 hours.\textsuperscript{14} Soon after, a novel and a play fictionalized the family’s ordeal.\textsuperscript{15} In 1955, Life magazine published a story which portrayed the play as an actual reenactment of the Hills’ experience.\textsuperscript{16} Mr. Hill sued Life, based on New York’s commercial appropriation statute, claiming the false statements of fact invaded his family’s privacy.\textsuperscript{17} The lower court found that the Life story placed Hill and his family in a false light.\textsuperscript{18}

The Supreme Court, recognizing the similarity between false light and libel, found the actual malice standard applied to libel in \textit{New York Times} to be an appropriate standard for false light as well. Because Life magazine

---

\textsuperscript{10} \textit{N.Y. Times}, 376 U.S. at 278-83.
\textsuperscript{11} Id. at 270.
\textsuperscript{12} 388 U.S. 130, 155 (1967). \textit{Butts} defined public figures as those non-public persons who “are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.” Id. at 164.
\textsuperscript{13} 385 U.S. 374, 387-88 (1967).
\textsuperscript{14} Id. at 377-79.
\textsuperscript{15} Id. The Hill family was not identified in the novel or play so there was no privacy action. See J. Hayes, \textit{The Desperate Hours} (1955).
\textsuperscript{16} Id. at 377-79.
\textsuperscript{17} Id.
was not found to meet this standard of knowing or reckless falsity, Mr. Hill lost his false light claim. The Court denied damages to the plaintiff because the trial court's jury instruction failed to require that he establish that Life magazine had acted with actual malice. The Supreme Court found that privacy rights under false light, like libel's reputation rights, were less important than the press' first amendment rights. More significantly, by applying the actual malice standard to false light in Hill, the Supreme Court extended New York Times and found that all false light plaintiffs—not just public officials and public figures—would have to prove actual malice whenever the alleged falsity involved a matter of public interest.

In an effort to keep its libel and false light doctrines consistent, the Supreme Court applied the Hill actual malice standard to subsequent libel actions. The Court ruled in Rosenbloom v. Metromedia, Inc. that all libel plaintiffs—private individuals as well as public officials and public figures—must prove actual malice as long as the libel involved matters of public interest. Three years later, however, the Court overruled Rosenbloom, and shifted its focus in libel cases from the public interest nature of the publication to the status of the plaintiff. In Gertz v. Robert Welch, Inc., the Supreme Court held that private individuals bringing libel suits need not prove actual malice. (The Gertz Court left intact the New York Times actual malice requirement in libel suits by public officials and public figures). Thus, Gertz signaled a restriction of the press' first amendment protection; even if the information reported is a matter of public interest, a private individual alleging libel will have only to prove negligence.

Based on the Supreme Court's past efforts to keep its libel and false light holdings consistent, some commentators have argued that the Gertz opinion, although a libel case, casts doubt on Hill. These commentators argue that

20. Id.
21. Id. at 388-91.
22. Id. at 387-91. While the court provided no definition of matters of public interest, it noted: "We have no doubt that the subject of the Life [magazine] article, the opening of a new play linked to an actual incident, is a matter of public interest." Id. at 388.
26. See Walden & Netzhammer, False Light Invasion of Privacy: Untangling the Web of Uncertainty, 9 COMM./ENT. L.J. 347, 359-71 (1987). This uncertainty also has been recognized by the Restatement (Second):

The effect of the Gertz decision upon the holding in Time, Inc. v. Hill has thus been left in a state of uncertainty. In Cantrell v. Forest City Publishing Co. [419 U.S. 425 (1974)], the court found that the defendant was shown to have acted in reckless disregard as to the truth of falsity of the statement, and it consciously abstained from indicating the present authority of Hill.

Pending further enlightenment from the Supreme Court, therefore, this Section
because the Court no longer requires private individuals to prove actual malice when asserting a libel action, neither should private individuals bringing false light claims have to prove actual malice.\textsuperscript{27} Although the Supreme Court has reiterated since \textit{Gertz} that all false light plaintiffs, private or public, must prove actual malice,\textsuperscript{28} Justice Powell observed that \textit{Gertz} “called into question” the validity of \textit{Hill}’s actual malice standard.\textsuperscript{29}

Indeed, some jurisdictions already have applied the lesser \textit{Gertz} negligence standard to false light cases.\textsuperscript{30} These courts have focused on the plaintiff’s status instead of on the public-interest nature of the report. Two recent cases have held that private individuals bringing false light actions need prove only negligence, not actual malice, even if the publication involves a matter of public interest.\textsuperscript{31}

\textbf{B. Libel}

\textit{1. Generally}

Libel law is concerned with harm to reputation. This concept, however, is more complex than it first appears. Libel is not concerned with portrayals that offend the plaintiff or are unpleasant to him. In fact, the feelings of the plaintiff are not relevant in a libel action. Rather, libel is concerned with portrayals which disgrace the plaintiff, or “excite adverse, derogatory or provides that liability for invasion of privacy for placing the plaintiff in a false light may exist if the defendant acted with knowledge of the falsity of the statement or in reckless disregard as to truth or falsity. The Caveat leaves open the question of whether there may be liability based on a showing of negligence as to truth or falsity.

\textit{RESTATEMENT (SECOND), supra} note 4, at § 652E comment d.

\textsuperscript{27} See supra note 26.

\textsuperscript{28} Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490 (1975).

\textsuperscript{29} \textit{Id.} at 498 n.2 (Powell, J., concurring). In that footnote, Justice Powell wrote:

The Court’s abandonment of the “matter of general or public interest” standard as the determinative factor for deciding whether to apply the \textit{New York Times} malice standard to defamation litigation brought by private individuals, \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 346 (1974); see also \textit{Rosenbloom v. Metromedia, Inc.}, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting), calls into question the conceptual basis of \textit{Time, Inc. v. Hill}. In neither \textit{Gertz} nor our more recent decision in \textit{Cantrell v. Forest City Publishing Co.}, 419 U.S. 245 (1974), however, have we been called upon to determine whether a State may constitutionally apply a more relaxed standard of liability under a false-light theory of invasion of privacy.

\textit{Id.}


unpleasant feelings against him." Libel is a subset of the larger category of defamation, and provides a cause of action to one who has been defamed by means of the printed word. Libel's twin, slander, gives a cause of action where defamation has been inflicted by means of the spoken word. Libel has been extended beyond the printed word to include pictures, signs, and motion pictures.

32. W. Prosser, Handbook of the Law of Torts 739 (4th ed. 1971); see generally Beauharnais v. Illinois, 343 U.S. 250 (1952). In Beauharnais, an action was brought alleging group libel. The Court upheld the conviction of Joseph Beauharnais for distributing anti-black leaflets on Chicago streets in violation of Illinois law. Although group libel was undermined by subsequent court decisions, the Beauharnais case contains a comprehensive treatment by the United States Supreme Court of the development of state libel laws and common law libel concepts. For instance, the Supreme Court found that actual statutory definitions of libel varied little. Eleven jurisdictions, including Illinois, had generally accepted the following definition:

A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury.

Id. at 255-56, n.5.

Another twelve jurisdictions had adopted the following definition, with minor variations:

A libel is a malicious defamation of a person, made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends.

Id. at 256, n.5.

Still another twenty jurisdictions followed common law precedents that, variously, defined libel "in accordance with the usual rubric, as consisting of utterances which arouse 'hatred, contempt, scorn, obloquy or shame,' and the like." Id. at 257 n.5 (quoting Grant v. Reader's Digest Ass'n, 151 F.2d 733, 735 (2d Cir. 1945)). The Court found that the remaining seven jurisdictions had definitions that did not fall into common patterns.

Despite the relative uniformity of libel definitions, however, one commentator has noted that the practices that attached to those laws or common law precedents varied not only from state to state but also from case to case within a state. See R. Labunski, supra note 6, at 54. For this reason, Labunski argues that discussing the evolution of libel law would be exhaustive and, in view of the Supreme Court's efforts to provide national standards in the last 20 years, unproductive, since most states have altered their libel laws to accommodate the Court's modern interpretation of libel. Id. See supra note 6 (discussing common law and statutory libel).

33. W. Prosser, supra note 32, at 751. Most jurisdictions treat defamatory radio and television broadcasts as libel, even though words there are spoken. Compare Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947) (broadcast is libel, not slander, if broadcaster reads from a script) with Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932) (defamation by broadcast is libel, not slander), appeal dismissed, 290 U.S. 599 (1933). See generally, Comment, Defamation in Radio and Television—Past and Present, 15 Mercer L. Rev. 450 (1964) (tracing history of radio and television defamation). Illinois treats all defamation by the media as libel. Ill. Rev. Stat. ch. 126, para. 11, 12 (1988). Thus, a plaintiff in Illinois who asserts a defamation claim against the media must prove the elements of libel whether he is defamed by a newspaper story or a television broadcast. Id.

To assert the tort of libel, the plaintiff must establish the following elements: 1) the statements must be capable of a defamatory meaning, though it is not necessary that anyone believes the defamatory remarks to be true; 2) the meaning must be conveyed to a third party; and, 3) the publication or utterance must be construed as a whole, so that defamatory portions may be balanced by other explanatory portions.37

2. Libel in Illinois

In Illinois, plaintiffs may plead either libel *per se* or libel *per quod*. A publication is libelous *per se* if the false language is "so obviously and naturally hurtful to the person aggrieved that proof of [its] injurious character can be, and is, dispensed with."38 This determination is a matter of law.39 A publication is libelous *per quod* where a false statement, though not libelous on its face, is rendered defamatory by extrinsic facts, and causes special damages, specifically pecuniary loss.40

Moreover, in Illinois the language will be deemed libelous unless it is easily capable of a "reasonable innocent construction."41 This effectively results in a finding that the language is not libelous *per se*. That is, considering the allegedly libelous statements in context, the court may determine that the language can be construed as "innocent" of defamatory content.42 If so, the complaint must be dismissed as a matter of law.43

37. Restatement (Second), supra note 4, at § 558. See W. Prosser, supra note 32, at 751.
38. Newell v. Field Enters., Inc., 91 Ill. App. 3d 735, 741, 415 N.E.2d 434, 441 (1st Dist. 1980). The Newell court also noted that Illinois courts have discerned four categories of words that constitute libel *per se*: 1) those imputing the commission of a criminal offense; 2) those imputing infection with a communicable disease which, if true, would tend to exclude one from society; 3) those imputing inability to perform or want of integrity in the discharge of duties of office or employment; and, 4) those prejudicing a particular party in his profession or trade. Id. 39. Von Solbrig Memorial Hosp. v. Licata, 15 Ill. App. 3d 1025, 1031, 305 N.E.2d 252, 256 (1st Dist. 1973), cert. denied, 19 Ill. App. 3d 1013, 313 N.E.2d 189 (1974) (whether writing is libelous *per se* is question of law).
41. Chapski v. Copley Press, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 199 (1982) (statement is to be considered in context with words and implications given natural meaning and if statement may reasonably be innocently interpreted it cannot be actionable per se).
42. Id. at 352, 442 N.E.2d at 199.
43. Id. Among the defenses to libel are truth, privilege, and fair comment. D. Dobbs, Torts and Compensation 831-33 (1985). As in most jurisdictions, these three defenses are available to the media in Illinois. The truth defense applies in Illinois so long as the news report is "substantially true." See, e.g., Farnsworth v. Tribune Co., 43 Ill. 2d 286, 293, 253 N.E.2d 408, 412 (1969); Sivulich v. Howard Publications, Inc., 126 Ill. App. 3d 129, 466 N.E.2d 1218 (1st Dist. 1984) (report that plaintiff had been charged with aggravated battery held substantially true where plaintiff had only been sued in civil action for battery). The privilege defense applies generally to reports on the proceedings of government. Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350 (1980), cert. denied, 451 U.S. 911 (1981). See also Lulay v. Peoria Journal-
C. Invasion of Privacy

1. Generally

Invasion of privacy by the media or other citizens, while related to libel, constitutes an entirely independent body of tort law. Put most simply, this cause of action is founded upon "the right to be let alone."44 This is the definition the Illinois Supreme Court embraced in its 1970 case Leopold v. Levin,4 where it recognized for the first time the right to privacy not only as a "sensitive and necessary human [value]," but also as a legally protected right.

The notion of personal privacy grew out of the dramatically changing social conditions of the late nineteenth century, which saw the rise of great urban centers and a competitive mass press that often stretched traditional bounds of news-gathering to entice readers.46 In their seminal 1890 Harvard Law Review article, Samuel D. Warren and Louis D. Brandeis, called for recognition of a tort that would protect people from invasions of their privacy by the press’ overzealous reporting.47

---

Star, Inc., 34 Ill. 2d 112, 214 N.E.2d 746 (1966) (report privilege is necessary to ensure freedom of press to report government actions and utterances without being compelled to prove government declarations are in fact true and correct). Fair comment as a defense applies to the honest expression of opinion or criticism on a matter of public interest based on facts. Compare Byars v. Kolodziej, 48 Ill. App. 3d 1015, 1018, 363 N.E.2d 628, 630 (4th Dist. 1977) (to hold university department chairman’s remarks about professor’s qualifications for tenure as defamatory would chill right of every person to form and express opinion on matters of public interest) with Kulesza v. Chicago Daily News, 311 Ill. App. 117, 35 N.E.2d 517, 520 (1st Dist. 1941) (matter of public interest and concern is legitimate subject of criticism by newspaper so long as done fairly and with an honest purpose, however severe its terms may be).

44. T. COOLEY, A TREATISE ON THE LAW OF TORTS 389 (1930).

Today, privacy is considered an intangible yet strongly felt personal right, protecting against unpleasant and offensive intrusions that libel is not concerned with, as well as intrusions that are embarrassing, humiliating, overreaching, or simply annoying. W. PROSSER, supra note 52, at § 118.

Prosser notes that in addition to the common law of privacy, which affords a tort action for damages resulting from an unlawful invasion of privacy, there also exists the constitutional right to privacy, which protects personal privacy against unlawful governmental invasion. This constitutional right to privacy was first acknowledged in Union Pac. R.R. Co. v. Botsford, 141 U.S. 250 (1891). In Botsford, the Court recognized a common law right "to be let alone," although no such specific constitutional right had been alleged. Id. at 251.

