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THE ABSENCE OF FALSE LIGHT FROM THE WISCONSIN PRIVACY STATUTE

I. INTRODUCTION

When the Wisconsin Legislature enacted this state's first privacy law on November 29, 1977, the statute did not provide a cause of action for placing a person in a false light in the public eye.1 "False light in the public eye" is a metaphor for deceptive publicity which blinds the audience to the sub-

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1. Right of Privacy Act, ch. 176, § 5, 1977 Wis. Laws 756 (codified at Wis. Stat. § 895.50 (1979)), which provides:

Right of privacy. (1) The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:

(a) Equitable relief to prevent and restrain such invasion, excluding prior restraint against constitutionally protected communication privately and through the public media;

(b) Compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and

(c) A reasonable amount for attorney fees.

(2) In this section, "invasion of privacy" means any of the following:

(a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

(c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

(3) The right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy, including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media.

(4) Compensatory damages are not limited to damages for pecuniary loss, but shall not be presumed in the absence of proof.

(6)(a) If judgment is entered in favor of the defendant in an action for invasion of privacy, the court shall determine if the action was frivolous. If the
ject’s true identity.² By definition, the wrong done in such cases must be at least twofold. First, there is the falsification, whether negligent or intentional, of some matter of fact or opinion attributed to an identified individual. In this respect, he or she has simply been misrepresented, for whatever purpose. Second is the light itself, the unwanted illumination of the identified individual before the public at large.³

False light first appeared in the law in 1816 when the poet Lord Byron enjoined the circulation of a poem attributed to him but written by another.⁴ Besides false attribution, false light actions have also been brought for inclusion of the plaintiff’s name or likeness in a rogue’s gallery when he had not been convicted of a crime;⁵ for embellishment, where a photograph or quotation was placed in a distorted context;⁶ and for fictionalization, where a story included references to real people either as disguised characters or as themselves.⁷

False light is notable for its absence in the Wisconsin statutory scheme because it is one of the four ways of invad-
ing a plaintiff's privacy identified by Dean Prosser and listed in the *Restatement (Second) of Torts*. The Wisconsin Legislature did adopt the other three categories, which include: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) appropriation for the defendant's advantage of the plaintiff's name or likeness; and (3) public disclosure of embarrassing private facts about the plaintiff.

The Wisconsin Senate deleted a false light provision when it passed section 895.50, and two subsequent attempts to reinstate it were also met with defeat, due in part to vigorous opposition from the state's communications media. Yet the possibility remains that this proposal might arise again in the Wisconsin Legislature, which over the course of twenty years turned aside four opportunities to declare any right of privacy at all. It is also probable that plaintiffs will continue to pursue false light claims under the common law, even though the legislature specifically refused to recognize this tort. False light is already recognized as a tort in the majority of jurisdictions and could serve as the

basis for a federal diversity suit involving a Wisconsin party when the law of the other state applies. This comment, therefore, will explore the nature and development of false light invasion of privacy to determine whether this aforementioned gap in Wisconsin's law needs filling. It will consider whether it needs filling in view of the already available alternative remedies and in view of the competing interests at stake. To this end it will be helpful in this consideration of false light to examine, at the outset, the right of privacy in general.

II. BACKGROUND OF THE TORT OF INVASION OF PRIVACY

A. The Warren and Brandeis Proposal

Louis D. Brandeis and his former law partner, Samuel D. Warren, bestowed legal recognition on the right to privacy in an article "regarded as the outstanding example of the influence of legal periodicals upon the American law." The authors borrowed the description "the right to be let alone" from a torts text and advocated allowing a cause of action for inflicting mental distress by publicizing facts or fiction about the private lives of private citizens. The pair particularly deplored the use of "numerous mechanical devices" which gave newspapers the capacity to proclaim from the housetops "what is whispered in the closet." Brandeis' authorized biographer relates that the impetus for the article was what the two Bostonians considered the untoward interest of the local press in the marriage and social life of Mr. Warren and his bride. The article itself did not refer to these personal grievances. Instead, it invoked protection for "man's spiritual nature," his "feelings" and his "intellect."
This high minded assault on "yellow journalism"\textsuperscript{24} in the pages of the already prestigious \textit{Harvard Law Review}, which Brandeis had recently helped found, was generally well received in legal circles.\textsuperscript{25} Some latter day commentators, however, criticize the article and the tort itself as the petty product of an overweening sense of Victorian prudery.\textsuperscript{26} Professor Kalven wonders "if the tort is not an anachronism, a nineteenth century response to the mass press which is hardly in keeping with the more robust tastes or mores of today."\textsuperscript{27} As the reporting of the breakup of another marriage over eighty years later in \textit{Time, Inc. v. Firestone}\textsuperscript{28} will illustrate, however, the passage of decades has not dulled the desire of some to keep false reports of their homelives out of the public eye.

Prior to the publication of Warren and Brandeis' article in 1890, no state had enacted a statutory right to privacy nor had any American or English court granted relief expressly based on a violation of such a right.\textsuperscript{29} New York became the first state to do so in 1903 by passing a law which made it both a misdemeanor and a tort to make use of the name, portrait or picture of any person for trade purposes without written consent.\textsuperscript{30} Two years later the Georgia Supreme Court recognized the right of privacy in a case involving false light and appropriation, where an insurance company used the plaintiff's picture without permission along with a spurious testimonial.\textsuperscript{31} Subsequently, judicial decisions in

\textsuperscript{25} \textit{See} W. PROSSER, \textit{supra} note 15, § 117, at 802. Prosser also concluded that "no other tort has received such an outpouring of comment in advocacy of its bare existence." \textit{Id.} at 802-03.
\textsuperscript{27} \textit{Id.} at 328-29. Indeed, one of the principal cases upon which Warren and Brandeis rely involved Queen Victoria's consort, Prince Albert, who brought suit when copies of etchings he made for his own amusement were included in a display. The court found a wrongful appropriation. Prince Albert v. Strange, 2 De G. & Sm. 652, 41 Eng. Rep. 1171, 1 Mac. & G. 25, 64 Eng. Rep. 293 (1849).
\textsuperscript{28} 424 U.S. 448 (1976). \textit{See infra} notes 177-78 and accompanying text.
\textsuperscript{29} W. PROSSER, \textit{supra} note 15, § 117, at 802.
many states began to give legal effect to the newly recognized right through opinions grounded on either common law, constitutional mandate or even natural law.

**B. Current Positions on Privacy**

As this body of decisional law accumulated, three divergent views of privacy developed through exposition in legal scholarship. Foremost among these is Dean Prosser's description of the four separate torts which fall under the rubric of invasion of privacy. Opposed to his view are those who see invasion of privacy as a unified tort protecting a single interest. Still others doubt that invasion of privacy should exist as an independent cause of action at all.

This theoretical debate has its ramifications on a practical level because the nature of the interest or interests protected determines the elements of the tort and the available defenses. These factors then enter into the complex process of weighing and balancing the conflicting interests which the courts and legislatures undertake in devising remedies.

1. Prosser's Four-Part Analysis

By 1960 Dean Prosser had gathered over three hundred reported cases from throughout the United States and organized them into the four categories of false light, disclosure, intrusion and appropriation. He determined that privacy is a composite right in which three interests of the plaintiff are at stake. Actions for false light and public disclosure protect

32. See, e.g., Hinish v. Meier & Frank Co., 166 Or. 482, 113 P.2d 438 (1941). Recognizing a common-law right of privacy in this case, the Oregon Supreme Court stated: "The common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is one of its cardinal virtues." Id. at —, 113 P.2d at 447.

33. CAL. CONST. art. I, § 1, has been one basis upon which California courts recognize a right to privacy. See, e.g., Melvin v. Reid, 112 Cal. App. 285, —, 297 P. 91, 93 (1931).

34. Pavesich v. New England Life Ins. Co., 122 Ga. 190, —, 50 S.E. 68, 69-70 (1905) (holding that "[t]he right of privacy has its foundation in the instincts of nature . . . . A right of privacy in matters purely private is therefore derived from natural law.").

