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Warren Spahn's Legal Legacy: The Right to Be Free from False Praise

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WARREN SPAHN’S LEGAL LEGACY: THE RIGHT TO BE FREE FROM FALSE PRAISE

Ray Yasser*

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First we'll use Spahn, then we'll use Sain,  
Then an off day, followed by rain.  
Back will come Spahn, followed by Sain,  
And followed, we hope, by two days of rain.¹

INTRODUCTION

Warren Spahn won more games than any left-handed pitcher in the history of baseball. He is in Baseball’s Hall of Fame. Spahn leaves a lasting legacy as a ballplayer. But few, if any, even know about his lawsuit. This article chronicles Spahn’s legal legacy – Spahn’s lawsuit is like no other case in the history of American law.

Spahn was moved to litigation by false praise. Imagine that. Spahn brought a lawsuit seeking damages and to enjoin the sale of his biography, which painted him in a false, but favorable light. His false light privacy case, based on false praise, is unique. The case raises fundamental issues about the proper reach of tort litigation – is a person legally “harmed” by false praise?

I. THE LIFE OF WARREN SPAHN

A. The Real Warren Spahn Story

Warren Spahn was immortalized by the phrase “Spahn and Sain and pray for rain.”² He was the winningest left-handed pitcher of all time and, arguably, the best as well.³ Spahn won 363 games in his major league career, the most for all lefties and fifth among all pitchers.⁴ Spahn won 20 or


². Id.

³. Id.

more games in a season 13 times, second only to Cy Young’s 16, ranking as the most in National League History. He pitched 382 complete games, 5,264 career innings, and 200 or more innings in 17 seasons – all National League records. He led the National League with 2,853 strikeouts and pitched 63 shut-outs and two no-hitters. He also hit 35 home runs – another National League record, an astonishing figure for a pitcher. Furthermore, he was the recipient of the Cy Young Award in 1957 and the Lou Gehrig Memorial Award in 1961. Additionally, he won three ERA titles was named to 14 All Star teams, led the National League in wins (eight seasons), and led the National League in strikeouts for four
consecutive years,\textsuperscript{17} and pitched in three World Series.\textsuperscript{18}

Born in Buffalo, New York on April 23, 1921, Spahn was one of six children.\textsuperscript{19} He was originally a first baseman on his high school team, but the team already had an all-city player at that position, so he switched to pitching.\textsuperscript{20} He excelled as a pitcher, and in 1940, at the age of 19, he signed with the Boston Braves for $80 a month.\textsuperscript{21} He was invited to spring training after he won 19 games in the minors in 1941.\textsuperscript{22} In 1942, Spahn was sent back down to the minors by manager Casey Stengel allegedly after he refused to brush back\textsuperscript{23} Pee Wee Reese in an exhibition game.\textsuperscript{24} Stengel deemed this the worst mistake he ever made after Spahn went 17-13 with a 1.96 ERA at Hartford that season while the Braves finished in seventh place.\textsuperscript{25}

While it is often said that Spahn took a break from the game in 1943 when the Army drafted him to serve in World War II, he actually pitched his way through the service.\textsuperscript{26}

\begin{itemize}
  \item \textsuperscript{17} \textit{Id.}
  \item \textsuperscript{19} \textit{ESPN Classics, supra note 1.}
  \item \textsuperscript{20} \textit{Id.}
  \item \textsuperscript{21} \textit{Id.} Warren Spahn's son, Greg Spahn, reported that his father's family was so poor that when Warren received a partial athletic scholarship to Cornell University, he had to turn it down since he would be unable to finance the rest of his schooling. Interview with Greg Spahn in Tulsa, Okla. (June 28, 2007). His recollection of Spahn's starting salary was that it amounted to $56/month. \textit{Id.}
  \item \textsuperscript{22} \textit{ESPN Classics, supra note 1.}
  \item \textsuperscript{23} "Brushback" is a term of art in baseball. It denotes a pitch that is intentionally thrown close to the batter. The effect is to move the batter away from the plate. It also intimidates the batter. SportsPool.com, MLB Baseball Terms: Baseball Terminology Explained, http://www.sportspool.com/baseball/terms.php (last visited June 25, 2007).
  \item \textsuperscript{24} See, e.g., \textit{ESPN Classics, supra note 1.} Most authorities report this account even though it seems anecdotal.
  \item \textsuperscript{25} \textit{Id.}
Private Spahn was assigned to the 276th Engineer Combat Battalion, fought in the Battle of the Bulge, and was primarily stationed in Remagen, Germany working to rebuild the Ludendorff Bridge across the Rhine River. Spahn accepted a commission as a second-lieutenant in June 1945.

In 1946, Spahn returned to the Braves and earned his first Major League win at age 25. After a modest 8-5 season in 1946, Spahn was hailed as one of baseball’s greatest pitchers in 1947 with a 21-10 record and a league-leading 2.33 ERA. He only got better from there.

Spahn helped pitch the Braves to a 1957 World Series championship and National League pennants in 1948 and 1958. On September 16, 1960, he pitched the first no-hitter attribute his lack of more wins in the major league to the time he spent serving in the Army.

27. U.S. Army Corps of Engineers, supra note 26. While stationed at Remagen, he was wounded in the neck by shrapnel ("only a scratch" according to Spahn) which earned him a Purple Heart. Most authorities report that his wound was in his foot, but his son corrected this misconception and said the artillery was lodged in the back of Spahn’s neck. Interview with Greg Spahn, supra note 21. Spahn’s battalion, the 276th, received a Presidential Unit Citation for its actions at Remagen. He is also credited with receiving the Bronze Star by most accounts. See, e.g., id.; Gary Bedingfield’s Baseball in Wartime, Warren Spahn, http://www.garybed.co.uk/Player_Bios/spahn_warren.htm (last visited June 6, 2007); CBS Sportsline.com, supra note 7; Access My Library, T.J. Quinn, Road to 300, ACCESS MY LIBRARY, Sept. 1, 2003, http://www.accessmylibrary.com/comsp2/summary-0286-4180966_ITM (last visited June 6, 2007); Wisconsin Sports Development Corporation (WSDC), Wisconsin Athletic Hall of Fame, http://www.sportsinwisconsin.com/wahf/index.php?category_id=976&subcategory_id=1528 (last visited June 6, 2007); The Baseball Hall of Fame, supra note 7; Bbaseball-reference.com, supra note 26. This was one of his points of contention in his lawsuit. See infra note 48. The book made him out to be a war hero, which he insisted he was not, but his son reported that Spahn, in fact, was the recipient of two Bronze Stars and a Purple Heart which are on display at The Ivan Allen Jr. Braves Museum & Hall of Fame at Turner Field in Atlanta, Georgia. But Greg did confirm that his father did not consider himself a hero. Spahn reserved that appellation for those who lost their lives. Interview with Greg Spahn, supra note 21.


29. CBS Sportsline.com, supra note 7.

30. ESPN Classics, supra note 1.

31. Id.

32. CBS Sportsline.com, supra note 7.
of his career against the Philadelphia Phillies.\textsuperscript{33} The following year, five days after his 40th birthday, he hurled a second no-hitter against the Giants.\textsuperscript{34} After slumping to 18-14 in 1962, Spahn still led the National League in complete games and had a 3.04 ERA. In 1963, at age 42, he tied his career-best record with a 23-7 season.\textsuperscript{35} Spahn's career subsequently declined, and he was traded to the New York Mets during the 1964 off-season; he won four and lost 12 games for the Mets in 1965.\textsuperscript{36} After being released from the Mets in July, Spahn added three more wins for the San Francisco Giants before once again being released.\textsuperscript{37}

Spahn pitched briefly in Mexico and in the minors before finally retiring at age 46 in 1967.\textsuperscript{38} When asked later about his departure from baseball, Spahn once remarked, “I didn’t quit; baseball retired me.”\textsuperscript{39} He is also quoted as saying, “I wanted to pitch until they tore the uniform off me, and that’s about what happened.”\textsuperscript{40}

Spahn finished with a career record of 363-245 and a 3.09 ERA.\textsuperscript{41} In 1973, Spahn became the first Buffalonian to be inducted into the National Baseball Hall of Fame in Cooperstown, New York.\textsuperscript{42} He was inducted his first year of eligibility and received nearly 83 percent of the votes.\textsuperscript{43} Spahn’s teammate Johnny Sain called him “one of the smartest men ever to play the game.”\textsuperscript{44} In 1999, The Sporting News ranked Spahn 21st in its list of the 100 Greatest Baseball Players, ranking him above such greats as Yogi Berra, Sandy Koufax, and Pete Rose.\textsuperscript{45} That same year, he was also inducted as a member of the All-Century Team.
Sandy Koufax kidded, "[Spahn] should be on the All-Century Team since he pitched most of the century."\(^46\)