The leading case recognizing a constitutional right of privacy from governmental intrusion is Griswold v. Connecticut, 381 U.S. 479 (1965) (holding law forbidding use of contraceptives infringes privacy rights of married persons). Eight years later, that right was fortified in Roe v. Wade, 410 U.S. 113 (1973). For a discussion of common law and constitutional aspects of the right to privacy, see Hanson, Illinois and the Right of Privacy: History and Current Status, 11 J. MARSHALL J. PRAC. & PROC. 91 (1977).


In contrast to the injury to reputation which results from defamation, a violation of the right of privacy involves an injury to one's feelings. While this focus suggests a subjective inquiry is appropriate, the cause of action has not developed in this way. Since the Warren and Brandeis article, the right of privacy has developed into four separate torts: 1) commercial appropriation of name and likeness; 2) public disclosure of private facts; 3) unreasonable intrusion upon seclusion; and, 4) false light.

2. Types of Privacy Invasion Torts

a. Commercial appropriation of name and likeness

New York was the first state to address the privacy doctrine when it enacted a privacy statute in 1903. However, that statute focused on a concept of privacy different from that which Warren and Brandeis had proposed. New York's law made it both a misdemeanor crime and a tort to make use of the name, portrait, or picture of any person for "advertising purposes or for the purposes of trade" without the person's written consent. This tort came to be known as "commercial appropriation of name and likeness" and since has become widely recognized. Unauthorized use of the conceptual framework as best illustrated by development of tort of nondefamatory falsehood, i.e., tort of "false light," one of four recognized torts of invasion of privacy; Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326 (1966) (arguing that public disclosure of private facts tort first suggested by Warren and Brandeis virtually eliminated by first amendment privileges for press). See infra note 53 (discussing various commentators' views of development of privacy and four torts it has spawned).

48. See supra note 6 and accompanying text.
49. J. THOMAS McCARTHY, THE RIGHTS OF PUBLICITY & PRIVACY §§ 5.8-.10 (1988) (privacy claims involve some sort of mental distress or injury to self-esteem or dignity); see infra note 86.
50. See RESTATEMENT (SECOND), supra note 4, at § 652A.
52. Id.
53. See Gordon, Right of Property in Name, Likeness, Personality and History, 55 NW. U.L. REV. 553 (1961) (cases dealing with appropriation of some element of plaintiffs' personality for commercial use would have avoided confusion and conflict and provided a firmer basis for measuring damages had the allegations and decisions avoided the additional elements of privacy and injured feelings). Through the years, New York courts construed the statute more broadly to encompass other types of privacy rights, and other jurisdictions followed suit. W. FROSSIER & W. KEETON, FROSSIER & KEETON ON THE LAW OF TORTS 850-51 (5th ed. 1984). In addition to commercial appropriation of name and likeness, courts differentiated three other invasion of privacy torts: a public disclosure of private facts; an unreasonable intrusion upon the seclusion of another; and, publicity which unreasonably places another in a false light before the public. RESTATEMENT (SECOND), supra note 4, at § 652A. Cf. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. REV. 962, 991 (1964) (arguing that four privacy torts should be merged since all forms of privacy and defamation involve essentially the same personal interest, i.e., protection of "individual personality and dignity").
plaintiff's name or likeness as a symbol of his identity gives rise to an action for tortious commercial appropriation.\textsuperscript{54} To help explain the nature of commercial appropriation, one author has likened an individual's persona to a property right.\textsuperscript{55}

Commercial appropriation, however, is not just concerned with advertising that appropriates one's name or likeness. A plaintiff also may recover when defendant's gain has not been pecuniary, as when an individual impersonates another in order to gain secret information.\textsuperscript{56} The focus is on whether the appropriation directly benefits the defendant in some way. For example, while a defendant is liable when plaintiff's name or likeness has been used without his consent to promote business,\textsuperscript{57} no liability attaches when a plaintiff's character, occupation, or the outline of his career are used as the basis for a fictitious character in a novel.\textsuperscript{58}

b. Public disclosure of private facts

Public disclosure of private facts most closely resembles the privacy tort advocated by Warren and Brandeis. To state a cause of action for public disclosure of private facts, the plaintiff must establish that the matter publicized would be highly offensive to a reasonable person and would not be of legitimate concern to the public.\textsuperscript{59} Plaintiffs generally have been

55. See D. PEMBET, supra note 46, at 199. The commercial appropriation doctrine experienced renewed vigor in the early 1970's that continues today in the related area known as "the right of publicity." Id. The term originally was coined by Judge Jerome Frank in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953), to describe the right of people to control the exploitation of their name or likeness for commercial gain. Not only have celebrities such as actors, writers, and athletes continued to fight for the significant property rights to their names, but they are mounting attacks on merchandisers and advertisers who fail to seek their consent based on material already in the public domain. See Hoffman, The Right of Publicity Heirs' Rights, Advertisers' Windfall or Courts' Nightmare?, 31 DePaul L. Rev. 1 (1981); see also Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (right to publicity was violated when television station broadcast entertainer's entire fifteen second performance which consisted of him being shot out of canon into a net at local county fair).
56. Goodyear Tire & Rubber Co. v. Vandergriff, 52 Ga. App. 662, 184 S.E. 452 (1936) (employee of Goodyear represented himself to tire dealers as the plaintiff in order to procure confidential price information).
59. See, e.g., Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966) (Connecticut prisoner, photographed during parole hearing that was televised, did not suffer invasion of privacy since he was nameless and faceless and identifiable only by voice); Sears Roebuck & Co. v. Moten, 27 Ariz. App. 759, 558 F.2d 954 (1976) (creditor does not incur liability for invasion of privacy by contacting person's employer to collect, provided creditor does not engage in defamatory or coercive conduct), petition for review denied (1977); Bazemore v. Savannah Hosp., 171 Ga. 257, 155 S.E. 194 (1930) (photo of baby born with two heads published against permission of}
unsuccessful pleading public disclosure of private facts because courts are reluctant to restrict the press’ first amendment freedom to publish what it deems important, especially if the information is true. This so-called “newsworthiness” privilege of the press to enlighten the public as to the truth, no matter how private, extends to include public figures as well as matters of public interest, and has been broadly interpreted by courts to cover everything from information to entertainment.

The United States Supreme Court has suggested that there might be limits on the press’ long-standing privilege to disclose private facts. In a footnote to its decision in Time, Inc. v. Hill, the Court wrote that public disclosure of private facts may be tortious in extreme circumstances. The Hill footnote focused on a leading public disclosure case, Sidis v. F-R Publishing Corp. In Sidis, the mundane facts about the adult life of a once-famous child prodigy had been reported in New Yorker magazine. Although the plaintiff failed on his public disclosure of private facts claim, the Sidis court noted mother deemed not of legitimate concern to public and, thus, invasion of privacy. See RESTATEMENT (SECOND), supra note 4, at § 652D. The “not of legitimate concern to the public” provision is generally referred to as the “newsworthiness defense.” Walden & Netzhammer, supra note 26, at 354.

60. See Wagner v. Fawcett Publications, 307 F.2d 409 (7th Cir. 1962) (holding no right to privacy where magazine published account of murder that was subject of public trial), cert. denied, 372 U.S. 909 (1963); Jenkins v. Dell Publishing Co., 251 F.2d 447 (3rd Cir. 1958) (holding no right to privacy where account of murder three months previous still had news interest), cert. denied, 357 U.S. 921 (1958). But see Briscoe v. Reader’s Digest Ass’n, Inc., 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (although story concerning truck hijacking was newsworthy, use of plaintiff’s name 11 years after the event was not necessarily privileged); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (use of plaintiff’s true identity without her consent in a motion picture that was based on her past life of infamy not privileged).

For a comprehensive list of cases which precluded plaintiffs’ recovery based on a newsworthiness privilege, see Ashdown, Media Reporting and Privacy Claims: Decline in Constitutional Protection for the Press, 66 Ky. L.J. 759, 763 (1977-78).


62. 385 U.S. 374, 383 n.7 (1967). The Court wrote: “This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where ‘[r]evelations may be so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency.’” Id. (quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940)).

63. 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940).

64. Id. at 807. Sidis lectured to distinguished mathematicians on the subject of Four-Dimensional Bodies, and graduated from Harvard College when he was 16. At the time of the article, he was living in a “hall bedroom of Boston’s shabby south end,” was an “insignificant clerk” collecting streetcar transfers, and had a “curious laugh.” Id.

65. Id. at 811.
in dicta that some "revelations may be so intimate and so unwarranted . . . as to outrage the community's notions of decency." Six years later, in Cox Broadcasting v. Cohn, the Supreme Court reinforced the suggestion that the long-dormant privacy tort of public disclosure of private facts might acquire new life.

The Cox case arose when a Georgia television station broadcast the name of a deceased rape victim it had obtained from court records. The father of the deceased victim brought suit against the station, claiming that the disclosure of his daughter's name was an invasion of his right to privacy. Although the Court held that the first and fourteenth amendments allow for public disclosure of truthful information contained in public records, the decision was a narrow one which did not extend constitutional protection to public disclosure of all facts, but only to those which were a part of public records. Thus, some commentators have suggested that the Supreme Court intended Cox to sustain the possibilities suggested by the Hill footnote—that public disclosure of facts not contained in public documents could be tortious. However, other commentators have questioned the constitutionality of punishing the press for publishing the truth, however private, and have suggested that courts—including the Supreme Court—would continue to reject any cause of action for publication of the truth.

c. Unreasonable intrusion upon seclusion

Unreasonable intrusion upon seclusion is the tort which protects individuals against eavesdropping through use of a wiretap or microphone. However,

66. Id. at 809.
68. 420 U.S. at 472.
69. Id. at 474.
70. Id. at 495.
71. Id. at 494-95; Ashdown, supra note 60, at 769-72.
72. Ashdown, supra note 60, at 769-72. Echoing the Hill article's remarks of a year earlier that the Supreme Court's Cox opinion revealed its receptivity to possible future liability for public disclosure of private facts, Ashdown argued that the Cox Court's cautious approach, evident in its narrow holding, had suggested that the privacy interest would fare better than it had in the past. See supra note 62 (for Hill Court's footnote first suggesting such receptivity).
73. See, e.g., D. PEMBER, supra note 46, at 214 (judiciary places great weight on role of press to inform and enlighten public); Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort, 68 Cornell L. Rev. 291, 304-06 (1983) ("history of first amendment neither supports nor justifies a system of tort liability for true speech," and policy justification for public disclosure of private facts tort is "not sufficiently compelling to justify infringement of fundamental first amendment rights").
this tort also protects against an intentional interference with plaintiff's physical solitude, such as an intrusion into his home, his shopping bag, or his bank account without authorization. In recognizing this cause of action for the first time in Illinois, the appellate court in *Melvin v. Burling* relied on Prosser's Handbook of the Law of Torts. The four factors of this tort as listed in Prosser's Handbook are: 1) an unauthorized intrusion or prying into the plaintiff's seclusion; 2) the intrusion must be offensive or objectionable to a reasonable man; 3) the matter intruded into must be private; and, 4) the intrusion must cause the plaintiff anguish and suffering.

d. False light

The false light doctrine protects an individual against intrusions which are characterized by widely disseminated false information about that individual, which would be highly offensive to a reasonable person. Professors Prosser and Keeton traced false light to 1816, when Lord Byron sued to enjoin the circulation of a bad poem that was attributed to him. Today, false light generally falls into one of two categories: fictionalization and false statements.

Fictionalization occurs most often in dramatizations, feature articles, and books in which writers imbue true stories with sensational details. False statements claims are more common than fictionalization claims. False statements result, for instance, from the exclusion of key facts which results
in rendering the story untrue and more sensational. 84 Similarly, this cause of action can arise from editorial decisions to rearrange the facts, or to write a photo caption in such a way as to sensationalize the story, or to print a photo and invite incorrect conclusions. 85

This type of false light injury appears similar to libel, as both involve allegedly false information and cause harm to a personal interest. Indeed, Dean Prosser at one time declared that the false light tort protected the same interest as libel, that of reputation. 86 Today, however, false light and libel are seen as distinct torts. 87 The significant difference between libel and false light is that in libel a damaged reputation is the harm, while in false light the harm is the highly offensive abuse of the plaintiff's right to be let alone. 88

84. See, e.g., Varnish v. Best Medium Publishing Co., 405 F.2d 608 (2d Cir. 1968), cert. denied, 394 U.S. 987 (1969) (after wife killed herself and children, husband sued publication for portraying wife in false light, i.e., that she had been happy and normal, when in fact she had a history of being despondent and depressed).


86. W. PROSSER & W. KEETON, supra note 53, at 865-66. Prosser contended in the 1960's that the false light tort protected the same personal interest as defamation, that of reputation. Prosser suggested that the false light category might even be capable of "swallowing up and engulfing the whole law of public defamation." Prosser, Privacy, 48 CALIF. L. REV. 383, 400-01 (1960); see also Wade, Defamation and the Right of Privacy, 15 VAND. L. REV. 1093 (1962) (suggested strong enough relationship among defamation, false light and public disclosure of private facts to justify merger of all three into single tort of intentional infliction of mental suffering).

Prosser and Keeton's current treatise focuses on the offensiveness that inevitably flows from false light actions. W. PROSSER & W. KEETON, supra note 53, at 865. However, two commentators have criticized this view because they believe that Prosser and Keeton's assumption that a false invasion is offensive, ignores the heart of the wrong—whether the communication is privacy-invading in the first place. They explain:

Keeton's false light definition is akin to a libel definition stressing the falsity and fault elements but ignoring the need for defamatory content. Keeton seems to be suggesting a tort designed to compensate people for the irritation they may experience as the result of being identified in a non-defamatory, non-privacy-invading, but untrue, communication. Such a tort might go far in stemming what used to be termed the licentiousness of the press, but it hardly comports with our twentieth century conception of what constitutes freedom of expression. . . . Keeton's conceptualization of false light places much emphasis on the offensiveness of fictionalized accounts. . . . But . . . offensiveness alone has not been deemed sufficient to overcome first amendment rights.