35. See infra notes 38-44 and accompanying text.

36. See infra notes 45-59 and accompanying text.

37. See infra notes 60-66 and accompanying text.

38. Prosser, supra note 4, at 388-89.
an interest in reputation; those for intrusion protect the interest in freedom from mental distress; and those for appropriation protect a proprietary interest in name and likeness. In his study, which was later incorporated into the Restatement (Second) of Torts, Prosser does not define privacy but merely describes four ways in which it can be invaded. He contends that these four types of invasion are "tied together by the common name [privacy] but otherwise have almost nothing in common . . . ." Yet, he maintains that "almost all of the confusion is due to a failure to separate and distinguish these four forms of invasion, and to realize that they call for different things."

2. The Unified Tort Theory

Other commentators criticize this analysis on the ground that Prosser's composite view has itself generated much of the uncertainty and confusion now surrounding the field. In general, they regard the Prosser position as an intermediate stage in the evolution of the right of privacy which should now move in the direction of a unified theory, a theory identifying only one fundamental interest. A leading partisan of this idea, Edward Bloustein, maintains that "the

39. Id. at 398-400.
40. Id. at 392.
41. Id. at 406.
43. Prosser, supra note 4, at 389.
44. Id. at 407.
disorder in the cases and commentary offends the primary canon of all science that a single general principle of explanation is to be preferred over congeries of discrete rules.\footnote{47} Warren and Brandeis did not define privacy either, apparently believing the term to be self-explanatory. Yet many now involved in the legal system complain that “\[w\]e share a common intuition of [the] right but are without any adequate and agreed upon definition or delineation of it. We have no way to know it when we see it.”\footnote{48}

The definitions formulated by the unified theorists are all quite abstract, owing to the mental rather than physical nature of the tort. Bloustein suggests that “all of the tort privacy cases involve the same interest in preserving human dignity and individuality . . . .”\footnote{49} Others call privacy “the condition enjoyed by one who can control the communication of information about himself”\footnote{50} or “the voluntary and temporary withdrawal of a person from the general society through physical or psychological means.”\footnote{51} These writers align their theories with Warren and Brandeis’ concept of privacy as protecting the “inviolate personality,”\footnote{52} a term Justice Brandeis described more fully after he ascended to the Supreme Court:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the govern-

\footnote{47}{Bloustein, supra note 45, at 963. Bloustein also states that: The study and understanding of law, like any other study, proceeds by way of generalization and simplification. To the degree that relief in the law courts under two different sets of circumstances can be explained by a common rule or principle, to that degree the law has achieved greater unity and has become a more satisfying and useful tool of understanding. Conceptual unity is not only fulfilling in itself, however, it is also an instrument of legal development. \textit{Id.} at 1004.}

\footnote{48}{Gerety, \textit{supra} note 2, at 244 (paraphrasing Jacobellis v. Ohio, 378 U.S 184, 197 (1964) (Stewart, J., concurring)).}

\footnote{49}{Bloustein, \textit{supra} note 45, at 1005.}

\footnote{50}{Lusky, \textit{supra} note 46, at 709.}

\footnote{51}{A. Westin, \textit{supra} note 46, at 7.}

\footnote{52}{Warren & Brandeis, \textit{supra} note 18, at 205.}
ment, the right to be let alone—the most comprehensive of
rights and the right most valued by civilized men. 53

In addition to advocating a unified theory of privacy,
some commentators, such as Judge Skelly Wright, go so far
as to call for a national law of privacy with liability insur-
ance funded by the government. 54 Judge Wright believes
that a federal cause of action for invasion of privacy by pub-
lication can properly be grounded on the first amendment or
the commerce clause; 55 but neither of these provisions is self-
executing in regard to an individual—hence the need for a
federal law. He also maintains that national legislation is
necessary because of the interstate structure of the communi-
cations industry, which is frequently a defendant in a pri-
vacy case. 56 When brought as diversity actions, these suits
usually raise conflict of laws issues 57 and could subject the
defendant to litigation simultaneously in several jurisdic-
tions with each having its own network of doctrine. Given
the current Supreme Court’s opposition to the development
of a body of federal tort law, 58 a national law of privacy
seems highly improbable at this point. However, similar fac-
tors of uncertainty and unmanageability are now prompting
the drafting of a national law of products liability. 59

3. The Unneeded Tort Theory

Another body of legal opinion rejects both the composite
and the unified theories by maintaining that there is no need
for a separate tort of invasion of privacy. 60 Frederick Davis

54. Wright, Defamation, Privacy, and the Public’s Right to Know: A National
Problem and a New Approach, 46 Tex. L. Rev. 630, 643 (1968). See also Beytagh,
Privacy and a Free Press: A Contemporary Conflict in Values, 20 N.Y.L. Forum 453,
501, 508-09 (1975); Shapo, Media Injuries to Personality: An Essay on Legal Regula-
tion of Public Communication, 46 Tex. L. Rev. 650, 665 (1968); Comment, The
Search, supra note 46, at 668-69 (for other suggestions for a uniform privacy law).
55. U.S. Const. art. I, § 8, cl. 3.
56. Wright, supra note 54, at 644-49.
58. Kirby, Demoting 14th Amendment Claims to State Torts, 68 A.B.A. J. 166, 167
(1982).
60. Davis, What Do We Mean by “Right to Privacy”, 4 S.D. L. Rev. 1 (1959);
Kalven, supra note 24, at 327-28; Pember & Teeter, Privacy and the Press Since Time,
dismisses privacy as merely "a sociological notion and not a jural concept at all." In his estimation already existing actions for expropriation of property rights in personality or for infliction of mental distress could just as well provide relief for the wrongs listed by Prosser.

Privacy could even be absorbed into a more comprehensive cause of action, just as the ancient common-law action for deceit was subsumed into the broader tort of misrepresentation. Dean Wade believes that:

"There is real reason to conclude that the principle behind the law of privacy is much broader than the idea of privacy itself, and that the whole law of privacy will become a part of the larger tort of intentional infliction of mental suffering. That tort would then absorb established torts like assault and defamation and invasion of the right of privacy and join them together with other innominate torts to constitute a single, integrated system of protecting plaintiff's peace of mind against acts of the defendant intended to disturb it."

Such predictions about the future course of privacy law spur debates in the law reviews, but the present state of the law seems to be dominated by the Prosser position. Kalven explains that "given the legal mind's weakness for neat labels and categories and given the deserved Prosser prestige, it is a safe prediction that the fourfold view will come to dominate whatever thinking is done about the right of privacy in the future."

III. PRIVACY AND FALSE LIGHT IN WISCONSIN

A. No Common-Law Right

Prior to 1977 none of these developments in the law of privacy had any practical application in Wisconsin courts.

