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FALSE LIGHT INVASION OF PRIVACY IN DOCUDRAMAS: THE OXYMORON WHICH MUST BE SOLVED.[1]

Matthew Stohl[*]

I. INTRODUCTION: "A CIVIL ACTION"[2]

As Joey Giardello,[3] one of Philadelphia's most celebrated Hall of Fame boxers of the 1950's and 1960's, sat in the movie theater he was quite simply shocked; shocked and embarrassed. The three minute opening sequence of *The Hurricane*,[4] a 1999 film starring Denzel Washington,[5] reenacted the December 1964 championship boxing match between Rubin "Hurricane" Carter [6] and Joey Giardello. The motion

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1. An oxymoron is defined as "a combination of contradictory or incongruous words (as *cruel kindness*)." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 832 (10th ed. 2001). A docudrama is defined as "a drama for television, motion pictures, or theater dealing freely with historical events especially of a recent and controversial nature." *Id*. at 342.

2. A CIVIL ACTION (Buena Vista Pictures 1998) (starring John Travolta as an attorney who represents eight families in a toxic tort lawsuit). The author notes that false light invasion of privacy is a civil action, therefore a party cannot be held criminally liable.

3. Joey Giardello, whose real name was Carmine Tilellie, was born on July 16, 1930. Joey Giardello, International Boxing Hall of Fame, *at* http://www.ibhof.com/giardell.htm. The highlight of his boxing career was a 15 round victory in which he won the world middleweight title in 1963. *Id.* Giardello had one successful title defense. *Id.* The title defense was against Rubin "Hurricane" Carter, and was depicted in the opening scene of *The Hurricane* THE HURRICANE (Universal 1999). In sixteen years of professional boxing, Giardello amassed a career record of 100 wins, 25 losses, 7 draws, 1 no decision, with 32 wins by knockout. International Boxing Hall of Fame, *supra*. In 1993, Giardello was inducted into the International Boxing Hall of Fame. *Id.*

4. THE HURRICANE, *supra* note 3 (story of Rubin "Hurricane" Carter, a boxer wrongful imprisoned for murder, and the people who help him prove his innocence).

5. Denzel Washington is one of the most recognizable and critically acclaimed actors of the 1980's and 1990's. E! ONLINE, *at* http://www.eonline.com/Facts/People/Bio/0,128,143,00.html. He received the 1989 Golden Globe, Best Supporting Actor in a Motion Picture for *Glory,* (GLORY (TriStar Pictures 1989)), the 1989 Oscar Best Supporting Actor for *Glory*, and the 1999 Golden Globe Best Actor in a Motion Picture (Drama) for *The Hurricane.*

6. Rubin "Hurricane" Carter was born May 6, 1937. Ron Flattery, *Story of Hurricane,*

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picture shows Carter, an athletic, African-American boxer, continuously beating the clumsy, Caucasian boxer, Giardello, during the closing moments of their championship fight. Moments later, the all white panel awards the profusely bleeding Giardello the unjust decision in front of a crowd in protest. While the badly beaten Giardello raises his hands in mock victory, acknowledging the judges for the "gift decision;" Rubin Carter leaves the ring disgusted and dejected as another victim of racism.[7]

According to Giardello, boxing historians, and even Rubin "Hurricane" Carter, himself, the opening sequence of *The Hurricane* — which purports to tell the "true story" of Carter's unjust imprisonment — was not only far from being accurate, it was a complete falsity. In reality, the fight was a lopsided Giardello victory, to the delight of the 6,000 fans in attendance.[8]

(Sept. 17, 2001) *at* http://espn.go.com/classic/biography/s/Carter_Hurricane.html. In six years of professional boxing, Carter compiled a career record of 27 wins, 12 losses, 1 draw with 16 wins by knockout. *Id.* On October 14, 1966, at the age of 29, Carter was arrested for the murder of three people. *Id.* Steadfastly maintaining his innocence, Carter was convicted and sentenced to three life terms in prison, narrowly escaping the electric chair. *Id*. In 1985, 19 years later, Rubin Carter's conviction was overturned, and he was released from prison. *Id.*