Walden & Netzhammer, supra note 26, at 376-77.


88. Several leading Supreme Court cases delineate the difference. While the Court in New York Times v. Sullivan, 376 U.S. 254 (1964), was most concerned with prescribing the constitutional dimensions of the privilege to defame, the underlying issue nonetheless was the possibly libelous nature of the remarks published in the New York Times advertisement, and whether they harmed the reputation of L.B. Sullivan. In contrast, the Court in Time, Inc. v. Hill, 385 U.S. 374 (1967), considered whether false statements of fact resulted in liability where plaintiffs' interest in and right to be let alone was damaged, not their reputations. Similarly, the Court
Although plaintiffs bringing libel and false light claims cannot seek double recovery,\textsuperscript{89} they typically plead both causes of action.\textsuperscript{90} False light claims which are not also libelous are those in which the false portrayal of the plaintiff, while an unreasonable invasion of his privacy, nevertheless does not harm the plaintiff's reputation.\textsuperscript{91}

3. Invasion of Privacy in Illinois

Until the mid-1970's, Illinois courts treated invasion of privacy claims cautiously. An Illinois appellate court first recognized a privacy right in a 1952 suit for commercial appropriation of name and likeness. In \textit{Eick v. Perk Dog Food Co.},\textsuperscript{92} a blind girl's photograph was used without her permission to promote the sale of dog food. The court held that she properly pleaded a violation of her right to privacy based on commercial appropriation of her photograph.\textsuperscript{93} However the \textit{Eick} court stressed that privacy rights in Illinois were limited in favor of the press' right to publish the information if it involved a newsworthy event.\textsuperscript{94}

\textsuperscript{89} Brink v. Griffith, 65 Wash. 2d 253, 396 P.2d 793 (1964) (plaintiff may allege defamation and invasion of privacy in separate claims or alternatively, but may not recover twice for same elements of damage growing out of same occurrence of event). \textit{See generally RESTATMENT (SECOND), supra note 4, at § 652E.}


\textsuperscript{91} \textit{See e.g.}, Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952). In \textit{Gill}, plaintiffs sued for invasion of privacy after a photograph of them in a romantic pose at their place of business was published in Ladies Home Journal, with a caption cautioning that love at first sight is a bad risk. \textit{Id.} at 275, 239 P.2d at 632. Plaintiffs had not consented to the taking of the photo or its publication. While the photo was not uncomplimentary, the court held that plaintiffs had stated a cause of action for invasion of privacy. \textit{Id.} at 281-82, 239 P.2d at 635-36. The court said that the caption and accompanying article portrayed plaintiffs as people who had only a sexual interest in each other, which invaded their privacy by impinging on their sensibilities. \textit{Id.} at 279, 239 P.2d at 634.

\textit{See also} Zolich, \textit{Laudatory Invasion of Privacy}, 16 CLEV.-MARSHALL L. REV. 532, 535-36 (1967). While Zolich finds that laudatory invasion of privacy falls within the privacy tort of public disclosure of private facts, the Seventh Circuit has suggested that laudatory invasion of privacy also exists in situations where plaintiffs allege false light based on material that may be complimentary or neutral, but false nonetheless, and, therefore, possibly tortious. Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985), \textit{cert. denied}, 475 U.S. 1094 (1986). \textit{See supra} note 88 (further explaining basic difference between libel and false light invasion of privacy). \textit{See infra} notes 104-06, 198-210 and accompanying text (further discussing false light recovery).

\textsuperscript{92} 347 Ill. App. 293, 106 N.E.2d 742 (1952) (abstract).

\textsuperscript{93} \textit{Id.} at 306, 106 N.E.2d at 748.

\textsuperscript{94} \textit{Id.}
The idea that an invasion of privacy will be justified by the press' proper exercise of its first amendment freedom has prevailed in Illinois. As long as the published material was a matter of legitimate public interest, plaintiffs have failed in their privacy claims.95 Based on this deference to the press, one Illinois decision explicitly admonished Illinois courts to "proceed with caution" when considering whether to expand the right to privacy beyond commercial appropriation.96 Indeed, when the Illinois Supreme Court formally recognized a right to privacy in Leopold v. Levin, it quoted the same caveat.97

In Leopold, Nathan Leopold brought suit to prevent further publication of the novel and film "Compulsion," which was based on the events surrounding Leopold's conviction for the murder of Bobby Franks.98 Leopold brought three claims, the first for commercial appropriation and the second for false light. He fashioned his false light claim to read like the false light claim brought by the plaintiff in Time, Inc. v. Hill.99 In his final claim, Leopold alleged that publicizing the information was so outrageous as to offend public decency.100 The Illinois Supreme Court interpreted this claim to be one for public disclosure of private facts, because Leopold had based it on the language from the Sidis v. F-R Publishing Corp. court's dicta.101

95. See, e.g., Buzinski v. Do-All Co., 31 Ill. App. 2d 191, 175 N.E.2d 577 (1st Dist. 1961) (privacy right is limited in areas of legitimate public interest); Bradley v. Cowles Magazines, Inc., 26 Ill. App. 2d 331, 168 N.E.2d 64 (1st Dist. 1960) (mother's privacy claim against magazine dismissed, inter alia, because report on her son was matter of public interest).
96. Bradley, 26 Ill. App. 2d at 334, 168 N.E.2d at 65.
99. Id. at 444-46, 259 N.E.2d at 255-57.
100. The Court in Leopold wrote: "A carefully narrowed argument of the plaintiff appears to be that the defendants through 'knowingly fictionalized accounts' caused the public to identify the plaintiff with inventions or fictionalized episodes in the book and motion picture which were so offensive and unwarranted as to 'outrage the community's notions of decency.'" 45 Ill. 2d at 443-44, 259 N.E.2d at 255-56 (quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940)).
101. The Court wrote:

We express no comment on whether or not the news worthiness of the matter printed will always constitute a complete defense. Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line.
113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940).
The trial court granted defendant's motion for summary judgment, and the Illinois Supreme Court affirmed.\(^{102}\) Although the \textit{Leopold} court formally recognized invasion of privacy in Illinois, it refused to find that Leopold had suffered such a tort and dismissed the action.\(^{103}\) In its discussion of privacy rights, the \textit{Leopold} court did not explicitly rule out the existence of false light or public disclosure of private facts in Illinois, nor did it recognize them.\(^{104}\) Furthermore, the court failed to recognize Leopold's commercial appropriation claim.\(^{105}\) Instead, as noted, the court cited with approval Illinois appellate courts that had approached

\begin{verbatim}
103. Id. at 440-42, 259 N.E.2d at 254.
104. Leopold fashioned his invasion of privacy claim to read, in part, as one for false light, patterning his allegations after those made by the plaintiff in Time, Inc. v. Hill, 385 U.S. 374 (1967). \textit{Leopold}, 45 Ill. 2d at 444-45, 259 N.E.2d at 256. The Illinois Supreme Court, however, distinguished Leopold's "knowingly fictionalized" (i.e., false light) claim from the \textit{Hill} plaintiff's claim, and explicitly rejected \textit{Hill} as supporting Leopold's position in any way. \textit{Id.} The Illinois Supreme Court noted that while Life magazine's article in \textit{Hill} was found to give the false impression that the play reflected what really happened to the Hill family, the "Compulsion" materials in \textit{Leopold} were represented to be fictional from the outset. \textit{Id.} The \textit{Leopold} court looked to \textit{Hill} to note further that the "right of privacy when involved with the publication of a matter of public interest was viewed narrowly and cautiously by the United States Supreme Court. \textit{Id.} at 442, 259 N.E.2d at 255. The \textit{Leopold} court also stated:

\begin{quote}
It is clear that \textit{Hill} involved a situation essentially dissimilar from the one here. The case involved what was claimed to be a false but purportedly factual account of the Hill incident. Here, the motion picture, play and novel, while "suggested" by the crime of the plaintiff, were evidently fictional and dramatized materials and they were not represented to be otherwise.
\end{quote}

\textit{Id.} at 445, 259 N.E.2d at 256.

Thus, the Illinois Supreme Court held that the "Compulsion" novel and film could not be subject to the actual malice standards discussed in \textit{Hill}.

As for Leopold's public disclosure of private facts claim, the court found:

\begin{quote}
Even if one were to accept the validity of the dictum [of the \textit{Sidis} court] for the purpose of discussing it, the genesis of the fictionalized episodes in "Compulsion," as we have observed, can be traced in a substantial way to the exposed conduct of Leopold. Argument that the community's notions of decency were outraged here must be regarded as fanciful.
\end{quote}

\textit{Id.} at 444, 259 N.E.2d at 256.

105. The Illinois Supreme Court said of Leopold's commercial appropriation claim:

\begin{quote}
The contention that a right of privacy was violated by an appropriation, without consent, of the plaintiff's name and likeness for the commercial gain of the defendants through their advertisements must also fail. The circumstances here obviously are distinguishable from those in cases, such as \textit{Eick v. Perk Dog Food Co.} [347 Ill. App. 293, 106 N.E.2d 742 (1950)], which the plaintiff cites. There, as has been noted, a likeness, \textit{i.e.}, a photograph of a girl who was clearly not a public figure, was "appropriated" to promote a purely commercial product. Unlike here, no question of freedom of expression was presented. The reference to the plaintiff in the advertising material concerned the notorious crime to which he had pleaded guilty. His participation was a matter of public and, even, of historical record. That conduct was without benefit of privacy.
\end{quote}

\textit{Leopold}, 45 Ill. 2d at 444, 259 N.E.2d at 256.
\end{verbatim}
with caution any expansion of privacy rights beyond commercial appropriation of name and likeness.\textsuperscript{106}

The \textit{Leopold} court thus reinforced the theme originally voiced in \textit{Eick} and subsequently reiterated by most appellate opinions up to that time; that privacy rights in Illinois were limited to commercial appropriation of name and likeness, and that this was so because the press' first amendment protection in reporting on matters of public interest properly limited individuals' privacy rights.\textsuperscript{107} In support of allowing the press broad discretion, the Illinois Supreme Court cited explicit language from \textit{Time, Inc. v. Hill} and \textit{New York Times v. Sullivan}. Quoting the United States Supreme Court in \textit{New York Times}, the Illinois Supreme Court stressed that the wide berth the Illinois courts had given to the media in all its forms—books, newspapers, magazines, and motion pictures—was consistent with the Supreme Court's announced objective of insuring "uninhibited, robust and wide-open discussion of legitimate public issues."\textsuperscript{108}

Despite the Illinois Supreme Court's strong language in \textit{Leopold}, cautioning against expanding privacy actions beyond commercial appropriation, an Illinois appellate court nonetheless recognized public disclosure of private facts five years later in \textit{Midwest Glass v. Stanford}.\textsuperscript{109} Although \textit{Midwest Glass} v. \textit{Stanford}...
Glass explicitly recognized public disclosure as a tort, it eventually became more significant for its discussion of false light. Regarding the plaintiff's invasion of privacy claim, the court noted that both the Illinois legislature and Illinois Supreme Court recognized such a right. In dicta, the Midwest Glass court discussed all four privacy torts, including false light, and referred to the Restatement (Second) of Torts and Prosser's Handbook of the Law of Torts as testimonials to their legitimacy. However, because the court noted that it was concerned specifically with Prosser's third category of invasion of privacy, public disclosure of private facts, it is apparent that the court intended to recognize this tort alone. Nonetheless, it was the court's passing notice of false light which several later courts found to be the most significant aspect of the case.

Some Illinois courts spurned the Midwest Glass dicta and instead emphasized the strong language of the Illinois Supreme Court in Leopold to deny dismissed Stanford's counterclaim, and Stanford appealed. Id. at 131-33, 339 N.E.2d 275-76.

Noting that the case was one of first impression in Illinois, the Midwest Glass court looked to other jurisdictions to determine whether Stanford, in its counterclaim, had properly pleaded public disclosure of private facts. Id. at 133-35, 339 N.E.2d at 276-78. While the court held that Stanford had failed to maintain a cause of action for public disclosure of private debt, it nonetheless explicitly recognized the tort as a cause of action in Illinois. Id.

Id. at 133, 339 N.E.2d at 277. See infra note 115 (quoting ILL. CONST. art. I, §§ 6, 12).

110. Id. at 133, 339 N.E.2d at 277. See infra note 115 (quoting ILL. CONST. art. I, §§ 6, 12).

111. 34 Ill. App. 3d at 13, 339 N.E.2d at 277. The Midwest court said:

In analyzing the common law right to privacy, Professor William L. Prosser has delineated four distinct kinds of torts which constitute an invasion of privacy. This breakdown, which has been adopted by the Restatement of Torts (Second) § 652A... as well as many other foreign jurisdictions... comprise the following situations: (1) an unreasonable intrusion upon the seclusion of another, (2) the appropriation of another's name or likeness, (3) a public disclosure of private facts or (4) publicity which unreasonably places another in a false light before the public.

Id. (citing W. Prosser, supra note 32, at § 117).

112. Immediately after citing the Restatement (Second's) and Prosser's four kinds of invasion of privacy torts, the court in Midwest Glass then wrote: "[a]pplying these concepts to the instant case, it is obvious that we are concerned with the third category of invasion of privacy, in particular, the public disclosure of a private debt." 34 Ill. App. 3d at 13, 339 N.E.2d at 277. "We therefore conclude that although an action for invasion of privacy based on the public disclosure of private debts may be brought in Illinois the allegations contained in the counterclaim do not substantiate such a tortious offense." Id. at 135, 339 N.E.2d at 278.

113. Id. After citing the Restatement (Second) and Prosser, which it noted recognized all four prongs of invasion of privacy, the Midwest Glass court focused its discussion on public disclosure of private facts and said nothing more about any of the other three privacy prongs.

Subsequently, the Seventh Circuit Court of Appeals characterized the Midwest Glass court's discussion of false light as dicta. See Douglass v. Hustler Magazines, Inc., 769 F.2d 1128, 1133 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986) (relying in part on Midwest Glass to recognize plaintiff's false light claim). See generally Hanson, supra note 44 (author noted only that Midwest Glass court recognized public disclosure of private facts as an invasion of privacy tort).