61. Davis, supra note 60, at 19.
62. Id. at 22-23.
63. Pember & Teeter, supra note 60, at 90-91; Wade, Defamation and the Right of Privacy, 15 VAND. L. REV. 1093, 1124-25 (1962).
64. Wade, supra note 63, at 1124-25.
65. A. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS 173 (1971); Kalven, supra note 26, at 332; Pember & Teeter, supra note 60, at 91.
66. Kalven, supra note 26, at 332.
because they steadfastly refused to recognize such a common-law right in the absence of legislative mandate. The first Wisconsin Supreme Court case to raise the privacy issue was *Klug v. Sheriffs*[^67] in 1906, where the plaintiff brought suit against an artist for painting an unauthorized portrait of his deceased wife. Sidestepping the privacy issue, the court granted relief on a contract theory.[^68] Thirty years later in *Judevine v. Benzies-Montanye Fuel & Wholesale Co.*,[^69] a Baraboo carpenter sued on several grounds, including invasion of privacy, because the defendant had distributed orange handbills offering to sell the accounts of Judevine and several others to the highest bidder. The plaintiff, who owed a bill of $4.32, alleged that this falsely implied he was a "dead-beat."[^70] This time the court addressed the privacy issue directly, saying that "it is more fitting that [the right of privacy] be created by the legislature by declaring unlawful such acts as it deems an unwarranted infringement of that right."[^71]

### B. Legislative History

Wisconsin legislators did not begin to respond to this call for action for another fifteen years,[^72] and, when they did respond, it took another twenty-six years for a bill to come to fruition.[^73] The legislative history of the various privacy proposals during this time span reveals a persistent split of opinion among the lawmakers as to whether Wisconsin should have a narrow statute covering only specific areas or whether a broadly phrased law granting a generalized right was

[^67]: 129 Wis. 468, 109 N.W. 656 (1906).
[^68]: *Id.* at 474-75, 109 N.W. at 658.
[^69]: 222 Wis. 512, 269 N.W. 295 (1936).
[^70]: *Id.* at 516, 269 N.W. at 298.
[^71]: *Id.* at 527, 269 N.W. at 302.
[^72]: The *Judevine* decision had the effect of putting potential plaintiffs on notice, however, for only one reported case during that 15 year period attempted to resurrect the issue of privacy. *See* State ex rel. Distenfeld v. Neelen, 255 Wis. 214, 218, 38 N.W.2d 703, 704-05 (1949).
needed. This dichotomy parallels the controversy, noted above,\textsuperscript{74} between Prosser's partisans, who see privacy as a composite of four separable torts, and those who view it as a unity. A recounting of the amending process will also show the forces and compromises which led to deleting the false light provision. Because section 895.50 is still virtually uninterpreted by the state courts,\textsuperscript{75} a summary of the legislative history which preceded its passage will provide a useful guide to legislative intent, which can serve as a tool for statutory analysis.\textsuperscript{76}

This law's long road to enactment began in 1951 when State Senator Warren P. Knowles introduced a bill recognizing a general right to privacy.\textsuperscript{77} Faced with opposition from the press and credit reporting agencies,\textsuperscript{78} he later amended his bill to cover only situations where (1) an advertiser appropriated a person's name or likeness without permission; (2) a creditor published the names of debtors; or (3) one person purported to represent another or a firm without permission.\textsuperscript{79} After carving out certain exceptions for collection agencies and the press, the senate passed this bill\textsuperscript{80} and an identical bill which Knowles introduced in the 1953 session,\textsuperscript{81} but the assembly defeated the measure both times.\textsuperscript{82}

Wisconsin citizens were still without a remedy for invasion of privacy in 1956, when a particularly outrageous event gave rise to the case of \textit{Yoeckel v. Samonig}.\textsuperscript{83} There, the proprietor of Sad Sam's Tavern in the town of Delafield photographed the plaintiff using the women's rest room and displayed the picture to other patrons in his establishment.

\textsuperscript{74} See supra text accompanying notes 35-66.
\textsuperscript{75} See infra note 139 and accompanying text.
\textsuperscript{76} See McGarrity v. Welch Plumbing Co., 104 Wis. 2d 414, 425 (1981) ("Legislative intent may be ascertained by an examination of the words of the rule in relation to the scope, history and subject matter of the rule and the object intended to be accomplished or the will to be remedied by the rule.").
\textsuperscript{77} Wis. S.B. 215 (1951) ("The legal right of privacy is recognized in this state and an invasion thereof shall give rise to an equitable action to recover damages for injuries sustained by reason thereof.").
\textsuperscript{78} See J. Eakins, supra note 13, at 103-06.
\textsuperscript{79} S. Substitute Amend. 1 to Wis. S.B. 215 (1951).
\textsuperscript{80} S. Substitute Amend. 2 to Wis. S.B. 215 (1951).
\textsuperscript{81} Wis. S.B. 537 (1953).
\textsuperscript{82} See J. Eakins, supra note 13, at 112, 127-28.
\textsuperscript{83} 272 Wis. 430, 75 N.W.2d 925 (1956).
The Wisconsin Supreme Court dismissed the claim in a decision Prosser calls "an atrocity." Since the photograph was not used for advertising purposes, the Knowles bill would not have provided relief either; still, the legislature, unmov ed, declined to consider a privacy bill in any form until 1973.

In 1972 several University of Wisconsin law students, having learned that Wisconsin did not recognize a right of privacy, persuaded Assemblyman R. Michael Ferrall to introduce a bill offering broad privacy protection. The senate failed to take action on the measure, so it died when the session ended. Two years later Ferrall reintroduced his bill, and this time the media mounted a strong opposition. Their chief objection was that, since privacy was not defined in the bill, its coverage would be either too vague or overbroad. After more maneuvering the two sides worked out a compromise amendment which basically listed Prosser's four categories (including false light). This amendment also eliminated exemplary (punitive) damages and allowed an action for false light only upon a showing of knowledge or reckless disregard for the truth. Meanwhile, Assembly Majority Leader Terry Willkom worked with the press on another substitute amendment which entirely deleted the false light category. The assembly failed to vote on either the bill or the amendments before the session ended on March 31, 1976, so again the legislation expired.

Much the same scenario occurred in 1977 when Ferrall reintroduced his generalized privacy bill and then compromised on a more specific draft. Ferrall pushed to include false light in the assembly version of the bill, but it was deleted by the senate. This time, however, both houses of the

84. Prosser, supra note 4, at 388 n.58.
85. Wis. A.B. 1165 (1973); see J. Eakins, supra note 13, at 150-51.
86. Wis. A.B. 232 (1975); see J. Eakins, supra note 13, at 181.
89. A. Substitute Amend. 2 to Wis. A.B. 232 (1975).
90. J. Eakins, supra note 13, at 200.
legislature approved the amended bill and it became law on November 29, 1977.94

C. Section 895.50

The privacy bill finally enacted by the Wisconsin Legislature is a hybrid piece of legislation reflecting the compromises which enabled its passage.95 This law specifically limits the right of privacy to three of the four categories described by Prosser96 and the Restatement (Second) of Torts97 with a few variations. Section 895.50 covers:

(1) **Intrusion.** In Wisconsin intrusion is actionable if it would be “highly offensive to a reasonable person.”98 According to the Restatement the intrusion must be intentional,99 but in Wisconsin it may also be negligent “or in a manner which is actionable for trespass.”100

(2) **Appropriation.** A plaintiff can press a complaint for appropriation in Wisconsin if his name or likeness is used for commercial purposes without written consent.101 The Restatement does not limit claims to commercial appropriation or appropriation for pecuniary benefit, but would allow an action for any unauthorized use for the purposes and benefit of the defendant so long as it is not merely incidental.102

(3) **Disclosure.** The final action allowed by the statute is for “publicity”103 given to a “matter concerning the private life of another, of a kind highly offensive to a reasonable person.”104 Both this statute and the Restatement note that

94. 1977 Wis. Laws 756, ch. 176, § 5 (codified at Wis. Stat. § 895.50 (1979)); see supra note 1 for text.
95. See P. Salsini, supra note 13, at Exhibit A, which says that the drafters of the bill were surprised when the author pointed out that there is no subsection (5) in the law. They explained to Salsini that the bill's sections were renumbered in the various stages of rewriting and that no one noticed the dropped number. They said that all of the sections that belong in the law are there.
96. See Prosser, supra note 4, at 389.
103. See RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977), which defines “publicity” as a matter communicated to so many people that it is certain to become public knowledge.
there is no liability for publishing information available to the public as a matter of public record.\textsuperscript{105} The Wisconsin test for liability focuses on the "newsworthiness"\textsuperscript{106} of the matter disclosed and the Restatement similarly speaks of matters of "legitimate public concern."\textsuperscript{107} Under the Wisconsin statute the disclosure may be either negligent, reckless or intentional. This makes invasion of privacy along with defamation and nuisance the only torts in Wisconsin subject to this triple standard of conduct since recklessness was eliminated from the negligence calculus for compensatory damages.\textsuperscript{108}

Including disclosure while excluding false light from this statute results in the illogical situation of allowing an action for the revelation of true intimate facts while disallowing one for revealing intimate matters which turn out to be untrue. Professor Nimmer points out that this puts a premium on falsity so far as the defendant is concerned.\textsuperscript{109} While statements need not be of an intimate nature to put one in a false light, they very often are.\textsuperscript{110} Nimmer maintains that the "false light cases are . . . a logical, even a necessary, extension of the private facts cases . . . ."\textsuperscript{111} If false light is indeed a logical and necessary addition to Wisconsin's privacy protection, then recognition must come either from the courts by adoption of the common-law doctrine, or from the legislature, by amendment of the statute.