After leaving major league baseball, Spahn managed the minor league Tulsa Oilers. He also served as a pitching coach for the Cleveland Indians and for teams in Mexico and Japan. For a time, he was a minor league instructor for Cleveland and the Angels. In his later years, Spahn operated a cattle ranch in Hartshorne, Oklahoma. His wife, LoRene, died in 1978. Spahn died on November 24, 2003 at the age of 82 in Broken Arrow, Oklahoma, survived by his son, Gregory, and two granddaughters.\(^47\)

B. The Fictitious Warren Spahn Story

In 1958, at the height of Warren Spahn's career and popularity, Julian Messner, Inc. published a book titled THE WARREN SPAHN STORY written by Milton J. Shapiro. The book was a juvenile biography purporting to describe Spahn's life, complete with dialogue, thoughts, and events that never occurred.\(^48\) The book inaccurately depicted many areas of Spahn's private life such as Spahn's relationship with his father, the beginnings of his baseball career, his time in the Army, and his relationship with his wife.\(^49\) The book also created dialogue that never existed and formulated thoughts that Spahn supposedly had.\(^50\)

One of the sections of the book recounts Spahn's experiences in the Army. The book portrayed Spahn as a war hero who was awarded a Bronze Star.\(^51\) The Spahn I court


\(^{49}\) Id. at 531, 538-42.

\(^{50}\) Id. at 539-42.

\(^{51}\) Id. at 538. MILTON J. SHAPIRO, THE WARREN SPAHN STORY 65 (Julian Messner, Inc. 1958). "The Bronze Star Medal is awarded to any person who, while serving in any capacity in or with the Army of the United States after 6 December 1941, distinguished himself or herself by heroic or meritorious achievement or service, not involving participation in aerial flight, in connection with military operations against an armed enemy; or while engaged in military operations involving conflict with an opposing armed force in which the United States is not a belligerent party." Americal Division
found that “Spahn had not been the recipient of this award.”

The book also falsely explained Spahn’s war injury, stating that he was “rolled . . . onto a stretcher,” when he actually remained ambulatory at all times after treatment in the First Aid Station.

Additionally, the book’s dialogue inaccurately portrayed the relationship between Spahn and his father. The thrust of the chapters that pertain to Spahn’s childhood and teenage years painted a picture of Spahn’s father as a kind mentor. However, Spahn observed that it was untrue that “daily baseball sessions with his father were the rule during the season” and that his father taught him how to pitch. The book also described Spahn’s supposed shoulder injury and its psychological effects on his father. In reality, it was Spahn’s elbow, not his shoulder that had been injured. The book conjured dialogue between Spahn and his father which inaccurately described the traumatic effect that Spahn’s


52. Spahn I, 250 N.Y.S.2d at 538. Later in the litigation, in the New York Court of Appeals’s final decision, the Spahn IV court emphasized that it was not whether or not Spahn had been awarded the Bronze Star so much as it was that Shapiro had no confirmation for this fact before printing it in THE WARREN SPAHN STORY. When discussing Shapiro’s research, the court noted:

[even when some effort was made to check out these sources, the results were ignored if they interfered with the fictionalization of Mr. Spahn’s life. Thus, the author was informed by the Department of the Army that Mr. Spahn did not earn the Bronze Star in combat during World War II, although he was informed that the records were not absolutely accurate and that, if Mr. Spahn said he won the Bronze Star, it was likely that he did. Mr. Shapiro depicted Mr. Spahn as a Bronze Star winner even though he admitted that Mr. Spahn never stated that he had won the Bronze Star nor had he ever been quoted as saying so.

Spahn v. Julian Messner, Inc., 233 N.E.2d 840, 843; (N.Y. 1967) (“Spahn IV”). As previously noted, Spahn was in fact the recipient of two Bronze Stars.

53. 250 N.Y.S.2d at 539. SHAPIRO, supra note 51, at 14. See also supra note 27.

54. SHAPIRO, supra note 51, at 15-32. Greg Spahn confirmed that Spahn’s father did, in fact, push Spahn into baseball, but it was not in the overly kind, mentor-like way which the book describes. Interview with Greg Spahn, supra note 21.

55. Spahn I, 250 N.Y.S.2d at 539. SHAPIRO, supra note 51, at 16. Spahn had an unusual pitch that involved a very high kick. The book credits his father with developing this unique pitching form, but Spahn’s son reported that Spahn developed it himself to help hide the ball and thus keep what pitch he was going to throw a secret from the batter. Interview with Greg Spahn, supra note 21.

56. SHAPIRO, supra note 51, at 33-49.

57. Spahn I, 250 N.Y.S.2d at 539.
injury had on his father. The invented dialogue also chronicled Spahn's own reaction to his father's purported "breakdown." For example, page 42 of THE WARREN SPAHN STORY contains an alleged conversation between Spahn and his father's physician:

"This, well – breakdown let's call it – might have happened at any time, for any number of similar reasons. No Warren, it would be morally wrong, in my opinion, to fix the blame for your father's illness on your misfortune."

Warren nodded grimly. "What you're trying to tell me is it's not my fault that it's my fault, isn't that right, Doctor? That my getting hurt was kind of the straw that broke Pop's back?"58

In reality, no conversations of this sort ever occurred.59

The book also invented scenes between Spahn and his future wife, Lorene.60 In one chapter, the author described Spahn surprising Lorene with his returning home from Europe and surprising Lorene. It said Spahn yelled, "Surprise!" and swept Lorene off her feet, and they fell "onto the sofa in a laughing tangle."61 In reality, Spahn telephoned Lorene, who met him at the train station, and the two went out to dinner.62

Shapiro admitted in court that he had never interviewed or spoken with Spahn before writing the book.63 He never even interviewed any members of Spahn's family, friends, or any baseball player who knew Spahn. Shapiro made no attempt to obtain information from the Braves.64 Instead, Shapiro relied completely on general background books and newspaper and magazine articles he collected throughout the years as the sources for his book.65 Shapiro admitted to "creat[ing] dialogue based upon a secondary source."66

58. Id. at 539. SHAPIRO, supra note 51, at 50.
60. Id. SHAPIRO, supra note 51, at 62-65, 67-72, 76.
61. Spahn I, 250 N.Y.S.2d at 540.; SHAPIRO, supra note 51, at 68.
63. Id. at 542. Spahn's son tells a different story. He claims that the author did attempt to meet with Spahn, but he refused to cooperate with Spahn's requests, resulting in "bad blood" between the two men. Interview with Greg Spahn, supra note 21.
64. Spahn I, 250 N.Y.S.2d at 540.
65. Id.
66. Id.
Spahn thought that THE WARREN SPAHN STORY trivialized his fairly normal life by making it seem like a baseball player's fairytale although he really led a fairly normal life.\(^{67}\) By falsely praising the pitcher and his life experiences, Shapiro arguably wrote a book about how Warren Spahn's life should have been. After Spahn learned of the release of his "biography" and realized the distorted images the book created, he sued the book's author and publisher, claiming an invasion of his privacy.

II. INVASION OF PRIVACY GENERALLY

A. History, Background, and Purpose

Prior to 1890, "privacy" was an undiscovered cause of action. The legal right of privacy and the notion of recovering for an invasion thereof originated in a law review article written by Samuel D. Warren and Louis D. Brandeis titled

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67. About 25 years ago (at a precise date I am unable to recall), I informally chatted with Warren Spahn about his lawsuit against Julian Messner, Inc. At the time Spahn was signing autographs and acting as the star attraction at a baseball card collector's convention in Tulsa, Oklahoma. My young son Abe was an avid collector, and we attended the convention together. As Abe approached Spahn for an autograph, I mentioned to Spahn that I was a law professor interested in his lawsuit. I asked if he was willing to chat. Spahn immediately excused himself and enthusiastically joined me to talk about the case.

I told him that I first came across the case as a law student at Duke in the early 70s, and I was fascinated by the suit. Our conversation was about what irked him about the book, which after all contained false praise but was not defamatory.