114. See infra note 116 (discussing cases that addressed false light as though it was part of Illinois common law).
the existence of any privacy actions beyond commercial appropriation. However, other Illinois appellate opinions considering false light construed *Midwest Glass* dicta as standing for something more, thus fostering a split within the Illinois appellate courts after 1975. Indeed, five years after *Midwest Glass*, an Illinois appellate court presumed that plaintiff's false light action was appropriate under Illinois common law, and a federal court actually recognized false light, purportedly applying Illinois common law. Both cases looked to *Midwest Glass* for support.

In the state court case, *Adreani v. Hansen*, three real estate developers sued a private citizen and Pioneer Press, Inc., over a letter the citizen had written to his community newspaper criticizing the developers' alleged greed in a local park project. The plaintiffs sued for false light and libel, charging that the publication falsely depicted them as ruthless businessmen trying to bilk the public of money. The state court held that plaintiffs had properly pleaded false light based on the *Midwest Glass* dicta. Nonetheless, the

---

115. In 1976, a plaintiff-debtor alleged that a credit bureau had invaded her privacy. See Bureau of Credit Control v. Scott, 36 Ill. App. 3d 1006, 345 N.E.2d 37 (4th Dist. 1976). The court dismissed her false light claim as well as her privacy claims for public disclosure of private facts and intrusion upon seclusion. The court said that in light of Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 142 (1952) (recognizing commercial appropriation of name and likeness), there was neither precedent for, nor the need to create, additional remedies for invasion of privacy beyond that provided by commercial appropriation. Four years later, the court in *Kelly v. Franco*, 72 Ill. App. 3d 642, 391 N.E.2d 54 (1st Dist. 1979), observed, based on *Scott*, that only commercial appropriation actions had been explicitly accepted in Illinois. *Id.* at 646, 391 N.E.2d at 57-58.

The *Kelly* court also dismissed plaintiff's reliance on sections 6 and 12 of article I of the Illinois Constitution, which recognize a privacy right and remedy, to support her privacy claims. *Id.* at 644-45, 391 N.E.2d at 56-57. The *Midwest Glass* court had previously interpreted those two sections as providing a general right of privacy in Illinois. 34 Ill. App. 3d at 133, 339 N.E.2d at 276-77. In contrast, the *Kelly* court cited the record of the proceedings of the Sixth Illinois Constitutional Convention, in which the sponsor of section 6 said that provision pertained only to invasions of privacy by government of public officials. 72 Ill. App. 3d at 644-45, 391 N.E.2d at 56-57.

The pertinent part of section 6 provides: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means." Ill. Const. 1970, art. I, § 6.

The *Kelly* court found that section 12 also did not create a new constitutional privacy right. Section 12 provides: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." Ill. Const. 1970, art. I, § 12.


117. *Adreani*, 80 Ill. App. 3d at 730, 400 N.E.2d at 682; *Cantrell*, 529 F. Supp. at 756.


119. *Id.*

120. *Id.* at 730, 400 N.E.2d at 682.
court denied plaintiffs' false light claim, because the project and the letter were matters of public interest.\textsuperscript{121}

One year after Adreani, a federal district court held that a plaintiff had stated a cause of action for false light under Illinois common law. In \textit{Cantrell v. ABC, Inc.},\textsuperscript{122} a diversity case, the plaintiff alleged that a segment of the ABC television show 20/20 gave the false impression that plaintiff was involved in an arson-for-profit scheme with a group of individuals who actually were arsonists. The federal court followed the state court's interpretation of Midwest Glass. The federal court read Midwest Glass as having explicitly recognized all four invasion of privacy torts as actionable in Illinois, and thus, because the plaintiff had properly pleaded false light, his claim would not be denied under Illinois law.\textsuperscript{123}

The Seventh Circuit Court of Appeals later perpetuated the notion that false light was actionable under Illinois common law when it decided the case of \textit{Douglass v. Hustler Magazine, Inc.}\textsuperscript{124} In a new twist, however, the Seventh Circuit did not rely solely on the dicta of Midwest Glass to recognize false light.\textsuperscript{125} The Seventh Circuit also utilized its own interpretation of Leopold \textit{v. Levin} to reach its result.\textsuperscript{126} The Seventh Circuit accepted that while no Illinois appellate courts had explicitly recognized false light as a cause of action, it had nonetheless been made a part of Illinois' common law by the Illinois Supreme Court in Leopold fifteen years earlier.\textsuperscript{127}

At issue in Douglass were nude photos of the plaintiff Robyn Douglass, an actress and model. Although Douglass originally posed for the photos for Playboy magazine, Hustler magazine subsequently acquired and published them.\textsuperscript{128} In a diversity suit in federal court, Douglass charged that under Illinois common law Hustler cast her in a false light because the photos could reasonably be seen to insinuate that she was a lesbian and that she was the kind of person willing to be shown naked in a vulgar setting.\textsuperscript{129} She also alleged commercial appropriation.\textsuperscript{130} Douglass won damages from Hustler's publishing company, which appealed the decision.\textsuperscript{131}

The Douglass court held that the plaintiff had stated a cause of action under Illinois common law for both false light and commercial appropria-
The Seventh Circuit found that the Illinois Supreme Court considered "the false-light tort . . . part of the common law of Illinois," and that Illinois courts would recognize false light as soon as a suitable case arose. The Seventh Circuit also cited Adreani, Midwest Glass, and Cantrell for support, observing that the latter two already recognized the existence of false light in Illinois, even though Midwest Glass had done so only in dicta and Cantrell was a federal, not a state case.

The following year, two appellate court opinions illustrated the continuing split within the Illinois courts. In the first opinion, Melvin v. Burling, the court held that false light did not exist in Illinois, the Seventh Circuit's opinion in Douglass notwithstanding. The Melvin court specifically found that the false light area of privacy law had not been judicially accepted as a cause of action in Illinois, noting that Leopold was an action for commercial appropriation rather than for false light.

In contrast, a second Illinois appellate opinion considered a plaintiff's false light claim as though false light existed in Illinois, but did not find that plaintiff had established a claim because the published information was

132. Id. at 1138. The Seventh Circuit also held that Douglass was a public figure who would have to prove actual malice on the part of Hustler magazine regarding her false light claim. Id. at 1140-41.

133. Id. at 1133.

134. Based on what it perceived as the Illinois Supreme Court's acceptance in Leopold v. Levin, 45 Ill. 2d 439, 259 N.E.2d 250 (1970), of false light as part of Illinois' common law, the Seventh Circuit noted that "almost all signs point to Illinois' recognizing [false light] when a suitable case arises." Id. at 1134.


136. 141 Ill. App. 3d 786, 787, 490 N.E.2d 1011, 1012 (3d Dist. 1986). In Melvin, plaintiffs asserted intrusion upon seclusion when defendant used plaintiffs' names without authority to order numerous items through the mail, for which the plaintiffs later were billed. The trial court held that such a tort did not exist in Illinois and dismissed the case for failure to state a cause of action.

After discussing the facts of the Scott and Kelly cases, both which denied plaintiffs' intrusion upon seclusion claims when defendant used plaintiffs' names without authority to order numerous items through the mail, for which the plaintiffs later were billed. The trial court held that such a tort did not exist in Illinois and dismissed the case for failure to state a cause of action.

137. The Melvin court wrote:

Our Supreme Court's only venture into the area of privacy law followed in Leopold v. Levin. This case was similarly concerned with appropriation; however, at least one court has considered the case as involving the area known as "false light." It is generally accepted, however, that the false light area of privacy law has not, as yet, been judicially accepted in Illinois as a cause of action.

privileged.\textsuperscript{138} In \textit{McGrew v. Heinold Commodities, Inc.},\textsuperscript{139} the plaintiff sued a creditor and the creditor’s attorney for issuing garnishment summonses at a time when the plaintiff owed them no money. The court held that because the summonses were statements connected with judicial proceedings, the defendants’ conduct was privileged and plaintiff could not recover on his false light claim.\textsuperscript{140} Nonetheless, the opinion seemed to suggest that had the statements not been privileged, the court would have recognized plaintiff’s false light claim. The court based its recognition of the tort on the \textit{Douglass} court’s interpretation of false light’s development in Illinois.\textsuperscript{141}

Thus, the state of false light in Illinois when Judge Berkos asserted his false light claim was confused and in need of clarification. Many courts continued to deny that the false light doctrine existed in Illinois, based on their interpretation of \textit{Leopold} as limiting the scope of the privacy action.\textsuperscript{142} Other courts, however, supported recognition of false light, based either on the dicta of \textit{Midwest Glass} or on the Seventh Circuit’s questionable interpretation of \textit{Leopold} as making false light invasion of privacy actionable under Illinois law.\textsuperscript{143}

II. \textit{Berkos v. NBC, Inc.}

In the 10 p.m. newscast that spurred Judge Berkos to sue NBC and newscaster Peter Karl, Karl reported that Chicago police officer Ira Blackwood was indicted as part of the Greylord investigation into judicial cor-


\textsuperscript{139} \textit{Id.} at 106-08, 497 N.E.2d at 426-28.

\textsuperscript{140} The court in \textit{McGrew} found that plaintiff had complained about statements and inferences arising from the summonses themselves, which are court processes. The court reasoned that court proceedings are protected from defamation actions by absolute privilege, and since every jurisdiction that has considered this privilege has found that it also applies to false light suits, plaintiff’s false light claim had to fail. \textit{Id.} at 114, 497 N.E.2d 432.

\textsuperscript{141} The \textit{McGrew} court acknowledged that the Illinois appellate court, in \textit{Melvin v. Burling}, 141 Ill. App. 3d 786, 490 N.E.2d 1011 (3d Dist. 1986), had found that false light had not yet been judicially accepted in Illinois as a cause of action. However, the \textit{McGrew} court cited the Restatement (Second’s) discussion of false light and then quoted at length the Seventh Circuit’s discussion of \textit{Leopold} in its \textit{Douglass} opinion, which ended with the Seventh Circuit’s assertion that the Illinois Supreme Court considered the false light tort to be part of the common law of Illinois. \textit{McGrew}, 147 Ill. App. 3d at 113-14, 497 N.E.2d at 431-32 (citing \textit{Douglass} v. \textit{Hustler Magazines, Inc.}, 769 F.2d 1128, 1133 (7th Cir. 1985), \textit{cert. denied}, 475 U.S. 1094 (1986)).


Corruption and charged with ten counts of extortion and racketeering. The government alleged that he had solicited and received $4,440 to influence ten cases. All the charges involved pay-offs from undercover FBI Agent David Ries. Karl named the judges who had heard certain cases that involved

---

144. The newscast's transcript read as follows:

CAROL MARIN: The Greylord investigation into judicial corruption is getting bigger. Peter Karl reports new names of judges in court records, judges involved in cases where pay-offs were allegedly made. Peter . . .

PETER KARL: Carol, sources in the legal community tell Channel Five News that FBI Agents have been searching court records from the 2nd and 3rd District, in Skokie and Niles. And we have also learned that the U.S. Attorney's Office is getting more and more cooperation from more attorneys with knowledge of judicial corruption.

And, tonight, we can report that we found the names of five more judges which appear in cases where the FBI allegedly put in "the fix."

The new names of the judges surfaced in the case against Ira Blackwood, a Chicago Police Officer assigned to Traffic Court, but a man believed to have connections in many other courtrooms. The indictment against Blackwood charges him with 10 counts of extortion and racketeering. The government alleges that he solicited and received $4400 to influence 10 cases. All of the charges involve pay-offs. . . . Judge John Murphy heard the cases; Judge Murphy was also indicted last week. The Blackwood cases were used against him.

In another case, Judge Christy Berkos was on the bench at Branch 29 when Kenneth Rollings who was charged with battery, was found "not guilty." It is alleged that $500 was paid to influence that case.

Two cases involved Judge Daniel O'Brien, at Branch 23; the charges were battery. A $400 and a $600 bribe were allegedly paid. Both defendants were found "not guilty" by Judge O'Brien.

Judge Raymond Sadini [sic], of Branch 26, heard an FBI case of retail theft; there was a $400 bribe alleged paid. The case was dismissed with "leave to reinstate" by Judge Sadini [sic].

Judge Martin Hogan heard two cases involving possession of a stolen auto; two $600 bribes were allegedly paid. Both cases had a finding of "no probable cause"; they were dismissed by Judge Hogan.

Judge Arthur Ellis heard the final case, in Branch 45; it was a battery charge. An alleged bribe of $400 was paid; the verdict was "not guilty." Judge Ellis said he knows nothing about the case, he hasn't been contacted by the FBI and that he hasn't talked to Blackwood, since he was assigned to 45.

And Circuit Court Judge Wayne Olson, who faces 55 counts of racketeering, extortion and mail fraud, today, in an exclusive interview, said he'll be exonerated.

JUDGE WAYNE OLSON: I'm confident I'm innocent of all the charges, Peter. And it is our intention to plead "not guilty" to all of them.

KARL: We talked with Judge Berkos tonight, just a few moments ago; he said he substituted in Branch 29 a few times but that he doesn't know Ira Blackwood or the FBI Agent Ries.

Attempts to reach the other judges failed. Judges Berkos, O'Brien, Hogan, Sadini [sic] and Ellis have not been charged with any criminal wrongdoing. The FBI has subpoenaed all the court records to these cases for the Greylord investigations.

Carol and Ron, the story intensifies.
pay-offs, noting that plaintiffs in those cases were found "not guilty." Karl reported that Judge Berkos was on the bench when defendant Kenneth Rollings, who was charged with battery, was found "not guilty." Karl further stated that the indictments alleged that $500 was paid to influence that case.

At the end of the broadcast, Karl said Berkos had not been charged with any wrongdoing and that in an interview Berkos denied knowing either Officer Blackwood or the FBI agent. The broadcast’s video portion showed a photograph of Berkos and the part of Blackwood’s indictment referring to Rollings' acquittal. The trial court dismissed all four of Berkos’ claims relating to the broadcast.