\textsuperscript{105} Id.; Restatement (Second) of Torts § 652D comment d (1977). This Restatement section reflects the decision in Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975), which held that states may not impose sanctions for the publication of truthful information contained in official court records open to public inspection. Id. at 493-96.

\textsuperscript{106} Wis. Stat. § 895.50(2)(c) (1979). See also Brody, Invasion of Privacy in Wisconsin, Milwaukee Law., Summer 1978, at 11, 21 (for an explanation of "newsworthiness").

\textsuperscript{107} Restatement (Second) of Torts § 652D comments d & g (1977).

\textsuperscript{108} See Bielski v. Schulze, 16 Wis. 2d 1, 14-19, 114 N.W.2d 105, 111-14 (1962). But see Wangen v. Ford Motor Co., 97 Wis. 2d 260, 275, 294 N.W.2d 437, 446 (1980) (stating that "[w]e do not read Bielski as holding that 'outrageous' conduct, which may also fit the description of 'gross negligence,' has no place in determining the existence of liability for punitive damages . . . .").

\textsuperscript{109} Nimmer, supra note 46, at 963.

\textsuperscript{110} Cf. id. at 964 n.97 (suggesting one standard for false light statements regarding private matters and another for false light statements about public matters).

\textsuperscript{111} Id. at 963.
1. Considerations for Court Interpretation

A false light claim may be brought to judicial attention because of the frequent intermingling of Prosser's four privacy torts in a single factual situation. Truth is a defense to false light, while it is not in other privacy actions; but in other respects the categories can and do overlap. False light is like disclosure in that it requires publication to a large group. Thus, when revelations of true intimate facts are mixed with fabrications, both false light and public disclosure are involved.\(^1\) If the facts are gathered by means of trespass or eavesdropping, then a cause of action for intrusion would also arise.\(^2\) Similarly, when a person's name is used without permission to advertise a commercial product, a colorable claim for appropriation can arise; and if it is a product which would be out of character for the plaintiff to use, that plaintiff could also seek a remedy for false light.\(^3\)

Therefore, in situations where more than one type of privacy violation has occurred, a Wisconsin plaintiff could make a false light claim if only to serve as an aggravating factor.

This overlapping and blurring of the categories leads to confusion as to which label to apply. It is one reason why many legal scholars call for a unified, single tort theory of privacy.\(^4\) On the other hand, opponents of false light legislation fear any such broadening of the statute's coverage by the courts. They insist that the law be confined to its explicit provisions with as little latitude for judicial interpretation as possible.\(^5\)


\(^{113}\) See, e.g., Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964) (hidden photographer took picture at fun house of plaintiff with skirt blown over her head; the published photo allegedly placed her character in question).

\(^{114}\) Pavesich v. New England Life Ins. Co., 112 Ga. 190, 50 S.E. 68 (1905) (name, picture and false statement used to endorse life insurance which plaintiff did not buy).

\(^{115}\) See supra note 46 and accompanying text.

\(^{116}\) See Brody, supra note 106, at 13. Milwaukee attorney James Patrick Brody represented the Milwaukee Journal at legislative hearings on Wis. A.B. 216 (1977) and its amendments. He says that: "The direction to follow the 'common law' obviously does not permit departure from express statutory terms, but refers only to those matters not governed by the statute." Id. But see Comment, supra note 13, at 1040 (suggesting "inconsistencies in false light cases because this controversial area is part of the developing common law of privacy").
In view of the legislature’s deliberate rejection of false light, outright recognition by the courts seems highly unlikely, even though the Wisconsin Supreme Court may have the inherent power to do so and even though section 895.50 states that “[t]he right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy.” Legislative intent, however, is not the sole criterion for statutory interpretation. Further guidance as to how the courts might treat a false light claim can be obtained by examining judicial interpretations in other jurisdictions where the right to privacy is exclusively statutory.

These laws generally fall into two categories: (1) a broad unified grant of the right to privacy either in a constitution or in a statute, or (2) a more specific law, like Wisconsin’s, limited to one or more of the categories recognized by Prosser. These tort laws exist in addition to other statutes

117. See, e.g., State v. Cannon, 196 Wis. 534, 536-37, 221 N.W. 603, 603-04 (1928), where the opinion discusses inherent powers of the Wisconsin Supreme Court and quotes with approval In re Bruen, 102 Wash. 472, 172 P. 1152 (1918), which states:

The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy had been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists. It is true that the judicial power of this court was created by the constitution, but upon coming into being under the constitution, this court came into being with inherent powers.

Id. at 1153 (emphasis added).


119. See, e.g., State v. J.C. Penney Co., 48 Wis. 2d 125, 138, 179 N.W.2d 641, 647 (1970), which construes a Wisconsin usury law borrowed from New York. The opinion says that “when the Wisconsin legislature adopted the New York statute it also adopted the construction placed upon it by the New York courts . . . .” (citation omitted).


(usually criminal) which protect the confidentiality of certain records.123

Where a constitutional provision or statute is broadly worded, the courts have usually allowed a claim for false light as well as for the other categories.124 As for the limited statute states, only two specifically enumerate a cause of action for false light.125 The others accept or reject such claims depending upon whether the courts liberally126 or strictly127 construe the letter of the law.

Drafters of the Wisconsin statute borrowed the wording of the New York privacy law128 for the appropriation subsection.129 Despite the facially limited scope of this New York statute, the courts of that state have expanded it to cover false light cases by means of the fictionalization approach. For example, in Spahn v. Julian Messner, Inc.130 a baseball player sued a publisher for using him as the subject of a fictionalized biography. Although a lower court found the


123. See, e.g., Wis. Stat. § 6.80(2)(e) (1979) (secret ballot); § 13.95(1)(g) (state agency data bank information may be confidential); § 19.85 (meetings of governmental bodies which may be closed); § 48.396 (juvenile offender records closed); § 48.78 (records of child welfare agencies closed); § 48.93 (adoption records closed); § 71.11(44) (tax records confidential); § 118.125-.126 (pupil records and communications confidential); § 143.07 (venereal disease records confidential); § 146.82 (patient health care records confidential); § 767.53 (paternity records closed); § 885.365 (recording telephone conversations restricted); § 905.02 (required reports privileged); § 905.03 (lawyer-client communications privileged); § 905.05 (husband-wife communications privileged); § 905.06 (communications to clergyman privileged); § 905.065 (results of honesty testing device test privileged); § 905.07 (political vote privileged); § 905.08 (trade secrets privileged); § 905.09 (law enforcement records privileged); § 905.10 (identity of informer privileged); § 968.26 (John Doe proceeding confidential); § 968.27-.33 (interception and disclosure of wire or oral communications prohibited except when authorized).


125. Neb. Rev. Stat. §§ 20-201 to -211 (Supp. 1980); R.I. Gen. Laws § 9-1-28.1 (Supp. 1981). It would be premature to draw any conclusions from these two jurisdictions. At this writing no reported cases cite these statutes. At this writing no reported cases cite these statutes.