7. The 1960's represented a period of tremendous social unrest in the United States. ANDREW YOUNG, AN EASY BURDEN: THE CIVIL RIGHTS MOVEMENT AND THE TRANSFORMATION OF AMERICA (Harper Collins 1996). Restaurants, hotels, night clubs, public facilities, and the school systems were segregated during the early 1960's, and educational and job opportunities for minorities were far below those available to the white majority. *Id.* However, the Civil Rights Movement and the escalating war in Vietnam were the two great catalysts for social protest during the 1960's. *Id.* Since the end of the Civil War many organizations had been created to promote the goals of equality and racial justice in the United States, but progress had been painfully slow. *Id.* It was not until the 1960's that those goals would begin to garner the attention necessary to force the necessary change. *Id.* There was little consensus on how to promote equality on a national level groups such as the National Association for the Advancement of Colored People (NAACP), Congress on Racial Equity (CORE), and Dr. Martin Luther King's Southern Christian Leadership Conference (SCLC), endorsed peaceful methods and believed change could be affected by working around the established system. *Id.* On the other hand, groups such as the Black Panthers, the Nation of Islam, and the Black Nationalist Movement advocated retaliatory violence and a separation of the races. *Id.* During this time, there were numerous marches, rallies, strikes, riots, and violent confrontations with the police, and national African-American leaders such as Dr. Martin Luther King Jr. and Malcolm X were assassinated. *Id.*

8. The author notes that according to numerous sources in the sporting world, Giardello clearly won the fight. For example on ESPN Classic, it is noted that:

> The more experienced Giardello bobbed and weaved his way through the 15 rounds while Carter stalked him. Carter's best chance for victory came in the fourth round, when his left hook opened a bothersome cut over Giardello's left eye. Although Giardello's face displayed the puffy evidence of damage inflicted by Carter, there were no knockdowns, and the champ consistently scored with his left. Giardello won a unanimous decision in front of 6,000 spectators in Philadelphia.

Flattery, *supra* note 6. Additionally, another article had noted that "Referee Robert Polis, who scored the fight 72-66 in favor of Giardello, said: 'They portrayed Joey Giardello as an incompetent fighter. I thought it was ludicrous.'" *Ex-Boxer Sues Over Hurricane Film*, ASSOCIATED PRESS, Feb.

Joey Giardello, who knew nothing of the movie until the day he saw it in the theater, filed suit on February 16, 2000 against Universal Pictures claiming that the film inaccurately portrayed him as a weak fighter and the beneficiary of a racially motivated decision. Giardello sued for unspecified monetary damages and wanted future copies of the movie to include a trailer showing archival footage of the fight.[9]

This case exemplifies the disturbing and growing trend of false

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17, 2000. Finally, another author wrote "Giardello fought his last great fight against Carter as he continually controlled the action with his ramrod jab and pinpoint combinations. Carter got in some hurtful punches, but Giardello´s chin was up to the task as he took a deserved decision. Forget what you saw in the film *The Hurricane*, Giardello won that fight." Joe Queijo, *Remembering The Hurricane*, (Nov. 30, 2001), *at* http://www.secondsout.com/legends/legends_33191.asp.