A. Berkos' Claims Other Than False Light

The appellate court affirmed the lower court’s dismissal of the commercial appropriation of name and likeness, and intentional infliction of emotional distress claims, but reversed and remanded as to Berkos’ libel and false light claims. Because the case was an appeal on the pleadings, the appellate court focused on the threshold question of whether Berkos’ complaint was legally sufficient so as to entitle him to proceed on the merits of his claims. Regarding the legal sufficiency of the complaint, NBC made two assertions on appeal. First, that Berkos' libel claim failed to allege the specific statements he claimed to be defamatory, and second that he failed to show that NBC and Karl had acted with actual malice.

The appellate court, however, was unpersuaded. The court found that although Berkos' pleading was technically defective because it failed to allege the specific statements that were libel per se, the videotape was sufficient to constitute libel per se. As to whether Berkos showed that NBC and Karl had acted with actual malice, the court declined to find that Karl “could not have had a high degree of awareness that his allegedly false, defamatory remarks . . . were probably untrue.” Thus, while conceding that Berkos might be unable to prove actual malice, the court stressed that he had pleaded it sufficiently to state a cause of action.

145. See supra note 144.
146. 161 Ill. App. 3d at 480, 515 N.E.2d at 669.
147. Id. at 480-81, 515 N.E.2d at 670.
148. Id. at 484-88, 515 N.E.2d at 672-74.
149. Id. at 486, 515 N.E.2d at 673.
150. Id. at 489, 515 N.E.2d at 675.
151. The Berkos court stated:

We are not prepared to find at this preliminary juncture in these proceedings that Karl clearly and unequivocally could not have had a high degree of awareness that his allegedly false, defamatory remarks involving Berkos were probably untrue.

“Although plaintiff might be unable to prove actual malice, it appears that he did plead actual malice sufficiently to state a cause of action . . .”

NBC also raised three affirmative defenses: that the broadcast could be given a reasonable innocent construction under Illinois' common law requirements; was substantially true; and was privileged as a fair, accurate report of judicial records. As to NBC's first affirmative defense, the court found that a reasonable person could construe the broadcast's remarks as libelous, based on the court's application of the innocent construction rule, thus leaving to the jury the question of defamation. NBC's second defense was that the newscast was substantially true. The court found that the public records relied on in the report neither suggested nor implied that Berkos may have accepted a bribe, nor did those reports suggest that Berkos was under federal indictment or even was suspected of corruption in Operation Greylord. Finally, the court rejected NBC's attempt to raise the fair report privilege, finding that the broadcast's allegedly libelous innuendo was absent from the public documents relied on by NBC.

B. Berkos' False Light Claim

In recognizing Berkos' false light claim as a cause of action, the Berkos court derived the elements of such an action from the Restatement (Second) of the Law of Torts. The court then concluded that Berkos' complaint
"contained sufficient factual allegations to satisfy the applicable standard." To demonstrate that Illinois courts were prepared to recognize false light, the court cited McGrew, a case which reversed plaintiff's false light claim but presumed nonetheless that false light was part of Illinois common law.

The majority opinion generated a dissent. Judge Jiganti dissented and stated that he would have dismissed Berkos' libel and false light claims. He found that the facts that tainted Berkos emanated not from the newscast, but from the indictment returned in the United States District Court against police officer Blackwood. He determined that the newscast did nothing more than explain the circumstances surrounding Blackwood's indictment. Thus, the newscast could be interpreted as no more than a report of the charges against Blackwood and, therefore, did not place Berkos in a false light. Judge Jiganti did not, however, base his reasoning on the fact that Illinois did not recognize false light as a cause of action.

III. ANALYSIS

A. Berkos' False Light Holding Generally

The Berkos court found that because his complaint satisfied the applicable false light elements found in the Restatement (Second), Berkos' false light claim had to be remanded along with his libel claim, as both failed to withstand the fair report privilege. The court rejected NBC's argument that no Illinois decision had recognized the tort of false light invasion of privacy and the defendants advanced no other reason not to recognize false light in Illinois. Finally, the court stated that it declined to affirm the trial court's dismissal of Berkos' false light claim, and relied on the Seventh Circuit's opinion in Douglass as support for its holding.

The Berkos court's case for recognizing false light was flimsy. The court apparently accepted the Seventh Circuit's interpretation of Leopold—that
the Illinois Supreme Court considered false light to be part of Illinois common law and meant for a false light cause of action to be recognized as soon as a "suitable case" arose. The Berkos court also cited Melvin v. Burling, which disagreed with the Seventh Circuit's interpretation of false light's development in Illinois but failed to distinguish the case properly. Just as NBC failed to offer a reason not to allow Berkos' false light claim, other than the fact that no Illinois court had ever recognized the tort of false light, the court in Berkos failed to offer substantive reasons for recognizing false light. Because Berkos is the first Illinois appellate decision to recognize false light as a cause of action, it is curious that the court declined to use this opportunity to set forth a strong, or at least basic, rationale for recognizing false light.

Because the Berkos court was determining not whether Berkos had proved his case, but merely whether he pleaded it properly, one might argue that it did not have to be specific. This argument is undermined, however, by the fact that the court was specific in detailing why Berkos should be allowed to proceed with his libel claim. Additionally, the court specified precisely why Berkos had failed to state his commercial appropriation and emotional distress claims.

---

167. Id.
168. Id.
169. Other than the court's remarks contained in supra note 165, the Berkos court cited the Restatement (Second), noted the elements of a false light claim listed, and held the following:

In our view Berkos' complaint contains sufficient factual allegations to satisfy the applicable standard. Furthermore, as stated above, we conclude that the broadcast's references to Berkos do not fall within the scope of the common law fair report privilege. As a result, we reverse the trial court's dismissal of Berkos' false light claim and remand the matter for further proceedings.

Id. (citing Restatement (Second), supra note 4, at § 652E comment d; McGrew v. Heinold Commodities, Inc., 147 Ill. App. 3d 104, 497 N.E.2d 424 (1st Dist. 1986)).


171. As for Berkos' commercial appropriation claim, the court noted that such a claim could not be stated where a plaintiff's name or likeness has been used as a part of a "vehicle of information," such as the news media. Berkos, 161 Ill. App. 3d at 495, 515 N.E.2d at 679. The court distinguished the use of Berkos' photograph by NBC and Karl from the commercial use made of plaintiff's likeness in Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952), the first Illinois case to recognize commercial appropriation of name and likeness in Illinois. The Berkos court further noted that even NBC's use of "teasers" or "hype" spot advertisements to increase viewer share of the 10 p.m. broadcast was not tantamount to commercial appropriation. 161 Ill. App. 3d at 495-96, 515 N.E.2d at 679-80.

As for Berkos' emotional distress claim, the court set out the facts he had to have alleged to make out such a claim: 1) defendant's conduct is so extreme and outrageous as to exceed all possible bounds of decency; 2) the emotional distress inflicted is so severe that no reasonable person could be expected to endure it; and, 3) defendant intended to inflict this distress or was substantially certain the conduct would result in severe distress. Berkos, 161 Ill. App. 3d at 496-97, 515 N.E.2d at 680 (citing Public Finance Corp. v. Davis, 66 Ill. 2d 85, 89-90, 360 N.E.2d 765, 767 (1976)). The court found, based on its review of Berkos' other claims, that he failed to satisfy these criteria. Id. at 496-97, 515 N.E.2d at 680.
For the court then to recognize Berkos' false light claim in such a seemingly cavalier manner is difficult to understand. However, if the Berkos court believed, as the Seventh Circuit did, that false light already was part of Illinois common law, and that recognition of false light as a cause of action was a mere formality requiring little justification, the opinion is more acceptable. Indeed, this is the only satisfactory explanation for the Berkos court's sparse reasoning—especially because this is the same court which was so careful when it recognized public disclosure of private facts for the first time in Midwest Glass.

B. Berkos' False Light Holding Falls Short

The Berkos court failed to address several important considerations. First, by failing to analyze the precedent of Leopold and its progeny to discern guiding principles, the Berkos court failed to clarify the status and history of false light in Illinois. The court chose instead to rely on the Seventh Circuit's debatable interpretation of Leopold. Second, the Berkos court entirely ignored the fact that NBC's newscast involved a newsworthy event. This is an important policy consideration that Illinois courts prior to Berkos generally found outweighed the privacy interests of false light plaintiffs.

Finally, the Berkos court failed to examine how other jurisdictions had treated false light. Had they done so, the court would have found that the scope of false light appears to be contracting. Moreover, while valid reasons exist for recognizing a false light tort, other, equally compelling reasons exist for denying such a tort.

1. Berkos did not Examine False Light's Development in Illinois

Because Illinois appellate courts are split over whether false light is a part of Illinois common law, it was incumbent on the Berkos court to examine for itself Leopold and subsequent opinions addressing false light. Instead, the Berkos court accepted the Seventh Circuit's view of the history of false light in Illinois. Unfortunately, the Seventh Circuit's version of history is based on a peculiar—and debatable—interpretation of Illinois "precedent." A close look at false light in Illinois indicates that, contrary to the Seventh Circuit's view, the Illinois Supreme Court was wary of the false


174. See supra note 3 (listing Illinois cases prior to Berkos that found the press' right to publish newsworthy information outweighed privacy rights).

175. See infra notes 201-05 and accompanying text (canvassing other jurisdictions on the claim of false light).

176. See supra notes 124-35 and accompanying text (discussing Seventh Circuit's view of Leopold decision and false light in Illinois).
light tort and likely did not intend for it to be actionable in Illinois. Moreover, the Illinois opinions indicate that the courts were even more reluctant to recognize a false light claim that involves the press’ right to publish matters of public interest.177

To support its recognition of Berkos’ false light claim, the Berkos court cited the Seventh Circuit’s opinion in Douglass which presumed that false light was a part of Illinois common law.178 The Seventh Circuit’s reasoning in support of this proposition was that the Illinois Supreme Court recognized false light as part of Illinois common law in Leopold.179 This interpretation of Leopold, however thoughtful, does not appear to be at all what the Illinois Supreme Court intended.180 In fact, the Illinois Supreme Court did not even regard Leopold as a false light case but, instead, as one for commercial appropriation of name and likeness and, possibly, public disclosure of private facts.181 The Leopold court dismissed outright the notion that the novel and film versions of “Compulsion” portrayed Leopold in a false light, and expressed reluctance to recognize his commercial appropriation and public disclosure claims as well.182

177. See supra notes 95-108 and accompanying text (discussing Illinois Supreme Court’s view of invasion of privacy and competing right of press to publish matters of public interest).


180. See Leopold v. Levin, 45 Ill. 2d 434, 442-46, 259 N.E.2d 250, 255-56 (1970). See supra notes 98-108 and accompanying text (discussing Leopold court’s treatment of privacy rights in Illinois and in other jurisdictions). See also Hanson, supra note 44. The author argued that the Illinois Supreme Court in Leopold determined that “once a party is a public figure whose many actions are newsworthy, that party always remains a public figure for those events, and he will not be allowed to return to the private sector.” Id. at 97 (citing Leopold v. Levin, 45 Ill. App. 2d 434, 259 N.E.2d 250 (1970)). Nowhere did Hanson find that the Illinois Supreme Court recognized Leopold’s claim as one for false light, or that the court recognized false light in general. Rather, Hanson noted that the Illinois Supreme Court concluded the following in Leopold:

[While recognizing the right of privacy, the right had not been expanded in Illinois beyond the original pronouncement in Eick. . . . Because the plaintiff was a public figure due to his prior criminal conduct, he remained a public figure thereafter and no right of privacy existed in matters associated with his participation in a highly publicized crime. Although the right was not extended to plaintiff Leopold, a public figure, the right was clearly recognized with this limitation, for the people of Illinois.]

Id. at 97-98.

181. See supra notes 98-108 and accompanying text (discussing Illinois Supreme Court’s treatment of privacy rights).

182. See supra notes 103-05 (discussing Leopold court’s treatment of Leopold’s three privacy claims). In a 1974 survey of books on the first amendment and the media, one commentator briefly discussed the Leopold case. See Wilson, Survey of Legal Literature, 23 DePAUL L. Rev. 1155, 1157-58 (1974). Wilson noted that the Illinois Supreme Court rejected all three of Leopold’s privacy claims—commercial appropriation, false light, and fictionalization that outraged reasonable standards of decency. He suggested that privacy in Illinois might be moving toward
In light of the Illinois Supreme Court's reluctance in *Leopold*, the Seventh Circuit's interpretation of that court's opinion as making false light part of Illinois' common law appears faulty. The Seventh Circuit, however, augmented its contention that the *Leopold* court believed false light to be a part of Illinois common law, by pointing out the following: Leopold "had forfeited any right of privacy by the notoriety of his crime; the book was represented to the public as a fictionalized rather than literal account; Leopold was a public figure; and to award tort damages would have unduly limited freedom of expression." To support its argument, the Seventh Circuit explained that "these points would have been unnecessary [for the

extinction, as indicated by the Illinois Supreme Court's decision in *Leopold*. He appears correct in perceiving the Illinois Supreme Court as wary of privacy claims based on its cautious tone in the *Leopold* opinion.

Wilson's interpretation of the Illinois Supreme Court's disposition of Leopold's false light and "fictionalization" claims is misleading, however, and should be clarified. He observed that the Illinois Supreme Court was so "predisposed" to defendant's position that it characterized the "Compulsion" material "as true against a 'fictionalization' attack but, on the other hand, as fiction as against plaintiff's asserted use of *Time, Inc. v. Hill*." *Id.* at 1158. It should be noted, however, that it was not the Illinois Supreme Court that characterized Leopold's claims as both true and false, but Leopold himself.