126. See infra text accompanying notes 128-31.

127. See infra text accompanying notes 132-33.


book generally laudatory (for example, the false statement that Spahn was a war hero), the court granted relief based on material and substantial falsification as well as commercial misappropriation.\textsuperscript{131}

Utah's privacy statute\textsuperscript{132} is identical in most material respects to New York's, but Utah courts construe it strictly. The Utah statute applies only to actual advertising or sales promotion of collateral commodities. It does not apply to the communications media.\textsuperscript{133} Because of the concentration of the media in New York, it is likely that the courts there found it expedient to accommodate false light claims under the appropriation statute on a case-by-case basis. Had they not done so, there would have been pressure on the legislature to amend the statute.

2. Considerations for Legislative Action

If Wisconsin courts refrain from recognizing false light claims, it is still possible that the legislature will amend the statute to include such a provision. Assemblyman Thomas Rogers proposed one false light bill in 1979\textsuperscript{134} which would have required all plaintiffs to prove that the defendant acted with knowing or reckless disregard of the truth. The 1981 version of his bill applied this standard only to suits brought by public personalities.\textsuperscript{135} The press vehemently opposed both these bills and both died in committee.\textsuperscript{136} But, like the privacy bill itself, this false light legislation may someday succeed after several trial runs.\textsuperscript{137}

Opponents of false light legislation and scholars who doubt its efficacy raise at least four objections to it as a tort action: (1) it would promote a high volume of claims; (2) these claims tend to be trivial; (3) alternative remedies


\textsuperscript{132} UTAH CODE ANN. §§ 45-3-1 to -6 (Supp. 1981).

\textsuperscript{133} See generally Jeppson v. United Television, Inc., 580 P.2d 1087 (Utah 1978); Donahue v. Warner Bros. Pictures Distributing Corp., 2 Utah 2d 256, 272 P.2d 177 (1954) (for the only two reported cases construing the Utah statute or its predecessor).

\textsuperscript{134} Wis. A.B. 1224 (1979).

\textsuperscript{135} Wis. A.B. 40 (1981).

\textsuperscript{136} See P. Salsini, supra note 13, at 21-22.

\textsuperscript{137} See supra text accompanying notes 72-94.
already exist; and (4) it would have a chilling effect upon freedom of the press.

a. High Volume of Claims

As for the predicted flood of litigation, the same objection was lodged against the 1977 privacy bill, but during the four years following that bill's passage only four reported Wisconsin cases cite the statute. Moreover, only one of these cases involved the press as a party, and in that case it was the newspaper which brought suit. This scarcity of cases might validate the contention that the bill was not needed in the first place. It could also indicate that most complaints were settled out of court or that the public is not yet claims conscious with regard to privacy in general or this statute in particular.

138. See P. Salsini, supra note 13, at 14.
139. Joel v. Various John Does, 499 F. Supp. 791 (E.D. Wis. 1980) (appropriation of singer's name and picture on T-shirts and like merchandise actionable under statute); Hirsch v. S.C. Johnson & Sons, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979) (appropriation of athletic director's nickname "Crazylegs" protected by statute and common law); Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 279 N.W.2d 179 (1979) (disclosure of public arrest records not prohibited under statute); Maynard v. City of Madison, 101 Wis. 2d 273, 304 N.W.2d 163 (Ct. App. 1981) (statute does not make city immune from suit by informer whose identity was disclosed).
141. See J. Eakins, supra note 13, at 251-52.
142. Id. at 185-86, quoting the editor of the Milwaukee Journal who testified concerning the proposed privacy legislation that "even without a law the Journal suffers from many claims that the paper has invaded the public's privacy." Yet a check by this author of the Milwaukee County Circuit Court records for the period of August 1978 through July 1982 revealed no large claims (over $1000) filed against the Journal Company alleging invasion of privacy. See also P. Salsini, supra note 13, at 17-19. Salsini located two lawsuits filed in Dane County, Wisconsin, Circuit Court. One memorandum decision dismissed a claim against the Milwaukee Sentinel newspaper because the statute of limitations had run. Hornick v. YWCA, No. 81-CV-2991 (Cir. Ct. Dane Co. filed Oct. 12, 1981). The other suit charged a private individual with invasion of privacy for listing the plaintiff's address in a "lonely hearts" want ad. This case was settled out of court. Zimmer v. Gentz, No. 79-CV-5259 (Cir. Ct. Dane Co. Oct. 10, 1979). It is interesting to note that neither of these complaints explicitly referred to Wis. Stat. § 895.50 (1979), presumably because of the historical legislative disfavor of false light. Both made only general reference to invasion of privacy although in the case against the Sentinel, the plaintiff did allege that the newspaper profile put her in a "bad light . . . as a person who engages in bizarre behavior." Plaintiff's Amended Complaint at 2, Hornick v. YWCA, No. 81-CV-2991 (Cir. Ct. Dane Co. filed Oct. 12, 1981).
143. See Brody, supra note 106, at 11.
b. Trivial Claims

The argument against false light involves not only the quantity of cases which might arise, but also the quality. Some view false light as the most “unbeatably trivial” category of a trivial tort. They argue that if a statement is not outrageous enough to be defamatory, no redress need be allowed under any other theory. Also, if privacy is “the right to be let alone,” then the sincere victim of an unwarranted invasion will not want to invite additional publicity by bringing a lawsuit. Professor Kalven asserts that “privacy will recruit claimants inversely to the magnitude of the offense to privacy involved.” He warns that “those who will come forward with privacy claims will very often have shabby, unseemly grievances and an interest in exploitation.”

c. Alternative Remedies

Even where there is a legitimate claim, at least two other remedies for hurt feelings and reputation already exist under common law. When Warren and Brandeis wrote their article there was no independent tort action for infliction of mental distress. The 1963 case of Alsteen v. Gehl marked the acceptance of such an action in Wisconsin, provided the plaintiff can prove four factors: (1) that the defendant’s conduct was intentional; (2) that the conduct was extreme and outrageous according to community standards; (3) that the conduct was a cause in fact of the injury; and (4) that the plaintiff suffered an extreme disabling emotional response and was unable to function in other relationships. Wisconsin does not apply the recklessness standard to this tort, and when the conduct of the defendant is merely negligent, no recovery can be had for mental distress

144. Kalven, supra note 26, at 337.
145. Id. at 340.
146. Id. at 338.
147. Id. at 339.
149. 21 Wis. 2d 349, 124 N.W.2d 312 (1963).
150. Id. at 359-61, 124 N.W.2d at 318.
151. Id. at 357-58, 124 N.W.2d at 317.
alone in the absence of physical injury. These are difficult elements for the plaintiff to prove even in a flagrant case. The woman in Yoeckel v. Samonig, for example, did not allege any physical consequences of the exhibition of her picture, so she would have to have proved a specific intent to inflict emotional distress in order to have prevailed under this theory.

After Alsteen the Wisconsin Supreme Court did grant relief in Slawek v. Stroh to a woman who alleged that the admitted father of her illegitimate child invaded her privacy by harassing phone calls and visits. That court, writing in 1974, said that while Wisconsin does not recognize a cause of action for invasion of privacy, the plaintiff could recover for intentional infliction of emotional distress.

In a false light case the chief harm suffered will likely be the same hurt feelings, but given the present state of the law, it would be easier for the plaintiff to collect parasitic damages stemming from invasion of privacy than to proceed on a direct theory of infliction of mental distress. The Wisconsin privacy statute allows the additional standard of reckless conduct, and it also does not require proof of physical injury, even when negligent conduct is involved.

Some false light victims also have an alternate remedy in the ancient tort of defamation. Wisconsin has recognized a cause of action for libel and slander since the adoption of the Constitution of 1848, and two statutes now on the books recognize defamation as both a tort and a misdemeanor. Just as false light combines with other categories of privacy, it also extends into the field of defamation, for both torts redress false statements. Yet there is a difference in emphasis. The Restatement (Second) of Torts defines a defamatory statement as one which "tends so to harm the reputation of

153. 272 Wis. 430, 75 N.W.2d 925 (1956).
155. Id. at 314-16, 215 N.W.2d at 20-21.
156. Wis. Stat. § 895.05(2)(g) (1979).
159. Wis. Stat. §§ 942.01, .03 (1979).
another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."\textsuperscript{160} False light is described as a statement "highly offensive to a reasonable person."\textsuperscript{161} Thus, defamation is facially more outrageous and is gauged in relation to the effect on one's occupation or on third persons. The standard for false light relates more to its effect on the plaintiff himself as gauged by the reasonable person standard. A statement putting one in a false light is offensive not only because it is untrue, but also because it engenders unsought publicity about some aspect of the plaintiff's life.