9. Giardello ended up settling his lawsuit against the makers of *The Hurricane*, THE HURRICANE. Bernard Fernandez, *Giardello Settles 'Hurricane' Suit,* PHILADELPHIA DAILY NEWS, Sept. 27, 2000, at 112. While terms of the settlement were kept confidential, there were subtle but significant alterations to the video release of the movie that softened the implication that Giardello was the beneficiary of a racially motivated decision. *Id.* The standard disclaimer - which stated that certain events and characters "have been composited or invented, and a number of incidents fictionalized" - had been moved from the closing credits to the beginning of the movie. *Id.* The epilogue, which showed the real-life Carter receiving a championship belt from the World Boxing Council in 1993, noted that the awarding of the belt was "in recognition of his 20-year fight for freedom." *Id.* The additional explanation was used to refute any implication that the WBC was attempting to rectify an injustice tied to the 1964 unanimous decision for Giardello. *Id.* Additionally, Armyan Bernstein, head of Beacon Communications Corp., which financed the film, sent a letter to Giardello, in which he wrote that "we had no intention of taking away from your legacy as world middleweight champion, or of besmirching the other boxing accomplishments in which you, your friends and family take pride. Rubin Carter, who worked with us on *The Hurricane*, told me that you never ducked a fight." *Id.* However, it was a voice-over by director Norman Jewison in the DVD version of the home video that comes closest to acknowledging that Giardello was unfairly represented by the fight sequence. *Id.* Jewison stated, "This [the fight sequence] is probably one of the most controversial scenes in the film. This is the famous fight with Giardello, who was then middleweight champion. Rubin was a strong contender . . . we just dealt with the last few seconds of the fight, where it seemed that Rubin had it. But, going back over it, there's no doubt about it, Giardello won it. I can understand the controversy in our interpretation of this . . . ." *Id.* Jewison's voice-over also addressed a scene in which the television blow-by-blow broadcaster exclaims that "I've seen a lot of things in my time, but it's taken 35 minutes for these judges to tell us what this hometown crowd already knows: Joey Giardello is about to lose the crown to Rubin 'Hurricane' Carter." *Id.* "Whether the announcer ever really said that, I have no idea," Jewison said. *Id.* "But we did want to build some of the kind of prejudice that existed. And it did exist, whether people want to deny it or not . . . the truth is a moving target, I found. When you make a film about real people, about something that really happened, you'll never get it right because there's always somebody who's going to disagree with you." *Id.* In the end, Giardello and his attorney, George Bochetto, had appeared pleased with the final outcome. *Id.* "I can say that Joey's legacy as a great world champion has been restored," said Bochetto, who was also the Pennsylvania boxing commissioner. *Id.* "The makers of *The Hurricane*, acknowledge that he's a great fighter and want to make it clear that they never intended to detract from that legacy in making this movie. Their primary purpose was to demonstrate Rubin Carter's struggle for freedom for being wrongfully imprisoned. They have stated as much in writing, and to the mutual satisfaction of both parties." *Id.* Giardello had stated that "for 19 years, I fought the greatest fighters around and I beat Carter fair and square. I just wanted to set the record straight, and I think it has been." *Id.*

light invasion of privacy[10] in present day motion pictures. Due to courts' narrow application of the doctrine of false light invasion of privacy, as it applies to motion pictures, false light has become a near impossible claim to prevail upon.[11]

Courts have continuously narrowed the protection provided by the false light invasion of privacy, to the point of non-existence. As a result, they have failed to guard unsuspecting public figures from overzealous film-makers' distortion of individuals' lives in the creation of modern day motion pictures, specifically docudramas. In order to protect unsuspecting and unaware public figures from wrongful depiction, the courts should adopt the original intent of the doctrine and expand the current state of the doctrine of false light invasion of privacy. While there are many flawed aspects in the present handling of false light claims, an effective way to solve these problems is through small, thoughtful, incremental steps. The first and key step is to simply lower the burden of persuasion from "clear and convincing evidence"[12] to "preponderance of evidence."[13] This step would make it easier to

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10. The Restatement (Second) of Torts has recognized false light invasion of privacy as a distinct cause of action, and goes on to define false light in section 652E (Publicity Placing Person in False Light), where it provides that:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (1976).

11. *See infra* note 21 and accompanying text (discussing the facts and outcome of some high-profile false light invasion of privacy cases).

12. "Clear and convincing evidence" has been defined numerous way. For example, early on clear and convincing evidence was defined as, "evidence so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind.'" Sheehan v. Sullivan, 126 Cal. 189, 193 (1899). However, other courts have defined clear and convincing evidence as "an amount of evidence which is less than 'beyond a reasonable doubt' but more than 'a preponderance of the evidence.'" Lamphere v. Brown University, 798 F.2d 532, 536 (1st Cir. 1986). Additionally, clear and convincing evidence has been "defined as evidence that which instantly tilts the scales in the affirmative when weighed against evidence in opposition, and clearly convinces the factfinder that the evidence is true." Eldridge v. Sullivan, 980 F.2d 499, 500 (8th Cir. 1992). While clear and convincing evidence has also been defined as "the quantum of proof which leaves no reasonable doubt in the mind of the trier of fact as to the truth of the proposition in question." Estate of Ragen, 79 Ill. App. 3d 8, 13 (1st Dist. 1979). Finally, the Federal Code defines clear and convincing evidence as that "measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than 'preponderance of the evidence' as defined in 5 CFR 1201.56(c)(2)." 5 C.F.R. § 1209.4(d) (2001).

13. Much like clear and convincing evidence, "preponderance of the evidence" is also subject to numerous definitions. For example, the Federal Code defines preponderance of the evidence "as the degree of relevant evidence that a reasonable person, considering the record as a whole, would

impose the liability upon the party with the comparative advantage in reducing the likelihood that such a distortion would occur.