Although Leopold characterized one of his three claims as "fictionalization," he based his argument on *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940), a public disclosure of private facts case. The Illinois Supreme Court, thus, appropriately read that particular claim as one for public disclosure of private facts, a point Wilson appears inadvertently to obscure. The court noted that the allegedly offensive "fictionalization" was derived from the facts of Leopold's life. *Leopold*, 45 Ill. 2d at 443-44, 259 N.E.2d at 255-56. Contrary to Wilson's interpretation, Leopold did not dispute this, since Leopold's major contention in that claim was that defendant had exposed so much of Leopold's private life that it caused the public to identify him with episodes of the novel and film that were so offensive and unwarranted as to "outrage the community's notions of decency." *Id.* Thus, the court found that while the material was published as fiction (hence, Leopold's characterization of this claim as "fictionalization"), it was, at the same time, based on Leopold's actual crime and life afterward. While the court quoted the *Sidis* opinion's characterization of public disclosure, that some revelations may be so offensive as to be tortious, the court also observed that for Leopold to make such an argument "must be regarded as fanciful," considering that the core of the novel and film were a part of his life that he had caused to be placed in public view, and that his notorious crime was a matter of public record and interest. *Id.*

The court explained further that Leopold's false light claim also must fail, because defendant portrayed Leopold's crime and life as fictional from the outset, and that false light as Leopold had alleged it applied only when something false was represented as true, which was not the case here. *Id.* at 444-46, 259 N.E.2d at 256-57. Therefore, the Illinois Supreme Court's disposition of Leopold's public disclosure of private facts and false light claims was consistent.

Moreover, it is common for plaintiffs to allege both a false light and a public disclosure claim. The plaintiff in *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d 1006, 1007, 345 N.E.2d 37, 38 (4th Dist. 1976), brought an action alleging false light and public disclosure of private facts. Most important, the Illinois Supreme Court's ruling in *Leopold* reflected its unwillingness to recognize an expansion of the right of privacy in Illinois to include either false light or public disclosure of private facts as a cause of action, as Wilson suggested.

Illinois Supreme Court] to make if the court had thought that the false-light tort was not part of the common law of Illinois.}\textsuperscript{184} This assertion, however, reads too much into the Illinois Supreme Court's remarks in Leopold, and isolates them in a misleading manner. Although the Leopold court found the fact that the book and film had been represented as fictional relevant only when considering Leopold's false light claim,\textsuperscript{185} it found the other points singled out by the Seventh Circuit—those referring to the public interest in Leopold's crime and his status as a public figure—relevant to each of Leopold's three separate privacy claims.\textsuperscript{186} Thus, the court's main thrust was to limit the general privacy right it was recognizing, rather than to delineate distinct privacy torts.

Moreover, the Berkos court completely ignored the cautionary tenor and language of the Leopold opinion. The Illinois Supreme Court in Leopold stressed that courts in Illinois should approach with caution any expansion of privacy beyond commercial appropriation.\textsuperscript{187} Even as the court recognized a right to privacy, it reiterated the limits to that right where, as in Berkos, the plaintiff was a public figure whose affairs certainly were a matter of public interest.\textsuperscript{188} Most significantly, Leopold noted that the United States Supreme Court's decision in Time, Inc. v. Hill stood foremost for its careful consideration of the effect of the constitutional guarantees for speech and press on the scope of privacy rights.\textsuperscript{189} Thus, despite the Seventh Circuit's disingenuous reading of Leopold as sanctioning the false light tort, a closer look reveals that the Leopold court did not recognize the tort, and, in fact, explicitly directed Illinois courts that might consider doing so to act with care.\textsuperscript{190}

Aside from misconstruing Leopold because of its reliance on the Seventh Circuit's flawed interpretation, the Berkos court should not have recognized false light without also attempting to reconcile—or at least examine—the conflict between Illinois courts which denied the existence of false light and those which "proceeded as if [false light] existed in Illinois."\textsuperscript{191} None of the Illinois appellate cases that proceeded as if false light already existed in

\begin{itemize}
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Leopold, 45 Ill. 2d at 445, 259 N.E.2d at 256.
\item \textsuperscript{186} Id. at 440-45, 259 N.E.2d at 254-56.
\item \textsuperscript{187} Id. at 440-41, 259 N.E.2d at 254. See supra note 106 (discussing Leopold court's reasoning supporting a cautious approach to expansion of privacy rights in Illinois).
\item \textsuperscript{188} Leopold, 45 Ill. 2d at 440-41, 259 N.E.2d at 254.
\item \textsuperscript{189} The Illinois Supreme Court said that in Hill "the right of privacy when involved with the publication of a matter of public interest was viewed narrowly and cautiously by the [United States Supreme Court]." Id. at 442, 259 N.E.2d at 255.
\item \textsuperscript{190} Id. at 440-41, 259 N.E.2d at 254; see supra notes 107-08 and accompanying text (discussing Leopold court's treatment of privacy rights in Illinois as compared with press' right to publish matters of public interest in light of Time, Inc. v. Hill, 385 U.S. 374 (1967)).
\item \textsuperscript{191} Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1133 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986); see supra notes 142-43 (listing cases that deny existence of false light in Illinois and those that have proceeded as if it existed).
\end{itemize}
Illinois actually recognized the tort. Instead, they relied on the dicta of Midwest Glass. Moreover, the Midwest Glass dicta itself is based on the Restatement (Second) of Torts, and not on the holding of any Illinois court. Thus, the line of Illinois cases that presumes the existence of false light in Illinois does not have its roots in Illinois common law at all, but instead, in one court’s dicta regarding the Restatement (Second).

2. Berkos Failed to Address the Issue of Public Interest

Even if one agreed with the Seventh Circuit’s prediction that “almost all signs point to Illinois’ recognizing [false light] when a suitable case arises,” it is doubtful whether Berkos was that “suitable” case. Berkos involved a matter of legitimate public interest. Illinois courts, from Eick through Adreani, had limited privacy rights whenever they involved newsworthy matters.

Indeed, had the Berkos court heeded Leopold’s cautionary guidance, it would have addressed the Illinois Supreme Court’s pivotal concern—that privacy rights are greatly limited where the plaintiff is a public figure, or one whose affairs are a matter of public interest. In view of the fact that Judge Berkos was mentioned in the context of Operation Greylord, certainly a matter of considerable public interest and scrutiny, the Berkos court failed, at the very least, to explain why Berkos was a suitable case in which to recognize false light for the first time.

3. Berkos’ Treatment of False Light is Inconsistent with Other Jurisdictions

Allowing plaintiffs to assert false light is especially desirable in instances in which a publication, while not defamatory, is highly offensive due to the nature and extent of the intrusion. The plaintiff and his family in Time, Inc. v. Hill presented such a claim. While the Life magazine article did not


193. The courts in Cantrell and Adreani explicitly relied on the dicta of Midwest Glass. See Cantrell, 529 F. Supp. at 682; Adreani, 80 Ill. App. 3d at 730, 400 N.E.2d at 683. Although the McGrew opinion relied explicitly on the Seventh Circuit reasoning in Douglass, the McGrew court also cited Midwest Glass for support in its favorable consideration of false light. See McGrew, 147 Ill. App. 3d at 113, 497 N.E.2d at 431.


195. Douglass, 769 F. 2d at 1134.

196. See supra note 3 (discussing Illinois cases, including Adreani, which refused to recognize plaintiffs’ privacy rights in favor of newsworthy matters of public interest).


198. See Walden & Netzhammer, supra note 26, at 374-77.
portray the Hill family negatively or in a way that harmed their reputations, it did intrude upon their privacy by portraying them falsely in a national publication after they had tried to avoid public scrutiny.199 Thus, as the Seventh Circuit pointed out in Douglass, false light appears to be an appropriate form of redress for those who wish to be left alone but who are portrayed to the public in a false and offensive manner.200

On the other hand, the false light claim may have greater potential than libel to restrict the press’ freedom to publish matters it deems interesting or important. Where the allegedly false portrayals are not serious or derogatory, the harm to the plaintiff does not seem to justify the imposition of liability on the press and the potential chilling effect of such impositions. Based on this consideration, the North Carolina Supreme Court abolished false light as a tort in 1984 and articulated two reasons for doing so.201 First, the court noted that any right to recover for false light invasion of privacy would duplicate an existing right of recovery for defamation or overlap significantly with such rights. Second, the court held that to allow damages in false light cases in which plaintiffs were not libeled would add to the already existing tension between the first amendment and libel.202

Other jurisdictions have followed North Carolina’s lead. Some refuse to accept false light as a tort,203 one limits false light claims,204 and still others

200. Douglass, 769 F. 2d at 1133-34; see supra notes 88-91 and accompanying text (discussing libel and false light).
202. Id. at 323, 312 S.E.2d at 412-13. The North Carolina Supreme Court also suggested that recognition of false light claims would reduce judicial efficiency by requiring courts to consider two claims for the same relief which, if not identical, would differ very little. Id. at 326, 312 S.E.2d at 414. Supporting the notion that libel and false light claims do not differ significantly, some courts have held that where plaintiffs have alleged both libel and false light claims that the defenses or privileges that apply to libel apply to false light as well, as long as the language at issue in both claims is the same. See, e.g., Holbrook v. Chase, 12 Med. L. Rep. 1732 (4th Dist. 1986) (false light invasion of privacy claim that rests on same facts as libel cause of action is subject to same immunity and defenses); Jensen v. Times Mirror, 634 F. Supp. 304 (D. Conn.), reconsidered, 647 F. Supp. 1525 (D. Conn. 1986) (privacy and defamation actions, when based on same facts, are subject to same standards, and defendants may challenge invasion of privacy claims on same grounds as they challenge defamation actions).
204. See, e.g., Fellows v. National Enquirer, Inc., 42 Cal. 3d 234, 721 P.2d 97 (1986) (public policy and legislative intent require false light claims to be subject to the special-damages requirement of California libel law which was passed to protect press’ freedom); see also Note, Invasion of Privacy: False Light Offers False Hope, 8 Loy. Envr. L.J. 411 (1988) (discussing Fellows case).
DEPAUL LAW REVIEW [Vol. 38:1121

decline to decide whether false light is actionable. Thus, while Berkos has recognized false light in Illinois, the trend elsewhere has been to reject or restrict the false light tort.

Nonetheless, even commentators who support granting the press wide latitude in exercising its first amendment rights suggest that to abolish false light entirely may be going too far. These commentators reason that there should be room for protecting the "private persona from public scrutiny." Accordingly, the fundamental issue is whether the communication is privacy-invading, just as the basic issue in a libel action is whether the words evoke a defamatory meaning. If the communication is deemed privacy-invading, then and only then should one examine whether the communication is false and offensive. This viewpoint reflects a growing body of scholarship which advocates judicial rejection of what is seen as a superficial link between libel and false light. Instead, these commentators urge courts to focus on false light's similarity to the related privacy tort of public disclosure of private facts, since both protect the same right—to be left alone and free from unwanted publicity. These interests differ from the interest in reputation, which is at issue in libel cases.

The practical effect of such a view would be to require false light plaintiffs to prove actual malice in actions that involve a matter of public interest. In such cases, a plaintiff would be entitled to less protection because he cannot claim that a communication is privacy-invading if it belongs legitimately to the public domain. Because newsworthiness is the accepted defense in public disclosure cases, the parallel in false light actions would be the Time, Inc. v. Hill matter-of-public-interest standard, thus providing the "appropriate conceptualization of false light as an offshoot or derivative of the disclosure tort."

---


206. See Walden & Netzhammer, supra note 26, at 382.

207. Id.

208. Id. at 377.


Another approach would be to deny false light actions categorically which involve matters of public interest. This view is in accord with the Illinois precedent set forth in *Leopold*,\(^{211}\) because the cases cited therein denied plaintiffs' privacy (and false light) claims whenever they concerned matters of public interest.\(^{212}\) Based on Illinois precedent, and underscored by the Illinois Supreme Court's cautionary note in *Leopold*, Illinois courts may want to recognize plaintiffs' false light claims as long as they do not involve newsworthy matters of public interest. Thus, even if it were appropriate for Illinois appellate courts to recognize false light, recognizing false light in the *Berkos* case was inappropriate because the published matter was not private, but of public interest.

**IV. IMPACT**

It is likely that plaintiffs in Illinois will continue to bring false light actions. The fact that Illinois had not recognized the tort as a cause of action prior to *Berkos* apparently did not discourage plaintiffs from bringing false light actions.\(^{211}\) It remains to be seen, however, whether Illinois courts will be more inclined to recognize plaintiffs' false light claims, *Berkos* notwithstanding, especially when they involve matters of legitimate public interest. Because the *Berkos* opinion did not address the substantive merits of that claim, but merely rendered Judge Berkos' false light pleading effective, it is difficult to predict what the impact will be.

If Illinois courts look to *Berkos* for guidance, they will in effect be looking to the Seventh Circuit's *Douglass* opinion. If Illinois courts look to *Leopold* for guidance, they may find themselves at odds with the *Berkos* holding, at least where false light claims involve matters of public interest. While *Leopold* did not preclude courts from recognizing false light, the opinion included a caveat to defer to the press in cases dealing with newsworthy events or matters of legitimate public interest.

However, allowing a plaintiff to plead false light is only the first half of the decision. The second, more significant issue still facing Illinois courts is to determine which plaintiffs must prove actual malice: all plaintiffs, based on *Hill*;\(^{214}\) or only public figures and officials, based on *Gertz*.\(^{215}\) This choice is critical, because it will determine how the privacy rights of plaintiffs will be balanced against the first amendment rights of the press.

As noted, the *Gertz* standard for libel, which allows private individuals to prove mere negligence rather than actual malice, may have rendered the

---

211. See supra note 3 (listing Illinois cases that denied plaintiffs' privacy claims if they involved matters of public interest).
212. Id.
214. See supra notes 13-22 and accompanying text.
215. See supra notes 24-31 and accompanying text.
The Seventh Circuit in *Douglass* followed *Gertz* and found that the constitutional requirements of libel actions apply to false light claims, at least as far as requiring public figures and officials to prove actual malice. The Seventh Circuit declined, however, to answer the question of whether a private individual alleging false light also must prove actual malice.

In contrast, the court in *Berkos* applied the *Hill* standard for actual malice, perhaps unwittingly, by applying the Restatement (Second’s) elements to determine whether Judge Berkos had properly pleaded false light. The Restatement (Second) suggests that all false light plaintiffs, private individuals as well as public figures and officials, must prove actual malice. Thus, the *Berkos* court, by effectively adopting the actual malice standard for all plaintiffs, comports with the Illinois Supreme Court’s desire, as stressed by the *Leopold* court, to limit privacy rights.