Almost all defamatory communications would also put a person in a false light; but not all communications actionable as false light need be defamatory. In the same case either action or both will very often lie; so, although there can be only one recovery for a wrong,\textsuperscript{162} the plaintiff may proceed on alternate theories.\textsuperscript{163} Commentators once believed that false light would be the preferred claim because it was a tort without a profile and, hence, was not hampered by the rigid rules of pleading and privileges encrusted upon defamation.\textsuperscript{164} Prosser even wondered whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?\textsuperscript{165}

Courts and legislatures, however, soon began to impose the same requirements on false light actions as on defamation suits.\textsuperscript{166}

\begin{itemize}
\item \textsuperscript{160} Restatement (Second) of Torts § 559, at 156-58 (1977).
\item \textsuperscript{161} Id. § 652E, at 394-400 (1977).
\item \textsuperscript{162} W. Prosser, supra note 15, § 48, at 299-301; Wade, supra note 63, at 1124.
\item \textsuperscript{163} See Wade, supra note 63, at 1107.
\item \textsuperscript{164} See Kalven, supra note 26, at 339-40; Wade, supra note 57, at 1121.
\item \textsuperscript{165} Prosser, supra note 4, at 401.
\item \textsuperscript{166} See, e.g., Khaury v. Playboy Publications, Inc., 430 F. Supp. 1342, 1345
\end{itemize}
The Wisconsin Legislature has also shown an intent to treat defamation and privacy equally. The statute of limitation is the same for both — two years when intentional conduct is involved.\(^{167}\) Also, section 895.50 allows "defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media."\(^{168}\) These privileges are presumably to be imported from the law of defamation since there is no common law of privacy in Wisconsin.

Still, there are two differences. Privacy is a claim which survives a wrongful death, while defamation does not.\(^{169}\) Also, before filing a defamation suit against a media defendant, a Wisconsin claimant must demand a retraction.\(^{170}\) If the retraction is forthcoming it can serve as a defense or a mitigating factor for the defendant. In some states retraction statutes also apply to false light actions.\(^{171}\)

This like treatment of both torts has come about because the majority subscribes to Prosser's view that defamation and false light both harm the same interest in reputation.\(^{172}\) If privacy were seen as protecting a separate interest, such as "inviolate personality," perhaps the results would have been different.\(^{173}\) In regard to retraction statutes, for example, once a person has been thrust into the public spotlight by

(S.D.N.Y. 1977) (applying the single publication rule to invasion of privacy claims arising out of mass communications); Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, —, 483 P.2d 34, 44, 93 Cal. Rptr. 866, 876 (1971) (holding that the same procedural prerequisites should apply to defamation and false light). See also FED. R. Civ. P., which no longer includes special rules for pleading defamation suits. Formerly, a plaintiff was required to set forth the interpretation, inducement, innuendo and colloquium of a statement which was not defamatory on its face. See W. PROSSER, supra note 15, § 111, at 746-49. Cf. Wis. STAT. § 802.03(6) (1979) ("In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally.").

168. Id. § 895.50(3).
169. Id. §§ 895.01(1), .02.
170. Id. § 895.05(2).
172. Prosser, supra note 4, at 400. See also RESTATEMENT (SECOND) OF TORTS § 559, at 156-58 (1977); Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1274-75 (1976); Wade, supra note 63, at 1120.
173. See Bloustein, supra note 45, at 981; Nimmer, supra note 46; Warren & Brandeis, supra note 18, at 197; Comment, Privacy, Defamation, supra note 46, at 926.
false publicity, no retraction can mitigate that harm. Even Prosser recognizes that there are some legitimate false light claims that would not be cognizable under defamation.\textsuperscript{174} It is these claims that are now without remedy under Wisconsin law. The possibility of their occurrence raises the ultimate issue of whether the threat to freedom of the press posed by allowing an action for false light is sufficiently outweighed by the potential benefit to citizens who might invoke such protection.

\textit{d. Chilling Effect}

The most weighty objection to false light legislation is that it would result in unnecessary self-censorship and prior restraint on the part of the press. For this reason the Wisconsin news media have been vigilant in attempting to prevent any such incursion on their first amendment freedom. They say that the threat of suits by newsworthy people and of costly settlements could have a chilling effect on the reporting of public affairs.\textsuperscript{175}

During the legislative hearings on section 895.50 and the subsequent false light bills, allegations were made that these measures were being supported by legislators because they or their influential constituents had been criticized by the press.\textsuperscript{176} These people would not be likely to gain any relief from a false light law since a line of cases in the Supreme Court, which began with \textit{New York Times Co. v. Sullivan},\textsuperscript{177} requires that a public figure must prove that a statement was made with “actual malice”\textsuperscript{178} in order for liability to attach. This “public figure” category includes any government employee acting in his official capacity.\textsuperscript{179} It can also include anyone who has become the center of a public contro-

\textsuperscript{174. Prosser, supra note 4, at 400-01.}
\textsuperscript{175. See J. Eakins, supra note 13; P. Salsini, supra note 13, at 14-16.}
\textsuperscript{176. See J. Eakins, supra note 13, at 182.}
\textsuperscript{177. 376 U.S. 254 (1964).}
\textsuperscript{178. \textit{Id.} at 279-80, where actual malice is defined as “knowledge that [a statement] was false or [was made] with reckless disregard of whether it was false or not.” This is to be distinguished from “common law malice,” which means “either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff’s rights.” \textit{Cantrell v. Forest City Publishing Co.}, 419 U.S. 245, 252 (1974).}
\textsuperscript{179. See Rosenblatt v. Baer, 383 U.S. 75 (1966) (official was supervisor of municipal ski resort).}
versy.\textsuperscript{180} One plurality opinion, \textit{Rosenbloom v. Metromedia, Inc.},\textsuperscript{181} shifted the focus from the status of the plaintiff by applying the \textit{New York Times} standard to all "communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."	extsuperscript{182} The problem with this status test is that unless the plaintiff is a public employee or a candidate for office it is uncertain into which class he will fall. Under the Burger Court the category of "public figure" has been somewhat narrowed. In \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{183} the plaintiff was a lawyer who had been active in political causes when a magazine accused him of leading a conspiracy to discredit the police. Yet the Court decided that he had not injected himself into this particular controversy; therefore, as a private person he only had to prove negligence on the part of the publisher.\textsuperscript{184} In \textit{Time, Inc. v. Firestone}\textsuperscript{185} a much publicized Palm Beach socialite, who held two press conferences during the course of her divorce proceedings, won a suit against a magazine which erroneously reported that her husband was granted a divorce on the grounds of adultery. According to Justice Rehnquist's majority opinion, she was still a private person because, although the divorce trial aroused widespread public interest, its outcome did not affect the public at large.\textsuperscript{186}

Two Wisconsin defamation cases illustrate a similar uncertainty in this state as to how to classify a plaintiff. In \textit{Schaefer v. State Bar}\textsuperscript{187} a widow complained to various newspapers about the difficulties she was having in probating her husband's sizeable estate. The State Bar countered

\textsuperscript{180} Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (athletic director paid by private funds found to be public personality when accused of fixing football game).

\textsuperscript{181} 403 U.S. 29 (1971) (Brennan, J.).

\textsuperscript{182} Id. at 44. The majority of the Supreme Court never accepted the \textit{Rosenbloom} test. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974). But see \textit{supra} notes 106-07 and Wis. Stat. \textsection 895.50(2)(c) (1979), which uses the "matter of public concern" test to determine whether a disclosure is privileged.

\textsuperscript{183} 418 U.S. 323 (1974).