II. THE DOCUDRAMA: "TRUE LIES"[14]

The motion picture industry has recently embraced the use of the docudrama.[15] The docudrama is a genre of film which consists of both fact and fiction, or a hybrid blend of documentary and dramatization.[16] In other words, a docudrama is a motion picture presenting a dramatic recreation or adaptation of actual events in the lives of real people.[17] Docudramas often "create ambiguity and a state of confusion, raising unique questions concerning the subject's legal rights."[18]

In recent years, the motion picture industry has had tremendous success with docudramas. Films such as "Gandhi," "JFK," "Erin

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accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56(c)(2) (2001). Additionally, preponderance of the evidence has been defined by the court as "a belief that what is sought to be proved is more likely true than not true." AG Sys. v. United Decorative Plastics Corp., 55 F.3d 970, 973 (4th Cir. 1995). Finally, preponderance of the evidence has also been defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not." Greenwich Collieries v. Dir., Office of Workers' Comp. Programs, United States Dep't of Labor, 990 F.2d 730, 733 (3rd Cir. 1993).

14. TRUE LIES (20th Century Fox/Universal Pictures 1994) (a spy thriller/comedy starring Arnold Schwarzenegger and Jamie Lee Curtis). While docudramas claim to be based on actual true life events, many of them tend to portray individuals in a false light, or misleading/untruthful way, *see infra* note 21 and accompanying text (discussing numerous motion pictures, in which individuals have filed suit claiming they have been portrayed in a false light).

15. *See infra* notes 19 & 20 and accompanying text (discussing the motion picture industry's use and success, both critically and financially, of docudramas, in addition to its failures).

16. Gregory J. Reed, *Docudramas: Whose Image Is Protected? A Practitioner's Point of View,* 78 MICH. B.J. 1284, 1284 (1999). Indeed, since the beginning of docudramas, they have "become an increasingly popular and profitable form of television entertainment." Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-Based Dramas – What Every Producer's Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 485, 485 (1992). (citing Steve Weinstein, *A Quarter-Century of Television Movies . . . The Historical View*, L.A. TIMES, Apr. 23, 1989, at C24). In fact, even though docudramas have had there fair share of critics since the beginning, this has not slowed down the motion picture industry from producing them, or from the public supporting them with their economic stamp of approval. *Id.* (citing Lionel S. Sobel, *The Trials and Tribulations of Producing Docu-Dramas: Tales of Elizabeth Taylor, John DeLorean and Network Program Standards*, ENT .L. REP. Aug., 1983, at 3, 4-5).

17. *See* Grunfeld, *supra* note 16, at 485. Before specifically addressing false light invasion of privacy issues, Grunfeld goes on to comment that the docudrama "is the presentation of choice whenever there is a sensational murder, titillating love triangle, heroic rescue, personal triumph, or event(s) of historical importance." *Id.* She notes that docudramas are so popular because they "provide the public with a voyeuristic journey into the lives of celebrities and other people in the news — a catharsis — an opportunity to release pent-up emotions in an entertaining way." *Id.* at 486.

18. Reed, *supra* note 16, at 1248.

Brochovich," "The Insider," "Schindler's List," "Apollo 13," and, of course, the unsinkable "Titanic" have experienced extraordinary financial and critical success.[19] However, the industry has been met with its share of failures, as well. "A Civil Action," "Nixon," and "Without Limits" are all docudramas that have been met with less than financial success at the theaters.[20]