My recollection is that the gist of Spahn's account was that it was simply wrong to just make up stories about someone. Spahn thought that the falsity hurt him in a variety of ways. Insofar as the false portrayal of his relationship with his father was concerned, Spahn thought it sent a false message to youngsters that sports prowess turned on a positive relationship between a father and a son. Insofar as the depiction of his military experience was concerned, Spahn was embarrassed by the way the author glorified Spahn's experience. Spahn also was concerned that some people would think he planted the account to make himself look heroic. Spahn was upset that entirely invented dialogue could be foisted upon readers, and sold as true accounts. Spahn went on at some length about how it was not about money — that, in fact, the case cost him significantly — but it was about vindicating what he thought to be an important principle — that truth matters.

Feeling pressure from the throng waiting for Spahn's autograph, I steered Spahn back to his assigned spot. Spahn was clearly energized by our chat. I decided then that I would some day write about Spahn's case and my encounter with him. It has taken me a while to do so.
The Right to Privacy. This article was provoked by newspaper articles written on the Warrens' social lives. Warren, the son of a wealthy paper manufacturer, and his wife, the daughter of a senator, were among Boston's social elites. In this era of yellow journalism, newspapers began sensationalizing the news in order to increase drive up circulation. The papers in Boston, especially the Saturday Evening Gazette, which specialized in reporting on the activities of "blue bloods," began to publish embarrassing personal details about the Warrens. According to William L. Prosser, the final straw was the intimate coverage of Warren's daughter's wedding. Other academics suggest that the article was promulgated due to Brandeis's belief that privacy would face increasing challenges in view of such relatively recent inventions as the photograph and telephone and possible future inventions. Although Warren had retired from the practice of law to run an inherited business, he and his former partner Brandeis collaborated to write the pioneering and influential article.

Because the right to privacy had not been previously

68. 4 HARV. L. REV. 193 (1890).
72. Prosser, supra note 70, at 383.
73. Id. However, J. Thomas McCarthy notes in his treatise, THE RIGHTS OF PUBLICITY AND PRIVACY, that this cannot be the case since Warren's daughter was only seven years old at the time The Right to Privacy was published. Id. at § 1.3(C), 1-13.
75. Id.
76. Prosser, supra note 70, at 383. Brandeis and Warren were classmates at Harvard Law School and graduated first and second, respectively, in their class in 1877. Id. at 383-84. Although it was a joint effort, it was most likely Brandeis who did most of the research and writing. Id. at 384. Brandeis also founded the Harvard Law Review. JSTOR, The Harvard Law Review Association, http://www.jstor.org/journals/harvardlaw.html (last visited June 25, 2007). Brandeis went on to become a Supreme Court Justice, appointed by President Wilson in 1916, and he served as Justice through 1939. FindLaw, Louis D. Brandeis, http://supreme.lp.findlaw.com/supreme_court/justices/ pastjustices/brandeis.html (last visited June 25, 2007). Brandeis tried to use his position as Justice of the Supreme Court to help further the development of privacy law. See, e.g., Olmstead v. U.S., 277 U.S. 438 (1928) (Brandeis, J. dissenting).
recognized in the United States as a cause of action,77 Brandeis and Warren based their article on older decisions affording relief to victims of defamation, invasion of some property right, or a breach of confidence or implied contract.78 These cases mainly came from England and Ireland.79 Brandeis and Warren advocated the recognition of the “right to be let alone” in American common law jurisprudence.80

In 1960, William L. Prosser explained the evolution of this right in his article Privacy.81 He noted that the evolution took time, but eventually the federal and state courts “recognized the existence of a distinct right of privacy.”82 The existence of the right of privacy was originally rejected by the New York Court of Appeals in 1902 in what would now be called a right of publicity case.83 This decision led to public outcry, and the New York Legislature responded by enacting a statute making the defendant’s conduct a criminal misdemeanor and a tort.84 In 1905, the Georgia Supreme Court had the opportunity to decide whether the right to privacy existed, and the court rejected the Roberson decision, determining that the right to privacy did, in fact, exist.85 This decision became the leading authority for states to recognize the right

77. Warren and Brandeis note this in their article’s opening quote: “It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage.” Willes, J., in Millar v. Taylor, 4 Burr. 2303, 2312.
78. Prosser, supra note 70, at 384.
79. Gormley, supra note 74, at 1345.
80. See generally Warren & Brandeis, supra note 77.
81. Prosser, supra note 70.
82. Id. at 386.
83. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902). In this case, the defendant used a picture of a young lady without her permission to advertise its flour, and as a result, she suffered mental anguish. Id. at 442. The court, in a 4-3 decision, found for the defendant company because (1) it was a compliment to the young lady to use her likeness, (2) there was no precedent for a right to privacy, (3) a finding of a right to privacy would not only lead to a “vast amount of litigation, but in litigation bordering upon the absurd,” (4) the injury suffered was purely mental in nature, and (5) a finding of a right to privacy would restrict the freedom of the press. Id. at 443, 445, 447.
84. N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1992) (derived from Act of Apr. 6, 1903, ch. 132, § 1, 1903 N.Y. LAWS 308).
85. Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68 (Ga. 1905). The defendant was an insurance company who, like the defendant company in Roberson, used a picture of the plaintiff without his consent for advertising purposes. Id. at 79.
to privacy as a viable cause of action.86

In noting the continuing evolution of American common law to acceptance of the right of privacy, Prosser observed that "[i]t is not one tort, but a complex of four."87 The four distinct ways in which the right of privacy can be invaded are: (1) intrusion, (2) misappropriation, (3) public disclosure of private facts, and (4) false light invasion of privacy.88

An invasion of privacy by intrusion upon seclusion requires a physical intrusion into a person's private affairs, seclusion, or solitude.89 A classic example is a peeping tom,90 where one is under surveillance from another. An invasion of privacy by misappropriation occurs where one uses another's name or likeness for his or her own benefit.91 Selling a product with another's name on it without first gaining his or her's permission would be an example of invasion of privacy by appropriation. The revelation of confidential matters that would be highly offensive to a reasonable person may give rise to liability for invasion of privacy by public disclosure of private facts.92 One could sue if another published embarrassing facts that were not a matter of public knowledge. Unlike the three other types of privacy actions, a claim for false light invasion of privacy requires a false representation.93

Warren Spahn's lawsuit hinged upon the falsity of facts contained in the biography. This article discusses the controversial nature of Spahn's claim - based as it was on facts which that placed him in a false but generally favorable light.

86. Prosser, supra note 70, at 386.
87. Id. at 389.
90. Id. § 652D (1977).
91. Id. § 652C (1977).
92. Id. § 652E (1977).
B. False Light Invasion of Privacy

1. History, Background, and Cases

The tort of false light invasion of privacy has been completely rejected by some jurisdictions because it is unnecessarily duplicative or closely parallels the tort of defamation. However, others do recognize it as a separate and independent cause of action. Generally, false light claims are brought against the person responsible, either by speaking or writing, for the communication of the false representation that placed the plaintiff in a false light.

94. See, e.g., Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994). A Texas inmate (Cain) sued the Hearst Corporation d/b/a the Houston Chronicle Publishing Co. because the newspaper published an article that Cain alleged placed him in a false light with the public. The article claimed Cain was a member of the "Dixie Mafia" and had killed up to eight people. Cain brought the claim because had missed the one year statute of limitations for a defamation claim. The Texas Supreme Court held that Texas does "not recognize the false light invasion of privacy action" and listed those jurisdictions with which it was joining in this decision.

95. See, e.g., Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 87-88 (W. Va. 1983). A female miner (Crump) in West Virginia allowed herself to be photographed for and mentioned in a December 5, 1977 article about female coal miners. Crump had experienced no such problems and was trying to be rehired by her coal mining company. Because she feared drawing more attention to the situation, she declined the paper’s offer to print a retraction. The West Virginia Supreme Court noted several distinctions between defamation and false light causes of action and held that “false light invasion of privacy is a distinct theory of recovery entitled to separate consideration and analysis.”