\textsuperscript{184} Id at 351-52.

\textsuperscript{185} 424 U.S. 448 (1976).

\textsuperscript{186} Id. at 454-55.

\textsuperscript{187} 77 Wis. 2d 120, 252 N.W.2d 343 (1977).
by defending the lawyers involved in a pamphlet which the widow claimed defamed her. In deciding the case Chief Justice Beilfuss said that "[b]ecause Mrs. Schaefer has made this a public issue or matter of public concern, she must prove actual malice or a reckless or careless disregard for the truth."188

Yet in the more recent *Denny v. Mertz*189 case, an attorney who provided information to a number of publications in connection with a corporate management dispute was not found to be a public person. The Wisconsin Supreme Court said that "the record is clear that Denny’s attempts to change Koehring management were motivated by his desire to protect his substantial investment in Koehring stock, rather than to affect the way that corporations are governed."190 According to that decision, two tests should be used to determine "whether a defamation plaintiff may be considered a public figure": (1) whether there is a controversy of public nature, impact and interest; and (2) whether the plaintiff has "voluntarily injected himself into the controversy so as to influence the resolution of the issues involved."191 A crucial consideration of the second test is whether the plaintiff has access to the media affording him an opportunity to rebut the defamation and whether by utilizing this access the plaintiff has assumed the risk of false reportage.192

The majority concluded that Denny did not fulfill these criteria for even a limited purpose. But in a dissenting opinion Justice Abrahamson argued that the court had adopted a "too narrow interpretation of the concept of public figure."193 She pointed out that approximately 11,500 shareholders own Koehring stock and the corporation employs nearly 11,000 people at twenty-three plants. "On how many thousands must the controversy have an impact in order for

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188. *Id* at 125, 252 N.W.2d at 346.
190. *Denny*, 106 Wis. 2d at 650, 318 N.W.2d at 148.
191. *Id* at 649-50, 318 N.W.2d at 147.
192. *Id* at 650, 318 N.W.2d at 148.
193. *Id* at 665, 318 N.W.2d at 155 (Abrahamson, J., dissenting).
the majority to consider the matter a public controversy?" she asked. Thus, in Denny the majority opinion indicates that the present court still adheres to vestiges of the Rosenbloom public interest test, but will follow the lead of the United States Supreme Court in narrowly delimiting the public figure status in defamation cases.195

The majority in Denny also considered the status of the defendant. They adopted the Gertz standard (negligence) for private persons defamed by the media, but refused to extend the same constitutional protections to nonmedia defendants. Instead, under Denny the private defendant is subject to the common-law standard of strict liability modified by certain privileges.196 Justice Abrahamson criticized this rule as one which would "create a privileged industry" and "a cumbersome route [in many cases] to the application of a negligence standard." Now it appears that in addition to adjudicating the public versus private plaintiffs dilemma, Wisconsin courts must also wrestle with whether to classify defendants as media or nonmedia.

The United States Supreme Court has demonstrated a willingness to apply these same defamation tests to false light cases. In Time, Inc. v. Hill,199 which arose under the New York privacy statute, the plaintiff sued Life magazine for using his name in an article about a new play. The play was based on an ordeal the Hill family suffered when three escaped convicts held them hostage in their home overnight. Although basically true, the play was embellished with incidents of violence and heroism. Mr. Hill had never sought to connect himself with the play, and had even moved his family to another state to put the memory of the incident behind them. When the Life article revealed the Hills to be the models for the characters, Mr. Hill brought suit. The New York Court of Appeals upheld a damage award based on the

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194. Id. at 667, 318 N.W.2d at 156 (Abrahamson, J., dissenting).
196. Denny, 106 Wis. 2d at 661, 318 N.W.2d at 153.
197. Id. at 673, 318 N.W.2d at 159 (Abrahamson, J., dissenting).
198. Id. at 674-75, 318 N.W.2d at 159 (Abrahamson, J., dissenting).
199. 385 U.S. 374 (1967).
false elements in the account.200 The Supreme Court reversed and remanded because the jury instructions did not require a finding of actual malice.201 Although the Hills were private people who shunned the public eye, the event itself was deemed sufficiently newsworthy to preclude liability on a showing of mere negligence.

A few years later in Cantrell v. Forest City Publishing Co.,202 a mother and son sued a newspaper and reporter for a story purporting to describe the impact on their family of the loss of their husband and father some months before in a widely publicized bridge collapse. The reporter portrayed Mrs. Cantrell in unflattering terms even though he had never seen or interviewed her at the time in question. Relying on the Gertz formula, Justice Stewart determined that the Cantrells were not public figures for any purpose; and since the statements putting them in a false light were made with knowing or reckless disregard, the plaintiffs were entitled to compensatory and punitive damages.203

In Cantrell the plight of the family of the disaster victim was arguably a matter of public concern204—albeit somewhat outdated after eight months. The return to the status test in that case raises the question of whether the newsworthy test of Time, Inc. v. Hill205 still applies in a false light action. Gertz indicates that it no longer applies in a defamation suit.206 No later privacy cases dealing with this issue have come before the Supreme Court207 and the lower courts

201. 385 U.S. at 394-96.
203. Id. at 250-53.
204. Id. at 255 (Douglas, J., dissenting).
205. 385 U.S. 374, 387-88 (1967) (holding that "the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.").
206. 418 U.S. at 332-48 (rejecting the public interest test of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)). It should be remembered that this same "newsworthy" test as a privilege to public disclosure was incorporated into Wis. Stat. § 895.50(2)(c). See supra note 106 and accompanying text.
207. It should be noted that Time, Inc., and Cantrell are right-to-privacy cases grounded in tort. The action in Time, Inc. was predicated on a state statute, while Cantrell reached the federal courts in forma pauperis as a diversity action. The two
are split on the matter. But under either test it is clear that the press now enjoys more protection for negligent falsehoods than it had under the common-law rule of strict liability.

In both *Time, Inc. v. Hill* and *Cantrell* the plaintiffs objected not only to the falsehoods, but also to the violation of their "right to be let alone." The acts of heroism ascribed to the plaintiff in *Time, Inc.* would not be clearly offensive to most people even if untrue. They were offensive to Mr. Hill because they invaded the sphere of privacy he had drawn about himself. The gravamen of that false light offense depended not so much on what was said, but that anything at all was said about an area of Mr. Hill's life he reasonably expected to keep private.

e. Guidelines

To date, no Wisconsin civil case has dealt with standards for determining what a reasonable expectation of privacy might be, but the press and other interested parties could discover analogous guidelines in the criminal procedure cases. In *State v. Fillyaw*, for example, Justice Coffey found that the defendant did not have a reasonable expectation of privacy in his girlfriend's apartment and upheld his
conviction for her murder based on evidence seized there. The opinion relies on the two-pronged test of *Katz v. United States*\(^\text{211}\) which asks: (1) whether the individual has demonstrated an actual, subjective expectation of privacy, and (2) whether this subjective expectation is one that society is prepared to recognize as reasonable.\(^\text{212}\) As noted above,\(^\text{213}\) a false light statement does not have to be of an intimate nature, but this is frequently an aggravating factor.

Despite these privileges and guidelines which favor the press more than any other profession or business under tort law, the media still oppose false light legislation because of their fear of exorbitant judgments. In this field even small settlements can take their cumulative toll. While insurance is becoming more common,\(^\text{214}\) small newspapers claim they cannot afford coverage.\(^\text{215}\)

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\(211\) 389 U.S. 347 (1967). The Wisconsin Supreme Court also considered the elements discussed in *Rakas v. Illinois*, 439 U.S. 128, 140-48 (1981) which are relevant to the determination of whether one has a legitimate expectation of privacy. The court said:

[this summary] may be useful to courts in determining the standing of defendants in other cases, although we point out this list of elements is neither controlling nor exclusive:

1. Whether one had a property interest in the premises;
2. Whether one is legitimately (lawfully) on the premises;
3. Whether one had complete dominion and control and the right to exclude others;
4. Whether the person took precautions customarily taken by those seeking privacy;
5. Whether the property was put to some private use;
6. Whether the claim of privacy is consistent with historical notions of privacy.