However, there is a much more important issue than the financial

19. GANDHI (Columbia Pictures 1982). This film depicts the biography of Mohandas K. Gandhi, who rose from a small-time lawyer to India's spiritual leader through his philosophy of non-violent but direct-action Protest. The Internet Movie Database, *at* http://us.imdb.com/Tawards?0083987. The awards for *Gandhi* include the Academy Award for Best Actor, Best Director, Best Picture, Best Writing (1983). *Id.* JFK (Warner Brothers 1991). This film is a mixture of fact and speculation surrounding the assassination of U.S. President John F. Kennedy, and the ensuing investigation conducted by New Orleans District Attorney, Jim Garrison. The Internet Movie Database, *at* http://us.imdb.com/Title?0102138. *JFK* received an Academy Award Nomination Best Picture in 1992. *Id. and accumulated more than* $205.4 million in world wide ticket sales. *Id*. ERIN BROCHOVICH (Universal Pictures 2000). The biographical story of Erin Brochovich, a single mother who investigates a suspicious real estate case and discovers that a billion dollar corporation is covering up the dumping of deadly toxic waste that is poisoning the area's residents. The Internet Movie Database, *at* http://us.imdb.com/Title?0195685. The awards include Academy Award Best Actress in a Leading Role; Academy Award Nomination Best Picture (2001). *Id.* and $125.5 million U.S. ticket sales. *Id.* THE INSIDER (Buena Vista Pictures 1999). (The true story of tobacco executive-turned-whistle blower Jeffrey Wigand and his relationship with "60 Minutes" producer Lowell Bergman). The Internet Movie Database, *at* http://us.imdb.com/Title?0140352. *The Insider* received an Academy Award Nomination for Best Picture (2000). *Id.* and $28.9 million U.S. ticket sales. *Id.* SCHINDLER'S LIST (MCA/Universal Pictures 1993). The true story of businessman Oskar Schindler, who while trying to make his fortune during the Second World War by exploiting cheap Jewish labor, instead ends up penniless after sacrificing his fortune to save the lives of over 1000 Polish Jews during the holocaust. The Internet Movie Database, *at* http://us.imdb.com/Title?0108052. *Schindler's List* received the Academy Award for Best Picture, Best Director, and Best Writing (1994). *Id.* and acheived $317.1 million world wide ticket sales. *Id.* APOLLO 13 (MCA/Universal Pictures 1995). Based on the true story of the ill-fated 13th Apollo mission bound for the moon. The Internet Movie Database, *at* http://us.imdb.com/Title?0112384. It received an Academy Award Nomination for Best Writing (1996) and $334 million in world wide ticket sales. *Id.* TITANIC (Paramount 1997). The true story of the Titanic and its passengers, and the fictional romantic story of forbidden love and courage in the face of the disaster. The Internet Movie Database, *at* http://us.imdb.com/Title?0120338. *Titanic* received an Academy Award for Best Picture and Best Director (1998). *Id.* $1.8 billion in world wide ticket sales (number 1 all-time). *Id*.

20. A CIVIL ACTION, *supra* note 2. The story of an attorney who agrees to represent eight families whose children died from leukemia after two large corporations leaked toxic chemicals into the water supply of Woburn, Massachusetts. The Internet Movie Database, *at* http://us.imdb.com/Title?0120633. *A Civil Action* had $60 million budget and $56 million gross. *Id.* NIXON (Buena Vista Pictures 1995). The story of former president Richard M. Nixon, and the events which would lead him to his eventual resignation of office. The Internet Movie Database, *at* http://us.imdb.com/Title?0113987. A $50 million budget and $13.5 million gross. *Id.* WITHOUT LIMITS (Warner Brothers 1997). The story of 1970's Olympic distance runner Steve Prefontaine. The Internet Movie Database, *at* http://us.imdb.com/Title?0119934. WITHOUT LIMITS had a $25 million budget and grossed $770,000 *Id*.

success of docudramas: the disturbing trend of Hollywood film-makers not simply missing the essence of the historical event in question, but rewriting a complete fiction for certain scenes with very little regard for the truth or the personal dignity of the individuals which they are portraying. Some motion pictures in which lawsuits over the false depiction of real life individuals in docudramas have included "The Temptations," "Missing," "Donnie Brasco," "Panther," and "The Hurricane."[21]