96. See, e.g., Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984). While camping, Mr. and Mrs. Wood became hot and disrobed to go swimming in an isolated part of a river. They took pictures of one another in the nude, and Mr. Wood had them printed by a mechanical developer. They kept the pictures private and hidden in a drawer in their bedroom. A neighbor broke in to their house, stole the photographs, and sent one depicting Mrs. Wood to Hustler Magazine along with some fictional and factual information about Mrs. Wood to be published in the magazine’s “Beaver Hunt” section. Hustler sent a mailgram with a request to call the magazine to the address (it was the neighbor’s address) printed on the consent form that was sent in with the photograph. The neighbor’s girlfriend called the number, and the staff member asked her a series of “yes” or “no” questions in a one to two minute conversation meant to verify the identity of the woman in the photograph. Hustler thereafter published the photograph with a caption that read, "Laguna Wood is a 22-year old housewife and mother from Bryan,"
may also be possible to state a false light claim against the publisher of the representation or others who were involved in the development or communication of the representation.\textsuperscript{97} False light actions are typically brought in state court, but they may be brought in federal court if the diversity jurisdiction requirements are met.\textsuperscript{98}

To establish a prima facie case for false light invasion of privacy, the plaintiff must prove that the defendant made a representation which (1) was false, (2) would be highly offensive to a reasonable person, (3) was made with either knowledge of its falsity or reckless disregard for truth or falsity (i.e., “actual malice”), and (4) was publicized.\textsuperscript{99}

The plaintiff’s first hurdle is proving that the representation is false. A representation may be false either because it is actually untrue or because its tone, tenor, or impact depicts the plaintiff in a false light.\textsuperscript{100} In other words, the representation may be false on its face, or the words may be true, but create a false implication.

Where the statements are untrue on their face, falsity may be shown by evidence that a representation falsely described the plaintiff,\textsuperscript{101} attributed statements to the plaintiff which he

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\textsuperscript{97} Id.


\textsuperscript{99} RESTATEMENT (SECOND) OF TORTS § 652E.

\textsuperscript{100} See, e.g., Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 787 (Ariz. 1989). The 32 plaintiffs were sheriffs, deputies, or civilian employees of the sheriff. Id. at 781. They brought suit after the newspaper published more than 50 articles, columns, and editorials that were very critical of plaintiffs’ various law enforcement activities. Id. at 783. The Supreme Court of Arizona determined that, while false light was an actionable tort in Arizona and laid out the requirements for a false light cause of action, these plaintiffs were not eligible for recovery on this theory since the plaintiffs were public officials and the publications concerned the discharge of their public duties. Id. at 789.

\textsuperscript{101} See, e.g., Bolduc v. Bailey, 586 F. Supp. 896 (D. Colo. 1984). The plaintiff was a Roman Catholic priest and the District Superior for the southwest district of The
or she did not make, or wrongly identified a person depicted in a published photograph as the plaintiff. Falsity through the tone, tenor, or impact of the representation may be shown by evidence that the defendant falsely implied the plaintiff had certain personality traits or motivations, falsely implied the plaintiff was involved in or participated in certain activities (particularly those involving sexual conduct, illegality, unprofessional conduct, discrimination, etc.).

Society of St. Pius X, an order "dedicated to preserving the traditional rites of the Catholic Church." Id. at 899. The defendant was a private investigator who contacted Father Finnegan, another member of The Society, and accused the plaintiff of several illegal and immoral acts which ultimately led to the Church relieving the plaintiff of his position as District Superior. Id. As of the time of the decision of the case, Father Bolduc was awaiting reassignment. Id.

102. See, e.g., Ritzmann v. Weekly World News, Inc., 614 F. Supp. 1336, 1339, 1341 (N.D. Tex. 1985). The defendant published an article that described an allegedly fictionalized domestic dispute between the plaintiff and her estranged husband and which attributed to the plaintiff several statements that she denied making. Id. at 1338-39. The article portrayed the husband as an abuser who burned and beat the plaintiff and then set their house on fire. Id. The court did not allow the plaintiff to recover on her defamation theory, but it did allow her to proceed with her false light claim. Id. at 1339 & 1341.

103. See, e.g., Lerman v. Flynt Distrib. Co., 745 F.2d 123 (2nd Cir. 1985). The plaintiff wrote a book, turned it into a screenplay, and her husband directed the movie based on her book. Id. at 127. The movie starred a woman who appeared in the nude and in an "orgy" scene. Id. The magazine Adelina published two stills from the movie and identified the nude woman as the plaintiff, who had never appeared nude in public and did not appear at all in the movie. Id. Accompanying the photographs was an article about how even serious actresses were willing to appear nude in films. Id. The plaintiff received an advance copy of the magazine and tried to halt publication. Id. However, the court found for the defendants because it determined that the plaintiff failed to prove actual malice on the part of the defendants. Id. at 142.

104. See, e.g., McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky. 1981). The plaintiff McCall was an attorney who was contacted by Ms. Frazier for criminal defense representation. Id. at 883. Reporters for the defendant were investigating allegations of "harassment of the drug community," and in the course of their investigation interviewed Ms. Frazier, who told them that the plaintiff had agreed to represent her "for a contingent fee and that part of the fee would be used to 'fix' the cases or to bribe a judge." Id. at 883-84. Even after Ms. Frazier talked with the plaintiff and recorded the conversation with a concealed tape recorder, the reporters were unable to confirm her story was true, yet they published the allegations. Id. at 884-85. Despite the fact that the published article reported that there was no evidence found of a crime on the part of the plaintiff, the court concluded "that a lay person would . . . inevitably conclude that McCall did solicit a high legal fee for the purpose of 'fixing' a case or bribing a judge." Id. at 885.

105. See, e.g., Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985). The plaintiff (Douglass) posed nude in two sessions (one with another female) in 1974 for a free-lance photographer working with Playboy Magazine. Id. at 1131. Afterwards, she gained some notoriety for appearing in television commercials, television dramas,
published the plaintiff's photograph in a context that falsely implied that the plaintiff was involved in certain activities, or published the plaintiff's photograph in a context that falsely implied that the plaintiff endorsed a product or agreed to publication of the photograph.

Secondly, a plaintiff must prove that a reasonable person would find the representation highly offensive. The plaintiff may show that the representation was offensive on the grounds that it was a major misrepresentation of his or her character, history, activities, or beliefs that would cause a reasonable person to take serious offense. Examples that may establish this highly offensive nature of a representation include evidence that the author published the plaintiff's photograph in a sexually explicit magazine, described the plaintiff in crude and vulgar terms, implied that the plaintiff was involved in certain activities, or published the plaintiff's photograph in a context that falsely implied that the plaintiff endorsed a product or agreed to publication of the photograph.

and movies (starring in one of them). The photographer moved to Hustler Magazine and brought the photographs of the plaintiff with him. The court at 1131-32. Hustler, without notice to the plaintiff and without receiving a release or permission from the plaintiff, featured some of the previously unpublished photographs of the plaintiff in a 1981 issue and alluded that the plaintiff might enjoy lesbian activities. The court at 1132. While the court ultimately reversed and remanded the case for other errors, it concluded that the plaintiff did have a valid false light claim against the defendant for portraying her as a lesbian and as one who consented to be displayed nude in Hustler Magazine. The court at 1138. The court also noted that "[i]t should be apparent by now that this little niche of the law of privacy is dominated by Larry Flynt's publications" emphasizing how many claims brought under this tort deal with sexually explicit material. The court at 1137.

106. See, e.g., Crump, 320 S.E.2d at 87-88.

107. See, e.g., Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984). The plaintiff (Braun) worked as a novelty entertainer at an amusement park. The court at 247. She worked with "Ralph, the Diving Pig" and had been the subject of some pictures and postcards for the amusement park. The editor of the "Chic Thrills" section of Chic, a magazine specializing in female nudity, published one such photograph in the December 1977 edition. The plaintiff recovered on defamation and false light theories, though the Fifth Circuit ordered a remittitur, holding that she recovered twice for the same damages under those theories. The court at 258.

108. See, e.g., Douglass, 759 F.2d at 1128.

109. See, e.g., Braun, 726 F.2d 245.

110. See, e.g., Martin v. Mun. Pub'ns, 510 F. Supp. 255 (E.D. Pa. 1981). Without his permission, the defendant published the plaintiff's photograph, in which he was wearing his Mummer's costume, in its January 1979 issue with the following caption: "Dead animal of the month/A New Year's tribute here to all the ostriches who gave their tails to make the world free for closet transvestites from South Philly to get themselves stinking drunk." The court at 257. The judge determined it was possible that a reasonable person might find this offensive and concluded it was a question for the jury to decide. The court at 259.
plaintiff was an alcoholic in need of serious treatment,\textsuperscript{111} implied that the plaintiff committed adultery,\textsuperscript{112} or implied that the plaintiff had committed a crime.\textsuperscript{113} The courts have, in the past, confirmed that these examples qualify as highly offensive to a reasonable person. However, this is not an all-inclusive list. Typically, a jury determines what is highly offensive on a case-by-case basis.