Further, it is reasonable for Illinois courts to require false light plaintiffs to prove actual malice, at least with regard to matters of public interest. First, false light is not as serious an injury as that of libel and therefore should require a higher threshold of proof. Second, mere personal annoyance at reports involving matters of legitimate public interest should not be allowed to outweigh the protections offered by the first amendment. This is especially so given the historical interpretation of the first amendment as affording the press a newsworthiness privilege where matters of public interest are involved.

216. See supra notes 26-29 and accompanying text (discussing whether *Gertz* actual malice standard for libel cast doubt on *Hill* actual malice standard for false light invasion of privacy).


218. *Id.* at 1141.


220. Restatement (Second), supra note 4, at § 652E.


222. See, e.g., Walden & Netzhammer, supra note 26, at 356. One of the reasons offered for requiring all plaintiffs alleging false light to prove actual malice, even in light of the *Gertz* holding requiring that private plaintiffs need only prove negligence in libel suits, is that "the injury is not so serious when the statement is not defamatory." Restatement (Second), supra note 4, at § 652E. Walden & Netzhammer, who believe all plaintiffs should have to prove actual malice when alleging false light, as long as the publication involves a matter of public interest, assert that "... false light results in a somewhat lesser degree of harm to personal interests." Walden & Netzhammer, supra note 26, at 356.

223. See supra note 3 (listing Illinois cases in which newsworthy matters of public interest superceded plaintiffs’ privacy interests). One commentator, Zimmerman, suggests that the history of first amendment protection for the press neither supports nor justifies tort liability for true speech, i.e., public disclosure of private facts. See Zimmerman, supra note 73, at 304-06. Another commentator, Nimmer, applies this viewpoint to false light as well. He suggests that since false light is more akin to public disclosure than libel, and since false light and public disclosure protect privacy interests rather than reputation, the same first amendment concerns
Thus, it is appropriate to require all false light plaintiffs in Illinois to prove actual malice where matters of public interest are at issue. The application of this standard strikes the appropriate balance between the individual’s privacy interest and the press’ first amendment rights. Plaintiffs’ privacy rights will be preserved because they will be able to plead false light even if they have not been libeled. Yet, the press’ right to publish matters of public interest will be preserved by requiring all plaintiffs who sue the press for false light to prove actual malice.

V. CONCLUSION

By failing to support its recognition of false light with reasoned analysis or precedent other than the Seventh Circuit Douglass opinion, the Berkos court recklessly expanded the common law right to privacy and provided no guiding rationale for future courts. The Berkos court failed to explain its reasoning when it recognized false light. The court instead relied on the Seventh Circuit’s faulty interpretation of false light in Illinois as set out in Douglass. Thus, the Berkos court may significantly have changed Illinois common law based on the Seventh Circuit’s inaccurate view. A closer look at Leopold and other Illinois privacy opinions by the Berkos court may have inspired a different holding.

Specifically, Leopold embodies not the potentially expansive view of privacy that the Seventh Circuit found in Douglass, but instead, a cautious approach to this tort based on extreme deference to the media. Therefore, the Berkos court should have considered for itself whether Illinois should, indeed, recognize false light and, if so, the court was obligated to provide guiding principles for future courts considering the tort.

Furthermore, the Berkos court failed to clarify the standard of proof applicable to false light. As long as false light remains actionable in Illinois, courts should uphold the actual malice standard for all plaintiffs bringing false light cases that involve matters of public interest. In Leopold, the Illinois Supreme Court suggested that the press’ first amendment protections are so important that they should limit privacy rights in Illinois. The need

that protect public disclosure should provide “absolute protection” of speech in a false light context. Nimmer, supra note 9, at 964. However, Walden & Netzhammer, citing the Supreme Court’s reluctance to provide absolute protection for knowing or reckless falsehoods (i.e., New York Times v. Sullivan, 376 U.S. 254 (1964)) observe that Nimmer’s suggestion is not practical. Walden & Netzhammer, supra note 26, at 378-79. Nonetheless, because they support Nimmer’s concern for protecting speech in accordance with the first amendment, they suggest a practical alternative to Nimmer’s “absolute” protection of speech: inasmuch as the newsworthiness defense applies to public disclosure of private facts. Walden & Netzhammer argue that the parallel in false light would be to apply the actual malice standard to false statements which, if true, would be privileged as newsworthy matters of public interest. This would “acknowledge the Supreme Court’s declaration that the Constitution provides no protection for ‘calculated falsehood,’” (citing Garrison v. Louisiana, 379 U.S. 64, 75 (1964)), while at the same time provide the press the maximum first amendment protection. Walden & Netzhammer, supra note 26, at 378-79.
for these limitations is stronger when those rights concern matters of legitimate public interest.

VI. POSTSCRIPT: THE ILLINOIS SUPREME COURT RECOGNIZES FALSE LIGHT INVASION OF PRIVACY

On February 2, 1989, the Illinois Supreme Court recognized false light invasion of privacy as a cause of action in Lovgren v. Citizens First Nat'l Bank. It did so even though the plaintiff, Harold Lovgren, never stated such a cause of action in his complaint. Instead, his complaint alleged invasion of privacy based on an unreasonable intrusion upon the seclusion of another, a claim the trial court dismissed. The Appellate Court of Illinois reversed and remanded, finding that Lovgren had stated a cause of action for intrusion upon seclusion, but for false light invasion of privacy.


225. Id. at 414. The Illinois Supreme Court stated:

Unlike the appellate court, we do not find that the plaintiff has stated a cause of action for intrusion into the seclusion of another. We do find, however, that the facts alleged state a cause of action for that privacy violation referred to as publicity placing [a] person in false light. Therefore, although we affirm the appellate court and remand the case, we do not adopt the reasoning of the appellate court and vacate that part of the appellate court opinion which finds that plaintiff has alleged a cause of action based on the unreasonable intrusion upon the seclusion of another.

Id.

226. Id.

227. Id.


229. See supra note 225 (citing pertinent part of Illinois Supreme Court's Lovgren opinion). In ruling that Lovgren had failed to plead a cause of action for intrusion upon seclusion, the court noted that, according to the Restatement (Second) § 652B, the "core of this tort is the offensive prying into the private domain of another."

Lovgren, 126 Ill. 2d at 417. In contrast, the court concluded that the alleged offensive conduct and subsequent harm in this case resulted "from the defendants' act of publication, not from an act of prying analogous to the examples set forth by Prosser and Keeton." Id. Examples cited by the court include: invading someone's home; an illegal search of someone's shopping bag in a store; eavesdropping by wiretapping; peering into windows of a private home; and persistent and unwanted telephone calls. Id. (citing W. Prosser & W. Keeton, supra note 53, § 117, at 854-56). See supra notes 74-78 and accompanying text (discussing intrusion upon seclusion, where it was noted that significant difference between this form of invasion of privacy and the other three is that it occurs unlawfully as soon as intrusion takes place, even if information gleaned is not revealed or published).

Interestingly, although the Illinois Supreme Court discussed the privacy tort of intrusion upon seclusion, setting forth its definition as found in the Restatement (Second) and citing examples offered by Prosser and Keeton, the court noted that its discussion did "not imply a recognition . . . of such a cause of action." Lovgren, 126 Ill. 2d at 417. The court further
A. The Illinois Appellate Court’s Decision

Lovgren’s three counts of intrusion upon seclusion were directed against Citizens First National Bank of Princeton, James Miller, the bank’s vice president, and William Etheridge, an auctioneer. Lovgren took out a second mortgage on his farmland in April, 1983, with the bank, signing a promissory note and executing a trust deed in favor of the bank. Lovgren subsequently borrowed more money from the bank and signed additional promissory notes secured by the trust deed. Sometime after 1983, Lovgren failed to meet his financial obligations to the bank and employees of the bank urged him to sell his farm. Lovgren declined to sell and asked for more time to meet his debts. However, in early November, 1985, the bank and auctioneer Etheridge ran advertisements in local newspapers and handbills stating that Lovgren would be selling his farm at public auction on November 25, 1985. At that time no such sale had been scheduled, and the bank had not started mortgage foreclosure proceedings against Lovgren. When he became aware of the scheduled sale, Lovgren filed suit against the bank, the bank’s vice president, and the auctioneer.

In his intrusion upon seclusion suit, Lovgren alleged that defendants had caused him anguish and suffering and had made it practically impossible for him to obtain refinancing of his mortgage loan. Lovgren’s complaint also sought compensatory and punitive damages and costs. Each defendant moved to dismiss Lovgren’s complaint for failure to state a cause of action. The trial court granted each of their motions.

On appeal, the Appellate Court of Illinois reversed and remanded the trial court’s decision. Citing Melvin v. Burling, the appellate court found that

We note that there is a conflict among the Illinois appellate court districts as to whether this cause of action should be recognized in this State. (See Melvin v. Burling (3d Dist. 1986), 141 Ill. App. 3d 786 (recognizing cause of action); Kelly v. Franco (1st Dist. 1979), 72 Ill. App. 3d 642 (not recognizing cause of action); Bank of Indiana v. Tremunde (5th Dist. 1977), 50 Ill. App. 3d 480 (implicitly recognizing cause of action); Bureau of Credit Control v. Scott (4th Dist. 1976), 36 Ill. App. 3d 1006 (not recognizing cause of action); see also M. Polelle & B. Ottley, ILLINOIS TORT LAW 192-96 (1985) (discussing Illinois Appellate Court’s treatment of unreasonable intrusion on another’s seclusion).) We do not find it necessary, however, to resolve these differences in this case.

Id. at 417-18.

230. Lovgren, 166 Ill. App. 3d at 584, 520 N.E.2d at 92.
231. Id. Lovgren’s first mortgage was with a St. Louis bank.
232. Id.
233. Id.
234. Id.
235. Id.
236. Id.
237. Id.
238. Id.
239. Id.
240. The requirements for intrusion upon seclusion, as set out in Melvin v. Burling, 141 Ill.
Lovgren had satisfied all four requirements necessary to allege intrusion upon seclusion. The Illinois Supreme Court granted leave to appeal.241

B. Analysis of the Lovgren Opinion

In recognizing Lovgren's cause of action as one for false light invasion of privacy, the Illinois Supreme Court addressed several issues raised by this Casenote, settling some of them as suggested herein. First, the Lovgren court recognized the false light tort. Second, the court avoided deciphering the Illinois conflict by relying on the Restatement (Second) as support for the tort's legitimacy. Finally, the Lovgren court adopted an actual malice standard for all plaintiffs bringing a false light action.

1. Recognition of False Light

This Casenote speculated that the Illinois Supreme Court might not recognize false light because of the tort's questionable foundation in Illinois common law,242 and because of the court's guarded tone in Leopold when

---

240. The requirements for intrusion upon seclusion, as set out in Melvin v. Burling, 141 Ill. App. 3d 786, 490 N.E.2d 1011 (3d Dist. 1986), are: 1) an unauthorized intrusion or prying into the plaintiff's seclusion; 2) the intrusion was offensive or objectionable to a reasonable man; 3) the matter upon which the intrusion occurred was private; and, 4) the intrusion caused the plaintiff anguish and suffering. See supra notes 74-78 and accompanying text (discussing intrusion upon seclusion and Melvin opinion). The appellate court noted that the circuit court found the first requirement met and did not expand any further. Lovgren, 166 111. App. 3d at 585, 520 N.E.2d at 92-93. As to the second element, the court said that a trier of fact could find that Miller, the bank's vice president, in advertising Lovgren's land for sale rather than pursuing acceptable legal remedies, engaged in an activity that a reasonable man would find objectionable or offensive. Id., 520 N.E.2d at 93. As to the third element, the court found that a mortgage exists only to secure indebtedness and that against every other person, and for every other purpose, the mortgagor is the owner of the land and as such is entitled to the "undisturbed occupation" of it; thus, the decision whether to sell his land was private to Lovgren and did not concern the public in any manner. Id. Finally, the court found that since defendants' intrusion made it "practically impossible" for Lovgren to obtain refinancing of his mortgage loan, and since it can also be inferred he had to endure humiliation and embarrassment in explaining to acquaintances and relatives that he was not selling his land, a trier of fact could find the intrusion caused anguish and suffering. Id.

241. Lovgren, 126 Ill. 2d at 414. The Illinois Supreme Court stated:

We find that this case is here by virtue of an appeal from the allowance of a motion to dismiss. A motion to dismiss a complaint for failure to state a cause of action admits all well-pleaded facts. Additionally, a motion to dismiss a complaint for failure to state a cause of action should not be granted unless it clearly appears that no set of facts could be proven under the pleadings which would entitle the plaintiff to relief. . . . Thus, within this framework, we must decide whether the facts alleged satisfy the elements of a cause of action for publicity placing a person in a false light.