104 Wis. 2d at 711-12 n.6, 312 N.W.2d at 801 n.6.

In a concurring opinion Justice Abrahamson argued that:

[a] person can have more than one dwelling and a reasonable expectation of privacy in each dwelling. Also a person can have a reasonable expectation of privacy in a place other than his own dwelling. A person's privacy can be protected in a hotel room, a union hall, a phone booth, a business office, a friend's apartment, a footlocker, and even a taxicab.

*Id.* at 733-34, 312 N.W.2d at 812 (Abrahamson, J., concurring) (citations omitted).

\(212\) 389 U.S. at 361 (Harlan, J., concurring).

\(213\) *See supra* note 104 and accompanying text.

\(214\) See N.Y. Times, Jan. 21, 1982, at C17, col. 5, which reports that Viking Penguin became the first publisher to provide liability insurance for original book authors. This policy covers invasion of privacy claims among other things.

\(215\) *See J. Eakins, supra* note 12, at 184-85.
f. Remedies

Under the present section 895.50 a successful plaintiff is entitled to any of three remedies:

(a) equitable relief to prevent and restrain such invasion, excluding prior restraint . . . ;
(b) compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and
(c) a reasonable amount for attorney fees.\textsuperscript{216}

Compensatory damages are not limited to pecuniary loss alone;\textsuperscript{217} the plaintiff may also recover for such things as emotional distress or personal humiliation, but damages will "not be presumed in the absence of proof."\textsuperscript{218}

It is probable that a prime area of contention concerning this statute will involve the possibility of recovering punitive damages. As noted in the legislative history, a clause allowing exemplary damages was deleted from the 1975 version of the bill.\textsuperscript{219} Some writers, including an architect of the 1977 law,\textsuperscript{220} believe that this precludes any punitive damage award under the present statute. When introduced in 1977, however, this bill was silent on the subject\textsuperscript{221} and the statute as enacted is also silent. Whether the 1975 manifestation of legislative intent is too remote to influence the interpretation of the present law will be a matter for the courts to determine. In general, however, when a tort law grants a statutory remedy, the plaintiff is limited to that remedy. For example, the Wisconsin court has declined to award punitive damages in a wrongful death action because the wrongful death statute does not explicitly mention them.\textsuperscript{222} A few states, however, construe similar statutes to allow for exemplary damages.\textsuperscript{223} It is probable that the Wisconsin court will follow the line of reasoning it applied to the wrongful death statute when it interprets section 895.50, which only

\textsuperscript{216} Wis. Stat. § 895.50(1) (1979).
\textsuperscript{217} Id. § 895.50(4).
\textsuperscript{218} Id.
\textsuperscript{219} Wis. A.B. 232 (1975). \textit{See supra} note 80 and accompanying text.
\textsuperscript{220} Brody, \textit{supra} note 106, at 21.
\textsuperscript{221} Wis. A.B. 216 (1977).
\textsuperscript{222} Wangen v. Ford Motor Co., 97 Wis. 2d 260, 315, 294 N.W.2d 437, 464-65 (1980) (construing \textit{Wis. Stat. §§} 895.03-.04 (1979)).
grants compensatory damages.\textsuperscript{224} Even if punitive damages were allowed in a privacy action, recovery for both public and private persons would require a showing of "actual malice" as decreed by the \textit{Gertz}\textsuperscript{225} and \textit{Cantrell}\textsuperscript{226} decisions.

With presumed damages and possibly punitive damages excluded by this statute, media defendants would probably be faced with lower judgments under a privacy action for false light than under the alternative remedies of infliction of mental distress or defamation. If vindication rather than a large money judgment is his objective, a plaintiff still might prefer to bring a privacy action because section 895.50 allows an award of attorney fees\textsuperscript{227}—a recovery not permitted in any other tort action in Wisconsin. If the defendant should prevail, however, the court must determine if the action was frivolous. If so, fees and costs may be awarded to the defendant.\textsuperscript{228}

\textbf{IV. Conclusion}

Based on this study it is apparent that false light is not the threat to fundamental freedom of the press that its critics fear, but neither is it the panacea for prominent people wounded by press criticism that its advocates want. At this stage the fears of the press seem to be somewhat exaggerated, while the claims of worthy plaintiffs seem to be few and far between. Merely because Wisconsin takes the extreme minority position on false light is not sufficient reason

\textsuperscript{224} \textit{Wis. Stat.} \textsection 895.50(1)(b) (1979).
\textsuperscript{225} 418 U.S. 323, 350 (1974) (requiring public figures to prove actual malice in all cases and requiring all plaintiffs to prove actual malice to collect punitive damages offers protection to the media). But this test has also led to another threat to press freedom. \textit{See} \textit{Herbert v. Lando}, 441 U.S. 153 (1979) (ruling that public figures must be given access to the information reporters and editors had gathered on the article or broadcast in question). \textit{See also} \textit{Downing v. Monitor Publishing Co.}, 120 N.H. 383, --, 415 A.2d 683, 686 (1980) (stating that if a newspaper would not reveal its sources, it could not be presumed to have any defenses). \textit{But see} \textit{Calero v. Del Chemical Corp.}, 68 Wis. 2d 487, 510, 228 N.W.2d 737, 750 (1975) (requiring that a private person prove only common-law malice to collect punitive damages in an action against a nonmedia defendant).
\textsuperscript{226} 419 U.S. 245 (1974).
\textsuperscript{227} \textit{Wis. Stat.} \textsection 895.50(1)(c) (1979).
\textsuperscript{228} \textit{Id.} \textsection 895.50(6). This provision exists in addition to \textit{Wis. Stat. Ann.} \textsection 809.25(3) (West Supp. 1981-1982) (costs upon frivolous appeals) and \textit{Wis. Stat.} \textsection 814.025 (1979) (costs upon frivolous claims and counterclaims).
in itself to rush to plug the statutory gap. It is arguable that Wisconsin courts have the authority to recognize the false light tort based on a common-law recognition of precedents in other jurisdictions. If a particularly worthy claimant should appear, this would be preferable to a repeat of the Yoeckel situation. Meanwhile, lawmakers have the luxury of allowing the states of Nebraska and Rhode Island with their false light statutes to serve as laboratories for observing the practical results of enacting such a law. This will give the legislature an opportunity to evaluate and balance societal interests based on actual, not hypothetical, data before taking action.

As the symbolic year of 1984 approaches, the right of privacy as conceived nearly a century ago by Warren and Brandeis is a subject of increasing concern to citizens of the United States. The mechanical devices Warren and Brandeis feared were only bulky cameras. Today, microtechnology and computerized data banks have expanded the means of invading privacy while making those means more invisible and, thus, more insidious. The country is also at the threshold of fundamental change in the communications industry. Newspapers are merging or shutting down, while channels on the airwaves are expanding. If these developments result in increased threats to individual privacy,

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229. See United States v. Twelve 200 Foot Reels of Film, 413 U.S. 123, 127 (1972), where Chief Justice Burger warns of this process when he says:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

230. See supra notes 77-78 and accompanying text.

231. See NEB. REV. STAT. §§ 20-201 to -211 (Supp. 1980).


233. See Comment, The Right to Privacy in Nebraska, 13 CREIGHTON L. REV. 935, 945 (1980) (concluding that "[t]he false light action created by section 20-204, when considered together with the existing actions for defamation, adds little to a Nebraska plaintiff's remedies").

234. See A. MILLER, supra note 65, at 184 (calling false light "the only one of Dean Prosser's categories that even remotely suggests the type of sensitive analysis that is necessary to come to grips with the range of subtle injuries that can be inflicted in an information-based society").
the legislature will have to enlarge the legal remedy for invasion now available in Wisconsin.

JACQUELINE HANSON DEE