The third element that the plaintiff must prove is that the defendant made the representation with knowledge of its falsity or with reckless disregard as to its truth or falsity. This element, known as "actual malice," is derived from the landmark case of \textit{Time, Inc. v. Hill}.\textsuperscript{114} Some courts have determined that, because a plaintiff suffers less seriously as a result of the false light publication than a plaintiff in a defamation action, the false light plaintiff should have a higher burden of proof than preponderance of the evidence in proving defendant's fault.\textsuperscript{115}

Plaintiffs can encounter difficulties proving actual malice because it requires evidence of the defendant's subjective state of mind. The plaintiff will rarely be able to use direct evidence to prove that the defendant knew that the

\begin{footnotes}
\item[111] \textit{See, e.g.,} Dean v. Guard Publ'g Co., 744 P.2d 1296 (Or. Ct. App. 1987) ("Dean I"). The defendant published a story about the opening of a new alcohol rehabilitation center. Dean v. Guard Publ'g Co., 699 P.2d 1158, 1159 (Or. Ct. App. 1985) ("Dean I"). Accompanying the story was a photograph taken in the center's aversion treatment room picturing two nurses and the plaintiff, a recovering alcoholic who was only there for the open house, who complained that the photograph implied he was a patient of the center. \textit{Id.} The judge concluded that a jury should determine whether this would be highly offensive to a reasonable person. Dean II, 744 P.2d at 1298.
\item[112] \textit{See, e.g.,} Fellows v. Nat'l Enquirer, Inc., 721 P.2d 97 (Cal. 1986). The defendant published a photograph of a married producer with an actress with a caption and article that stated the two were dating. \textit{Id.} at 98. While the court recognized this as a valid false light claim, it ruled in favor of the defendant since the plaintiff was unable to show special damages. \textit{Id.} at 108-09.
\item[113] \textit{See, e.g.,} Cantrell v. Am. Broad. Cos., 529 F. Supp. 746 (N.D. Ill. 1981). The defendant aired a segment of "Newsmagazine 20/20" entitled "Arson and Profit," which implied that the plaintiff was involved with a group of businessmen who were committing arson to capitalize on the insurance payoffs. \textit{Id.} at 748-51. The court determined that this was a valid false light claim and denied the defendant's motion to dismiss. \textit{Id.} at 759.
\item[115] \textit{See, e.g.,} Douglass, 759 F.2d 1128. In this case the circuit court held that because, \textit{inter alia}, the jury was not instructed that it must find actual malice by "clear and convincing" evidence, there must be a new trial. \textit{Id.} at 1140.
\end{footnotes}
representation was false. However, it may be possible to show reckless disregard by introducing evidence that the defendant published the representation despite the plaintiff's protests, that the defendant acted fraudulently in regard to the presentation, or that the defendant had reason to doubt the veracity of the person or the source of the information on which it relied in making the representation.

116. See, e.g., Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974). The plaintiff's husband was one of 44 people killed by a bridge collapse. Id. at 247. The defendant, in covering the disaster, published a story that focused on the plaintiff's husband. Id. Five months later, the same reporter returned to the plaintiff's home and interviewed the plaintiff's children and took pictures of the residence while the plaintiff was not at home. Id. The defendant published the story, which contained many inaccuracies and told how the disaster led to the plaintiff's family's destitution. Id. The story included descriptions of the plaintiff, which were obviously false since the plaintiff was not present at the interview. Id. at 248 ("Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of non-expression she wore at the funeral... "). The defendants conceded that the story included many inaccuracies and false statements. Id.

117. See, e.g., Jonap v. Silver, 474 A.2d 800, 806 (Conn. App. Ct. 1984). This is an example of a false attribution case. A false attribution plaintiff sues a defendant for placing him in a false light by attributing to him statements or writings he did not make. The plaintiff must prove that the attributions would be highly offensive to a reasonable person. In this case, the defendant (president of the defendant company where the plaintiff was the marketing director) mailed a letter to the editor of Animal Nutrition and Health magazine that criticized Food and Drug Administration policies. Id. at 802. The letter was attributed to the plaintiff despite his numerous objections. Id. at 806. It was published in the January/February 1977 edition of the magazine. Id. at 802. The appellate court affirmed the jury's finding that this was highly offensive "because there is sufficient evidence to establish that there was a 'major misrepresentation of his character, history, activities or beliefs.'" Id. at 806 (quoting RESTATEMENT (SECOND) OF TORTS § 652E).

118. See, e.g., Braun, 726 F.2d 245. The editor, in order to comply with Chic's policy of obtaining consent from those featured in the "Chic Thrills" section, told the amusement park's public relations director that Chic was "a men's magazine containing men's fashion, travel and humor." Id. at 247. He never disclosed that female nudity was prominent in the magazine and the humor was crude, racist, and vulgar. Id. Furthermore he told the director that Chic had "the same clientele that would read a REDBOOK or McCall's." Id. at 247-48. Judge Jolly humorously noted "[t]he same clientele indeed; in the sense that both sets of readers were featherless bipeds." Id. at 248 note 1.

119. See, e.g., Ashby v. Hustler Magazine, Inc., 802 F.2d 856, 859 (6th Cir. 1986). Like Wood, the plaintiff had possession of nude photographs of herself which had been taken by her roommate and which she kept as her own private property and secured "inside her jewelry box in her closet"; they were nevertheless published in Hustler Magazine's "Beaver Hunt" section. Id. at 857. The photographs were obtained by a Karen Johnson who attended a party thrown by plaintiff's brother when plaintiff was out of town, Johnson subsequently filled out a release form, but unlike Wood, listed her own name and information. Id. The photograph was published along with the
The fourth, and final, element of the plaintiff's prima facie false light case is to prove that the representation was publicized. Publicity is legally defined as "a communication made public by its communication to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." The publicity element is easily met when the plaintiff can show that the representation was broadcast by television or radio, or published in a newspaper or magazine. It may also be possible for the plaintiff to establish publicity through evidence that the representation was communicated to a small group of people, such as plaintiff's employer, friends, or family.

2. False Light and Defamation, Distinguished

A close cousin to the tort of false light invasion of privacy is the tort of defamation. Defamation is defined as "the unconsented to and unprivileged intentional communication to a third person of a false statement about the plaintiff which tends to harm the reputation of the plaintiff in the eyes of the community." Defamation consists of two torts: libel and slander. Libel is written or printed defamation, like something printed in a book, newspaper, or magazine. Slander is oral defamation.

Both false light and defamation share the element of falsity. Indeed, as discussed above, some courts do not

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statement that the model's "fantasy is to be the only girl at an orgy." Id. at 858.
120. RESTATEMENT (SECOND) OF TORTS § 652D.
122. See, e.g., Murray v. Schlosser, 574 A.2d 1339 (Conn. Super. Ct. 1990). The defendant disc jockeys broadcast "Berate the Bride," a segment aired every Thursday during which they solicit votes from listeners for the "dog of the week' selected from the photographs of recent brides on the 'Weddings' page" in the local newspaper. Id. at 1340. Plaintiff was named "dog of the week" and the DJs stated on air that she was "too ugly to even rate," among other insults. Id.
123. See, e.g., Crump, 320 S.E.2d at 87-88.
124. See, e.g., Wood, 736 F.2d 1084.
126. See RESTATEMENT (SECOND) OF TORTS § 652E cmt. b.
127. YASSER ET AL., supra note 88, at 727.
128. Id.
129. Id.
130. See, e.g., Time, Inc., 385 U.S. at 387-88.
recognize a separate cause of action for false light invasion of privacy due to the overlap between the two. However, there are several differences between false light and defamation. The first is the distinction between the interests that are protected. Defamation protects a person's interest in reputation while invasion of privacy protects the mental and emotional interests of a person to be let alone.

The communication element is different as well. Communication of a false representation to one person will satisfy the element of publication for defamation while communication to the public is essential to satisfy the element of publication for false light.

The requirements for culpability are also different for false light and defamation. For a defamation claim, a private citizen usually must only prove negligence on the part of the defendant. While courts have struggled with the appropriate standard for a false light claim, the majority held that both private and public figures must prove actual malice (that is, the statement was made with knowledge of its falsity or with reckless disregard as to its truth or falsity). The jury determines whether the representation in a false light

131. See, e.g., Cain, 878 S.W.2d at 579.
133. See, e.g., Albert v. Loksen, 239 F.3d 256, 269 (2d Cir. 2001) (citing, inter alia, RESTATEMENT (SECOND) OF TORTS § 577).
134. See, e.g., Cantrell v. Forest City Publ'g Co., 529 F.Supp. 746 (citing, inter alia, RESTATEMENT (SECOND) OF TORTS § 652E).
135. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). In this case, the Supreme Court upheld negligence as an appropriate standard for a private individual to prove defamation in holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Id. However the Supreme Court noted a distinction between private and public individuals. In an earlier case, the Court had held that, for a public official, the standard that defamation must be proved by is actual malice. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). This is because: (1) public figures more commonly "invite attention and comment," and (2) they "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements." Gertz, 418 U.S. at 344-45. The Supreme Court also ruled that, for both public and private figures, when suing for presumed or punitive damages, the standard is actual malice, which must be proven with convincing clarity. Id. at 349.
137. Id.
light claim would be offensive to a reasonable person, but reputational harm is not required.