Id. at 419 (citations omitted).

it admonished Illinois courts to "proceed with caution" when expanding privacy rights. However, this Casenote also concluded that it was desirable to allow plaintiffs to assert false light in those instances in which publication, while not defamatory, was highly offensive in the nature and extent of the intrusion. The Illinois Supreme court in Lovgren agreed. The court found that there were "recognizable differences" between false light and defamation, and that while all defamation cases can possibly be analyzed as false light cases "not all false-light cases are defamation cases." Furthermore, the Illinois Supreme Court recognized false light based not on the Douglass court's view that false light was rooted in the common law of Illinois, but on reasoned analysis. The court provided the following justifications for its holding: the Restatement (Second) of Torts and Prosser and Keeton long have recognized that such a tort exists at common law; other jurisdictions have embraced the tort of false light as a cause of action; and plaintiff Lovgren satisfied the requirements necessary to allege the tort. Similarly, this Casenote pointed out that those courts which had proceeded as if false light existed in Illinois had done so based on the Restatement (Second) rather than on questionable Illinois precedent. Therefore, this Casenote con-

243. Id. See supra notes 187-90 and accompanying text (discussing Leopold opinion).
244. See supra notes 198-200 and accompanying text (discussing false light and reasons supporting recognizing false light cause of action in Illinois).
245. Specifically, the court stated the following: "[t]here is an overlapping of protected interests in the false-light privacy tort and those protected by defamation law. Yet, there are recognizable differences. It has been said that all defamation cases can be analyzed as false-light cases, but not all false-light cases are defamation cases." Lovgren, 126 Ill. 2d at 421 (citing M. POLELE & B. OTTLEY, ILLINOIS TORT LAW 199-200 (1985)).
247. Lovgren v. Citizens First Nat'l Bank, 126 Ill. 2d 411, 418 (1989). The court directly quoted the Restatement (Second's) definition of false light as follows:
   One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
   (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
   (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.
   Id. at 418 (citing RESTATEMENT (SECOND), supra note 4, at § 652E).
   The examples the court cited from Prosser and Keeton include publicity falsely attributing to the plaintiff some type of opinion or statement, filing suit in the plaintiff's name without authorization, or using the plaintiff's name on a petition without authorization. Id.
248. Id. at 423 (citing 57 A.L.R. 4th 22, 58-69 (1987) (annot.).)
249. Id. at 420. See infra notes 252-56 and accompanying text (Lovgren court's discussion of how plaintiff Lovgren satisfied Restatement (Second's) requirements for alleging false light invasion of privacy).
250. See supra notes 116, 192-94 and accompanying text (Illinois cases that proceeded as if false light were a part of Illinois common law, and discussion of Restatement (Second's) influence on Illinois false-light suits).
cluded, that line of cases did not have its roots in Illinois common law at all, but in the Restatement (Second's) treatment of false light.251

In this vein, the court in Lovgren adopted the elements of false light found in the Restatement (Second).252 Applying those elements to the facts in Lovgren, the court found that defendants' advertising of an auction of plaintiff's farm satisfied the publicity requirement for false light.253 The court found also that the publicity was "clearly untrue" in that it named Lovgren as seller, thus satisfying the falsity requirement.254 Moreover, the court found that "[a] trier of fact could conclude that defendants knew that the publication of this false fact would prove highly offensive to the plaintiff,"255 thus satisfying the third element of false light as set out in the Restatement (Second).256

2. False Light's Dimensions in Illinois

While the Lovgren court did not acknowledge the conflict among Illinois appellate courts over whether false light was cognizable in Illinois, it also did not recognize the Seventh Circuit's strained interpretation of Leopold in Douglass.257 Instead, as noted, the Illinois Supreme Court in Lovgren relied forthrightly on the definitions and standards found in the Restatement (Second) of Torts and Prosser and Keeton's Law of Torts.258 Given the

251. Id.
252. See supra note 247 and accompanying text (Restatement (Second) citation).
253. The court stated: "After an examination of the advertisement placed in the local newspaper, we note that sufficient publicity was generated to satisfy this requirement." Lovgren, 126 Ill. 2d at 419.
254. The court stated: "Further, 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." Id. at 419.
255. Id.
256. The court stated:

[W]e must determine whether a finder of fact could decide that the false light in which the plaintiff was placed would be highly offensive to a reasonable person. The test articulated by the Restatement states that this element is met "when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity." (RESTATEMENT (SECOND) OF TORTS § 625E [sic], comment c, at 396 (1977)). We caution, however, that minor mistakes in reporting, even if made deliberately, or false facts that offend a hypersensitive individual will not satisfy this element.

Of considerable significance is the allegation that the unauthorized advertisement made it practically impossible for plaintiff to obtain refinancing of his mortgage loan. A trier of fact could conclude that the defendants knew that the publication of this false fact would prove highly offensive to the plaintiff. Thus, we conclude that the facts alleged state a cause of action based on the tort of publicity placing another in a false light.

Id. at 419-20.
257. See supra notes 124-35 and accompanying text (discussing Seventh Circuit's decision in Douglass).
258. See supra notes 229, 247 and 256 and accompanying text (Illinois Supreme Court's discussion of Restatement (Second's) definitions and standards).
confusion over false light in Illinois until now, this may be the most convenient, if not the most graceful approach the Illinois Supreme Court could have taken to extricate itself from the morass of prior conjecture.

Furthermore, the court in Lovgren was attempting to reconcile its recognition of false light with its 1970 Leopold opinion.\textsuperscript{259} To this end, the court conceded that Leopold's primary thrust was to limit, not expand, privacy rights, even while recognizing them.\textsuperscript{260} However, the Court explained that because this case, unlike Leopold, involved the private matters of a private citizen, the first amendment limitations stressed in Leopold were not implicated.\textsuperscript{261} Therefore, the court concluded it was appropriate to recognize false light invasion of privacy, Leopold notwithstanding, because there was "no need or reason for the uninhibited and robust discussion essential in cases involving a public interest or a public figure."\textsuperscript{262}

This language appears to limit false light to private plaintiffs and private matters, even while recognizing it as a cause of action. This is in keeping with Leopold's paramount goal of restricting privacy rights whenever they involve public figures or matters of public interest.\textsuperscript{263} The court was careful to confine its discussion to the case at hand, suggesting that any application of Lovgren to facts which depart from those at issue in that case may be inappropriate.\textsuperscript{264} In light of the supreme court's language in Lovgren, it

\textsuperscript{259} The court stressed that it must "consider this tort in light of first amendment limitations." Lovgren, 126 Ill. 2d at 421. The court added:

In Leopold v. Levin, this court recognized a right of privacy and also recognized that the dimensions of this right in this State had been defined by our appellate court. Quoting from the appellate court opinion in Bradley v. Cowles Magazines, Inc., 26 Ill. App. 2d 331, 334, 168 N.E.2d 64 (1960), the court stated that "the purpose underlying the right of privacy action was '[t]o find an area within which the citizen must be left alone'" and that, viewing the possible development of the right, "[i]t is important . . . that in defining the limits of this right, courts proceed with caution."

\textit{Id.} at 420-21 (citing Leopold v. Levin, 45 Ill. 2d 434, 440, 259 N.E.2d 250, 254 (1970)).

\textsuperscript{260} The court stated: "Ours is not a case involving a public figure or a matter of public interest. In Leopold, it was noted that in such cases the right or privacy is a limited one." Lovgren, 126 Ill. 2d at 421 (citing Leopold, 45 Ill. 2d at 440, 259 N.E.2d at 254).

\textsuperscript{261} The \textit{Lovgren} court noted:

In our case, the interest is purely a private one involving only the plaintiff and his bank. There was thus no need or reason for the uninhibited and robust discussion essential in cases involving a public interest or public figure. Acknowledging the above admonition that in defining the limits of this right courts proceed with caution, we, nonetheless, recognize that plaintiff has alleged a cause of action for a violation of his right of privacy.

\textit{Id.} at 421 (citing Leopold, 45 Ill. 2d at 442, 259 N.E.2d at 255).

\textsuperscript{262} \textit{Id.}

\textsuperscript{263} See supra notes 104-08 and accompanying text (discussing Illinois Supreme Court's discussion of why privacy rights should be restricted whenever they involve public figures or matters of public interest).

\textsuperscript{264} See supra notes 259-61 and accompanying text (citing pertinent portion of Illinois Supreme Court's \textit{Lovgren} opinion).
seems that Judge Berkos, because he is a public official and his claim clearly involved a public interest, might not have been able to prevail on his false light claim at all.\footnote{1166}

3. The "Actual Malice" Standard

In keeping with its cautious approach to privacy rights in \textit{Leopold}, the Illinois Supreme Court in \textit{Lovgren} adopted the "actual malice" standard of the Restatement (Second).\footnote{264} This standard suggests that all false light plaintiffs, private individuals as well as public officials and public figures, must prove actual malice.\footnote{265} This is precisely the standard this Casenote recommended,\footnote{266} notwithstanding the belief of some commentators that only a negligence standard should apply to false light actions that do not concern matters of public interest.\footnote{267}

The court in \textit{Lovgren} discussed the United States Supreme Court's opinions in \textit{Gertz v. Robert Welch, Inc.},\footnote{268} \textit{Cantrell v. Forest City Publishing Co.},\footnote{269} and \textit{Time, Inc. v. Hill},\footnote{270} and concluded that the Supreme Court had left open the question of whether false-light plaintiffs must prove actual malice.\footnote{271}

\begin{footnotesize}
\begin{enumerate}
\item[265.] See supra notes 195-97 and accompanying text (discussing why it was likely that Judge Berkos' false light claim was inappropriate) and notes 259-62 and accompanying text (explaining Illinois Supreme Court's comparison in \textit{Lovgren} of false light claims that involve public figures and public matters and those that do not, based on \textit{Leopold}).
\item[266.] See supra note 247 (Restatement (Second's) standard for actual malice in false light allegations).
\item[267.] Id.
\item[268.] See supra notes 219-23 and accompanying text (discussing why Illinois courts should adopt actual malice requirement for all plaintiffs alleging false light).
\item[269.] This Casenote suggests that Illinois courts should require false-light plaintiffs to prove actual malice regarding matters of public interest, at the very least. However, it also expresses support for Illinois courts' requiring the actual malice standard for all plaintiffs alleging false light, mostly because of the notion, supported by the Restatement (Second), that false light is less threatening a personal injury than libel and therefore should require a higher threshold of proof.
\item[270.] 418 U.S. 323 (1974).
\item[272.] 385 U.S. 374 (1967).
\item[273.] The court reviewed the actual malice requirement for defamation cases laid down in \textit{Gertz}, that "the States may define for themselves the appropriate standard of liability for a publication of a defamatory falsehood injurious to a private person as distinguished from a public figure." \textit{Lovgren} v. Citizens Nat'l Bank, 126 Ill. 2d 411, 421 (1989). The court noted that the United States Supreme Court in \textit{Time, Inc. v. Hill}, 385 U.S. 374 (1967), had considered a false-light action regarding a matter of public interest and had required proof of actual malice by defendants. The \textit{Lovgren} court added that in \textit{Cantrell v. Forest City Publishing Co.}, 419 U.S. 245 (1974), the trial judge had instructed the jury that liability could be imposed only if the publication was made with actual malice and "[n]o objection had been made to that instruction." 126 Ill. 2d at 422. The court continued:
\begin{quote}
The Supreme Court stated that under these circumstances, there was no occasion
\end{quote}
\end{enumerate}
\end{footnotesize}
Nonetheless, the Illinois Supreme Court adopted the actual malice approach of the Restatement (Second), based on "the admonition of *Leopold v. Levin* to proceed with caution" in expanding privacy rights.\(^2\) Similarly, this Casenote suggested that the actual malice standard was appropriate for all false-light plaintiffs because such an approach was in accord with *Leopold's* overriding interest in encouraging discussion of public matters,\(^2\) and would strike the fairest balance between the plaintiffs' opportunity to plead false light and the press' right to publish what it deemed important.\(^2\)

4. **Lovgren's Impact in Illinois**

The court in *Lovgren* pointed out that its decision to adopt the Restatement (Second's) actual malice standard was not based on its belief that such a standard was constitutionally required.\(^2\) Rather, its adoption of the actual malice standard for all plaintiffs was based on "the nature of the tort."\(^2\)

To explain its reasoning, the court quoted a passage from Prosser and Keeton's *Law of Torts*, which stresses that the outrageous character of the publicity "comes about . . . by virtue of the fact that some part of the matter reported was false and deliberately so."\(^2\) This suggests that some degree of knowledge or lack of diligence is an element inherent in the false light tort.

Several commentators have criticized this view because it *assumes* that a false invasion is offensive and, therefore, "ignores the heart of the wrong."\(^2\) These commentators suggest, instead, that the fundamental question is whether the communication is privacy-invading. Once the communication is shown to be privacy-invading, only then should a court address falsity and offen-
siveness. Under Prosser's interpretation, however, it is difficult to distinguish between whether the publication is privacy-invading or whether it is offensive, precisely because the measure of a publication's invasiveness is how offensive it is. Under this view, it would be impossible to discern, first, whether the publication was privacy-invading and then whether it was false and offensive, because the degree to which the publication invaded plaintiff's privacy would depend on how offensive it was in its falsity. Underlying the commentators' criticism of Prosser's view is their opinion that those plaintiffs alleging false light involving private matters should only have to prove negligence by the defendant.

The approach adopted by the Lovgren court goes far to protect the press' first amendment right to publish what it deems important. The court, however, recognized the legitimate concerns of plaintiffs whose privacy is infringed by offensive false publicity. Furthermore, the court's cautious approach in Lovgren will protect the press even as to publication of private matters, in keeping with Leopold's wary attitude toward expanding privacy rights in Illinois.

In this vein, consider if plaintiff Lovgren, instead of suing the bank and auctioneer, had sued the newspaper that published the false notice of the auction of his farm. Had the Illinois Supreme Court adopted a negligence standard for private plaintiffs alleging false light involving private matters, plaintiff Lovgren would only have to prove that the newspaper negligently published the advertisement. This would not directly endanger the press' first amendment right to publish. A negligence standard, however, would consume the press' resources by forcing publications to verify even routine items published, lest they leave themselves open to lawsuits and money judgments for unintended acts of negligence. When considered from this perspective, Prosser and Keeton's view of false light, and that of the Illinois Supreme Court requiring all plaintiffs to prove actual malice, are appropriate. Moreover, as this Casenote pointed out, to require all plaintiffs who allege false light to prove actual malice comports not only with Leopold's cautionary guidance, but also with the notion, supported by the Restatement (Second) and other commentators, that false light is less threatening a personal injury than libel and therefore should require a higher threshold of proof.

In conclusion, it remains to be seen whether Illinois courts will confine recognition of false light actions to publicity of private matters and private

282. Id. at 378-80.
284. See supra notes 224-79 and accompanying text (Lovgren court's explanation of Prosser and Keeton's view of false light invasion of privacy).
285. See supra note 229 and accompanying text, and note 268 (discussing why Illinois courts should adopt actual malice requirement for all plaintiffs alleging false light).
plaintiffs. This course seems plausible in light of the Lovgren Court's deference to the Leopold opinion and Leopold's strong support of first amendment freedom for the press. Furthermore, even if Illinois courts are inclined to recognize false light claims brought by public figures or those involving public matters, the Illinois Supreme Court's adoption of the actual malice standard for all false-light plaintiffs will make it more difficult for plaintiffs to prevail on false light claims by requiring them to prove either that the defendant knew the publication was false, or acted in reckless disregard of the truth.

_Crista Zivanovic_
DEPAUL LAW REVIEW

INDEX
VOLUME 38
1989

DEPAUL UNIVERSITY COLLEGE OF LAW
CHICAGO, ILLINOIS