Furthermore, the statute of limitations for a defamation cause of action is usually shorter than the statute of limitations for a false light invasion of privacy cause of action.138 When the facts support both defamation and a false light claim, the plaintiff has the choice of which cause of action to bring.139 Some plaintiffs have successfully circumvented the shorter statute of limitations requirement for defamation by presenting their claims as false light cases. It is not surprising that much of the false light privacy case law is preoccupied with the statute of limitations issue.

3. Warren Spahn's Case – The Only False Praise Case Ever?

It appears that Spahn is the only plaintiff to base his claim upon false praise.140 The discussion that follows examines Spahn's case in detail in an attempt to answer the perplexing question – is false praise actionable?141

138. See, e.g., Wood, Wood, 736 F.2d at 1087. In Texas, the applicable statute of limitations period for a libel or slander action, was one year, but the court determined that the two year statute of limitations “for injury done to the person of another” applied to Mrs. Wood’s claim which was filed approximately one year and two weeks after the offending issue of Hustler was published. Id. The court distinguished between defamation as “injuries done to the character or reputation of another” and the “mental anguish” of invasion of privacy as “injury done to the person of another.” Id. at 1087-88 (emphasis retained). Again, this should be single spaced

139. RESTATEMENT (SECOND) OF TORTS § 652E cmt. b: When “the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander . . . the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity.”

140. Some argue that the plaintiff in Time, Inc., 385 U.S. 374, sued on the basis of false praise, but the gist of the claim suggests that the Hills were irked by the resurrection of their ordeal – this would make it a public disclosure of private facts case.

141. When the defendants appealed the judgment of the trial court, the appellate court noted:

[the fact that the fictionalized treatment is laudatory is immaterial, except perhaps as it may influence the assessment of damages, for three reasons. In the first place, a laudatory treatment may make one appear more ridiculous than a factual one, at least to those who know enough of the truth. In the second place, one may have strong feelings about not being portrayed in any exaggerated light. Lastly, there may be serious difficulties in determining what is laudatory. So long as it is not the truth, the subject of the distorted
The following charts the timeline of Spahn's lawsuit against Julian Messner, Inc. (the publisher of THE WARREN SPAHN STORY) and Milton J. Shapiro (the author) in an effort to make the tortuous path of the litigation easier to follow.

<table>
<thead>
<tr>
<th>Date of Decision</th>
<th>Case Citations</th>
<th>Court</th>
<th>Brief Description</th>
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<tbody>
<tr>
<td>May 28, 1964</td>
<td>&quot;Spahn I&quot; 250 N.Y.S.2d 529</td>
<td>Supreme Court of New York</td>
<td>Spahn brought suit for the false depiction of him in THE WARREN SPAHN STORY. The court found for Spahn and awarded $10,000 in damages and enjoined publication and distribution of the book.</td>
</tr>
<tr>
<td>May 18, 1965</td>
<td>&quot;Spahn II&quot; 260 N.Y.S.2d 451</td>
<td>Supreme Court of New York, Appellate Division</td>
<td>The defendants appealed. The appellate court affirmed the trial court's judgment.</td>
</tr>
<tr>
<td>Sept. 23, 1965</td>
<td>211 N.E.2d 655</td>
<td>Court of Appeals of New York</td>
<td>Motion for leave to appeal was initially denied.</td>
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<tr>
<td>Dec. 1, 1965</td>
<td>213 N.E.2d 696</td>
<td>Court of Appeals of New York</td>
<td>Spahn moved to dismiss the appeal for lack of a substantial constitutional question. The court denied this motion but granted leave to renew upon the argument.</td>
</tr>
<tr>
<td>May 22, 1967</td>
<td>387 U.S. 239</td>
<td>Supreme Court of New York</td>
<td>The defendants appealed. The Supreme Court</td>
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biography ought to have the right to permit or prevent its being published.
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<tr>
<th>Date</th>
<th>Citation</th>
<th>Court</th>
<th>Summary</th>
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<tr>
<td>July 7, 1967</td>
<td>229 N.E.2d 712</td>
<td>Court of Appeals of New York</td>
<td>On remand from the United States Supreme Court, the New York Court of Appeals vacated the judgment and set the case down for argument.</td>
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<tr>
<td>Dec. 28, 1967</td>
<td>&quot;Spahn IV&quot; 233 N.E.2d 840</td>
<td>Court of Appeals of New York</td>
<td>On re-argument, in a 4-1-2 decision, the Court of Appeals reaffirmed its earlier decision which affirmed the trial court's judgment granting Spahn $10,000 in damages and an injunction preventing publication and distribution of THE WARREN SPAHN STORY.</td>
</tr>
<tr>
<td>Oct. 14, 1968</td>
<td>393 U.S. 818</td>
<td>Supreme Court of the United States</td>
<td>The defendants appealed the grant of the injunction claiming an unconstitutional restraint. The Supreme Court noted probable jurisdiction and requested briefing from both sides.</td>
</tr>
<tr>
<td>Jan. 8, 1969</td>
<td>245 N.E.2d 409</td>
<td>Court of Appeals of New York</td>
<td>The defendants appealed the Spahn IV decision, and the Court of Appeals treated it as a motion to amend the opinion, which it denied.</td>
</tr>
<tr>
<td>Jan. 17, 1969</td>
<td>393 U.S. 1046</td>
<td>Supreme Court of the United States</td>
<td>The defendants appealed, and the Supreme Court dismissed the appeal thus making Spahn's judgment final at last.</td>
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The publication of THE WARREN SPAHN STORY and the book’s false depiction of the pitcher’s life led Spahn to file suit in the New York Supreme Court for New York County for
Part VIII of the Special and Trial Term. Spahn sought to enjoin the further publication and distribution of the book and damages.\textsuperscript{142} He argued that the defendants took pecuniary advantage of his name, photographs, and likeness to create a fictionalized story in order to make money.\textsuperscript{143} Spahn's lawsuit was "predicated upon the contention that the fictionalization of his life story, the inclusion in the book of aspects of his private name and likeness constitute[d] an infringement of [his] 'Right of Privacy.'"\textsuperscript{144} The defendants argued that THE WARREN SPAHN STORY was protected by the First Amendment and thus, not within the reach of New York's privacy statutes.\textsuperscript{145} In its May 28, 1964 decision, the Spahn I court held that freedom of the press cannot be classified as an "unconditionally absolute right"\textsuperscript{146} because to do so would "inexorably relegate other rights to a deferred position."\textsuperscript{147} In doing so, the Spahn I court discussed the tension between freedom of the press and the right to be let alone:

The Founding Fathers well knew the value of Freedom of the Press as an indispensable safeguard for the security of our form of government. They were equally profoundly committed to the principle that the ultimate purpose of our government

\textsuperscript{142} Spahn I, 250 N.Y.S.2d at 531.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id. New York's privacy statutes are found at N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1992). At the time of the decision of Spahn I, they stated in relevant part:
§ 50. Right of Privacy
A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor.
§ 51. Action for Injunction and for Damages
Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. . . .

Spahn I, 250 N.Y.S.2d at 531, n. 1.
\textsuperscript{146} Id. at 535 (referring to N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).
\textsuperscript{147} Id.
is to secure man's "unalienable rights" among which are "life, liberty and the pursuit of happiness." Neither may be completely and automatically subordinated to the other.\textsuperscript{148}

This struggle requires that the rights of the individual and the rights of the press be harmonized.\textsuperscript{149}

The freedom of the press is designed to serve the public interest. It disseminates information to the public which is necessary for public discourse which, in turn, "is essential to the preservation of free government and progress of civilization."\textsuperscript{150} Accordingly, courts are quick to protect publications containing newsworthy information. The public has the so-called "right to know" what is going on in the world around it.\textsuperscript{151} Even information that may not be considered "newsworthy" may be protected by the freedom of the press; the \textit{Spahn I} court stated, "[t]he [privacy] statute 'has been held not to apply to articles which, though not strictly news, are informative and educational and which make use of the names or pictures of living persons.'\textsuperscript{152} However, the nonconsensual use of another's name or likeness for commercial gain is prohibited by New York's privacy statute.\textsuperscript{153} Thus, even such a fundamental right as freedom of the press would not necessarily protect those kinds of publications.

The court also discussed the distinctive privacy protections afforded to those who are considered public figures.\textsuperscript{154} The court decided that Spahn's public figure status did not preclude a privacy action.\textsuperscript{155} According to the court, public figures must accept their publicity in accordance with newsworthy events, but they do not have to allow exploitation of their personalities, especially when aspects of their private lives are fictionalized.\textsuperscript{156}

A public figure's right to privacy differs from that of an

\textsuperscript{148} \textit{Id.} (citing \textit{BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT} 232-37 (Ronald Press Company 1957)).

\textsuperscript{149} \textit{Id.} at 535-36.

\textsuperscript{150} \textit{Id.} at 535 (quoting Barber v. Time, Inc., 159 S.W.2d 291, 295 (Mo. 1942)).

\textsuperscript{151} \textit{Id.} at 536.

\textsuperscript{152} \textit{Id.} (quoting Koussevitzky v. Allen, Towne & Health, 188 Misc. 479, 482 (N.Y. Sup. 1947)).

\textsuperscript{153} \textit{Id.} See supra note 145.

\textsuperscript{154} \textit{Id.} at 536-38.

\textsuperscript{155} \textit{Id.} at 538.

\textsuperscript{156} \textit{Id.}
"ordinary," private citizen. The moment a public figure, either by choice or chance, is cast into the public spotlight, some level of their individual right to be left alone is diminished as to the aspects of their lives that are deemed to be within the legitimate interest of the public. The *Spahn I* court explained:

> [a]nyone becoming involved in matters of news interest must submit to the resulting publicity. Those seeking notoriety will be said to have waived, and those having it thrust upon them to have lost, their right to personal seclusion and to the exclusive property interest in the other facets of personality.

However, not all privacy rights are given up when one becomes a public figure. The public figure owns his "right to publicity" and is entitled to receive payment when his name is used for commercial purposes. The *Spahn I* court held that, "even as to those aspects of one's life deemed to be within the legitimate interest of the public, the use of an individual's name, portrait or picture is legally restricted."

The *Spahn I* court also emphasized that public figures still have exclusive dominion over their own personalities. The court determined that, "while one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information."

The *Spahn I* court treated Spahn's case as one dealing with a defendant's use of another's name or picture for its own commercial gain. However, the focus of the written opinion is on the falsity of the information contained in the biography, not the amount Spahn should have made from the sales of the book. The court did note that "the defendants have used Spahn's name and pictures to enhance the marketability and

157. *Id.* at 537.
158. *Id.* (quoting SAMUEL H. HOFSTADTER, THE DEVELOPMENT OF THE RIGHT OF PRIVACY IN NEW YORK 39 (Grosby Press 1954)).
159. *Id.* at 536-37.
160. *Id.* at 537-38.
161. *Id.*
162. *Id.* at 538 (quoting Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 488 (N.Y. 1952)).
163. *Id.* at 538-42.
financial success of the subject book of which approximately 16,000 copies were sold at the retail price of $3.25 per copy."\textsuperscript{164} The information in the book was false, but it was not negative. The court concluded that the defendant’s use of Spahn’s name for the purposes of a \textit{fictional} biography brought the case within the appropriation provision of New York’s privacy law,\textsuperscript{165} even though the gist of the complaint indicated it was a false light case.\textsuperscript{166} In concluding “that the writing constitute[d] a product – a creation, both in form and content – of the author’s artistic imagination,” the book constituted a violation of New York’s privacy law. The court ruled in favor of Spahn and granted him “injunctive relief preventing further publication and distribution of THE WARREN SPAHN STORY in all its aspects and phases and . . . damages against both defendants in the sum of Ten Thousand Dollars ($10,000) and costs.\textsuperscript{167}

After the trial court’s decision, Spahn’s case bounced throughout New York’s judicial system for years, with seemingly endless appeals. The defendants appealed the trial court’s judgment, but the New York Supreme Court, Appellate Division affirmed the decision.\textsuperscript{168} The appellate court focused on whether Spahn’s status as a public figure prevented him from suing under N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1992).\textsuperscript{169} The \textit{Spahn II} court reasoned that the legislature enacted these statutes to protect individuals’ privacy, whether they are public figures or not did not include any privileges or exemptions to be “facilely extended judicially except out of the necessities of the strongest public policy.”\textsuperscript{170} They concluded that one “should not be exposed, without his control, to biographies not limited substantially to the

\begin{footnotes}
\item 164. \textit{Id.} at 543.
\item 165. \textit{Id.}
\item 166. The court looked at the four categories set forth by Prosser (see Prosser, \textit{supra} notes 69, 85). It concluded that the “defendants have (1) intruded upon the plaintiff’s solitude and into his private affairs, (2) disclosed embarrassing ‘facts’ about the plaintiff, (3) placed the plaintiff in a false light in the public eye, and (4) appropriated, for defendants’ advantage, the plaintiff’s name and likeness.” \textit{Spahn I}, 250 N.Y.S.2d at 543.
\item 167. \textit{Spahn I}, 250 N.Y.S.2d at 543, 544 (emphasis retained).
\item 169. \textit{Id.} at 452-53.
\item 170. \textit{Id.} at 455.
\end{footnotes}
The authors of biographies such as Spahn's must either gain the consent of the subject to sensationalize his or her life or print only a factual account. Accordingly, the Spahn II court affirmed the judgment since freedom of the press did not privilege the publication.

More litigation ensued. In 1966, the New York Court of Appeals affirmed the judgment. The Spahn III court disposed of the defendant's freedom of the press argument in its observation that "[t]he free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual's attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter."

In a very brief holding, however, the United States Supreme Court vacated the judgment and remanded the case back to the New York Court of Appeals "for further consideration in light of" the decision announced earlier that year in Time, Inc. v. Hill. In Time, Inc., the United States Supreme Court held that freedom of speech prevented N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1992) from remedying false reports of matters of public interest unless published with knowledge of its falsity or in reckless disregard of the truth (i.e., "actual malice"). Thus, Time, Inc. applied the rule of N.Y. Times v. Sullivan (requiring actual malice for certain figures to recover damages in defamation cases) to false light cases. As a result, the New York Court of Appeals vacated the judgment on remand and ordered the case be set down for argument during its September session.

The parties reargued the case for a final time before the

171. Id. at 456.
172. Id.
173. Id. at 457.
175. Id. 221 N.E.2d at 546.
New York Court of Appeals with a decision issued in December 1967.\textsuperscript{180} The \textit{Spahn IV} court upheld Spahn's false praise claim even in light of the standards set forth in Time, Inc.\textsuperscript{181} It court first rejected the defendant's First Amendment defense by stating,

[...]

The New York Court of Appeals also refused to allow Spahn's failure to plead actual malice undercut his claim.\textsuperscript{183} The \textit{Spahn IV} court noted, "[the defendant admitted] that '[i]n writing this biography, the author used the literary techniques of invented dialogue, imaginary incidents, and attributed thoughts and feelings.'"\textsuperscript{184} It went on to observe that such behavior "clearly indicates that the test of \textit{New York Times Co. v. Sullivan} and \textit{Time, Inc. v. Hill} has been met here."\textsuperscript{185} After \textit{Spahn IV}, the defendants again appealed to the United States Supreme Court, arguing that the injunctive relief afforded Spahn "constitute[d] an unconstitutional restraint upon publication."\textsuperscript{186} However the decision issued January 7, 1969 dismissed the appeal, and Spahn finally realized his judgment from the \textit{Spahn I} court.\textsuperscript{187} His determination paid off. He received $10,000 in damages and enjoined the publication and distribution of the book.\textsuperscript{188}

\begin{footnotes}
\item[180] \textit{Spahn IV}, 233 N.E.2d. 840.
\item[181] \textit{Id.} at 843.
\item[182] \textit{Id.} 843.
\item[183] \textit{Id.}
\item[184] \textit{Id.} at 842.
\item[185] \textit{Id.} (citations omitted).
\item[187] \textit{See Spahn I}, 250 N.Y.S.2d at 543, 544.
IV. CONSTITUTIONAL BASIS FOR SPAHN'S CLAIM

In finding for Spahn, the courts concluded that one "should not be exposed, without his control, to biographies not limited substantially to the truth." The authors of biographies such as Spahn's must either gain the consent of the subject to sensationalize his or her life or print only a factual account. In light of this, the court in Spahn IV determined that the tests of New York Times Co. v. Sullivan and Time, Inc. v. Hill had been met; thus, the book was published with actual malice, and the plaintiff could recover damages. In understanding what led to the Spahn court's decision, it is important to briefly address the Supreme Court cases that paved the way for the extension of the actual malice standard to false light cases.

A. New York Times Co. v. Sullivan

In March of 1960, L.B. Sullivan was one of three elected Commissioners to the City of Montgomery, Alabama. As such, he supervised the Montgomery Police Department, Fire Department, Department of Cemetery and Department of Scales. On March 29, 1960, the New York Times ran a full page advertisement entitled "Heed Their Rising Voices." The advertisement stated that thousands of Southern blacks, engaged in a non-violent effort to secure constitutionally protected rights, were being met by an "unprecedented wave of terror," perpetuated by "Southern Violators," designed to prevent them from enjoying their constitutional rights. The Montgomery police were implicated on a number of occasions as "Southern Violators."

It was uncontroverted that some statements in the advertisement were not accurate descriptions of events which occurred in Montgomery. The text of the advertisement concluded with an appeal for funds and appeared over the names of sixty-four persons, many widely known for accomplishments in religion, public affairs, trade unions and the performing arts. L.B. Sullivan sued the New York Times.

189. 260 N.Y.S.2d at 456.
190. Id. at 456.
191. Id.
and four black Alabama clergyman who signed the advertisement. A Montgomery County jury found that Sullivan was defamed and awarded him on-half million dollars, the full amount claimed, against all the defendants. The Alabama Supreme Court affirmed,193 and the Supreme Court granted certiorari “because of the importance of the constitutional issues involved.”194

The Supreme Court considered the New York Times case “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.”195 In view of this national commitment to robust wide-open debate, Justice Brennan reasoned “that erroneous statement is inevitable in free debate and that it must be protected if the freedoms of expression are to have the 'breathing space' that they ‘need...to survive....’”196 Brennan cited Judge Edgerton for the simple truth that ‘whatever is added to the field of libel is taken from the field of free debate.’197

The Court then constructed legal rules to ensure that our national commitment was not compromised. According to the Court, the Constitution requires:

A federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.198

Moreover, the aggrieved official must prove “actual malice” with “convincing clarity” — a standard of proof which is arguably more demanding than proof by a mere preponderance of evidence.199 Thus, with this determination, constitutional privilege was born in defamation cases. However, while the Supreme Court recognized this

193. 273 Ala. 656, 144 So. 2d 25 (1962).
194. 376 U.S. at 264.
195. Id. at 270.
196. 376 U.S. at 271.
197. Id. at 272.
198. Id. at 279-80
199. Id. at 285-86.
constitutional privilege, the privilege was not unconditional. When a defendant made a defamatory statement and the statement was made with knowledge that it was false or with reckless disregard of whether it was false, any constitutional privilege was lost.\(^{200}\)

**B. Time, Inc. v. Hill\(^{201}\)**

The landmark *New York Times* case set the standard of actual malice for future defamation cases. However, it was not until *Time, Inc. v. Hill*, shortly later, in which this standard was applied to false light cases.\(^{202}\) In this case, the defendant (Time, Inc.) published an article entitled “True Crime Inspires Tense Play: The ordeal of a family trapped by convicts gives Broadway a new thriller, ‘The Desperate Hours.’”\(^{203}\) The plaintiff (Hill) and his family had been held hostage by three escaped convicts who treated plaintiff and his family “courteously” and released them unharmed.\(^{204}\) This inspired a novel, which was made into a play and movie; however, the novel, play, and movie depicted a suburban family held hostage by escaped convicts who treated the family with violence and molested them.\(^{205}\) The defendant, in reviewing the play, implied that it accurately depicted the plaintiff and his family’s experience.\(^{206}\) The U.S. Supreme Court held in a 5-1-3 decision that, in light of the First Amendment, there can be no redress for a false light cause of action unless there is “proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.”\(^{207}\) However, if the plaintiff proved the defendant published the report with actual malice,\(^{208}\) the constitutional protection of the First Amendment would not apply, and the

\[200\] Id. at 279-80.
\[201\] 385 U.S. 374 (1967).
\[202\] *N.Y. Times v. Sullivan*, 376 U.S. at 279-80
\[203\] 385 U.S. at 377.
\[204\] Id. at 378.
\[205\] Id. at 378.
\[206\] Id. at 377-79.
\[207\] Id. at 388.
\[208\] While *Time Inc.* did not explicitly state that actual malice had to be proven with convincing clarity, the Court applied the *New York Times* standard unambiguously, thus suggesting that the convincing clarity standard of proof applied in false light cases.
defendant would be liable for damages as a result of the false light claim.

The *Time Inc.* decision bridged the gap between the standard for defamation cases and false light cases. In *Time Inc.*, the Supreme Court recognized that defamatory publications made with actual malice were not only not protected in defamation cases, but neither were they protected in false light cases, regardless of whether there was injury to the plaintiff's reputation. The focus, instead, was on whether the falsehood was made with actual malice. Thus, after *New York Times* and *Time Inc.*, torts of defamation and false light had a constitutional dimension, but one which allowed constitutional protection only to those defendants that did not act with actual malice. Thus, in making the focus the actual malice standard under *New York Times*, the Supreme Court left room for recovery under other falsehood based torts that satisfy the actual malice standard—regardless of injury to reputation.

**CONCLUSION**

Even though Spahn won his false light case, a broader question remains. Is a legally viable cause of action generally available based on false praise? For the reasons articulated by the Supreme Court in the landmark defamation case of *N.Y. Times v. Sullivan*, I contend that it is. Calculated falsehoods—that is to say, false statements made with knowledge of falsity or reckless disregard for truth or falsity—are not worthy of protection from civil liability, whether they are defamatory or falsely praiseworthy.

As the Court in *Gertz v. Robert Welch, Inc.* observed:

But there is no constitutional valve in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide open" debate on public issues. *New York Times v. Sullivan*. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."209

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209. Gertz, 418 U.S. at 340 (citations omitted).
According to the New York Times line of defamation of cases, the actual malice standard provides adequate breathing room for factual mistakes. Calculated false statements, whether they are injurious to reputation or not (as in the case of false praise), are of little value in the marketplace of ideas.\textsuperscript{210}

Spahn had it right. False praise is actionable. While false praise does not necessarily cause reputational harm, all the policy rationales which support the well-established body of defamation law serve as effective justifications for liability in a false praise case.\textsuperscript{211}


\textsuperscript{211} In the midst of United States involvement in Afghanistan and Iraq, Pfc. Jessica D. Lynch and Cpl. Pat Tillman had false praise heaped upon them by government officials anxious to garner public support for foreign policy. On April 24 2007, the Committee on Oversight and Government Reform conducted a hearing entitled "Misleading Information from the Battlefield," using the experiences of the two as outrageous examples of truth-twisting for public relations purposes. Ms. Lynch and Tillman's mother, Mary, and brother, Kevin, testified eloquently about the importance to truth telling. Cpl. Tillman had been an inspiration for many after he quit the National Football League's Arizona Cardinals team to become an Army Ranger after 9/11.

Ms. Lynch testified, "I am still confused as to why they chose to lie and make me a legend when the real heroics of my fellow soldiers that day were, in fact, legendary." The "story of the little girl Rambo from the hills who went down fighting" was untrue, she said. She said she never fired a shot. Her faked ordeal was made into a movie, featuring a dramatic rescue. Ms. Lynch further stated, "The bottom line is the American people are capable of determining their own ideals for heroes and they don't need to be told elaborate tales...the truth of war is not always easy to hear but it[s] always more heroic than the hype." \textit{Misleading Information from the Battlefield: Hearing before the Committee on Oversight and Government Reform, 110th Congress (2007)} (statement of Pfc. Jessica Lynch).

Kevin Tillman angrily assessed the concocted story about his brother death. The military's initial account was portrayed as a heroic death in the face of enemy fire. The reality was that Cpl. Tillman was killed by friendly fire. Kevin Tillman testified, "A terrible tragedy that might have undermined support for the war in Iraq was transformed into an inspirational message that served instead to support the nation's foreign policy wars in Iraq and Afghanistan." Cpl. Tillman was posthumously promoted and awarded the Silver Star for Valor.