A. *Historical Development of the Docudrama: "Analyze This"*[22]

Ideas for docudramas often come from both current and historical

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21. THE TEMPTATIONS (Hallmark Entertainment 1998); *see* Ruffin-Steinbeck v. dePasseEntm't, 82 F. Supp. 2d 723, 732 (E.D. Mich. 2000) (court holding that as a matter of law, inferences in a motion picture based on outside knowledge were not capable of a defamatory meaning). The true story of The Temptations, the Soul vocal group of the 1960's, as seen from the viewpoint of the last surviving member, Otis Williams. *Id*. at 726. Beginning in the late 1950's, the film traces the band from their humble origins and continued up through the 1990's. *Id*. The estates of the three deceased members filed suit on the grounds of defamation, defamation by implication, and false light invasion of privacy, alleging that motion picture contained factual inaccuracies, untrue implications, and multiple false inferences based on outside knowledge. *Id*. at 726-27. MISSING (Universal Pictures 1982); *see* Davis v. Costa-Gavras, 619 F. Supp. 1372, 1386 (S.D. N.Y. 1985) (holding that as a matter of law there is no reasonable basis for the inference of a defamatory statement against the plaintiff). The motion picture explores the real-life experiences of Ed Horman, an American father who goes to a South American country in search for his missing son, a political activist. *Id*. at 1373. The plaintiffs alleged that the film accused the plaintiffs of ordering or approving the death of Charles Horman, constituting a defamatory statement. *Id*. at 1374. A federal judge had dismissed the suit based upon the defendant's motion for judgement on the pleadings. *Id.* at 1386. DONNIE BRASCO (Tristar Pictures 1997); *see* Cerasani v. Sony Corp., 991 F. Supp. 343, 352 (S.D.N.Y. 1998) (court holding that plaintiff's reputation was so "badly tarnished" that he could suffer no further harm and, therefore, no reasonable jury could award him damages). The film follows the true story of FBI agent Joe Pistone as he infiltrates the mafia of New York. *Id*. at 346. The plaintiff claimed that he was defamed in the motion picture which depicts him beating a truck driver during a hijacking, viciously beating the maitre d' of a Japanese restaurant, and participating in a brutal murder. *Id*. PANTHER (Gramercy Pictures 1995); *see* Seale v. Gramercy Pictures, 964 F. Supp. 918, 925-31 (E.D. Pa. 1997) (holding that plaintiff could not support false light claims, that his right to publicity was not violated because defendants did not use his likeness for commercial purpose, and that the Lanham Act claim failed because he could not proved the public was deceived). *Panther* is a semi-historical film depicting the origins of the Black Panther Party of Self-Defense, the plaintiff, Bobby Seale, founder of the Black Panther Party, contended that the motion picture both falsely depicted him and misrepresented what his organization represented. *Id*. at 919-20. *See also* Michael Farber, *Ring of Truth: An Ex-Champ Sues Over How He's Depicted in "The Hurricane,"* SPORTS ILLUSTRATED, Feb. 28, 2000, at 26 (discussing the Joey Giardello false light invasion of privacy lawsuit against the producers of the motion picture); *see supra* note 9 and accompanying text.

22. ANALYZE THIS (Warner Brothers 1999) (film starring Robert DeNiro as a member of the Mafia and Billy Crystal as his therapist). This section presents an analysis of the development of the modern day docudrama.

events.[23] Public documents such as newspapers, magazines, television news reports, celebrity biographies, books and court records often supply the docudrama producer an unlimited resource of ideas. However, due to a lack of facts in regards to particular events, a certain degree of fictionalization is allowed in the production of a docudrama.[24] Therefore, the primary goal of the docudrama is simply to capture the essence of the historical event and not necessarily to recreate for the audience every historical detail of that event.[25]

B. Foundation for Litigation in Docudramas Lawsuits: "Liar Liar"[26]

Docudramas have been criticized and subject to legal liability since their first days. Deceiving scenes, false dialogue and inaccurate impersonations are all aspects of the docudrama that could result in legal

23. The author notes that an example of a historical event which has been produced into a docudrama is the mini-series *From The Earth To The Moon* (Home Box Office 1998), which follows the story of the conquest of the moon by the Americans, from the Mercury and Gemini projects to the legendary Apollo missions. An example of a current event which has been transformed into a docudrama is the motion picture *Hardball*, (Paramount Pictures 2001), a film based upon the real-life story of a gambling addict who finds happiness after agreeing to coach an intercity little league baseball team. The author observes that this motion picture may raise false light invasion of privacy issues. It is this type of motion picture, the story of the bad guy turned good, the anti-hero with a heart of gold, which tends to portray other characters in a false light for dramatic effect. For example, in *Hardball*, two particular scenes show an opposing youth baseball coach "sinisterly" enforce rules, or simply attempt to make up rules in order for his team to prevail. *Id.* However, in real-life this may have never happened, yet this particular individual's reputation is damaged in order for the anti-hero to look like a better person. *See id.*

24. *See* Grunfeld, *supra* note 16, at 486. (courts allowing docudrama producers substantial leeway based upon First Amendment protection that is afforded to the media). Additionally, it has been held that courts will give authors/producers leeway so long as the author attempts to recount a true event, thereby, greatly limiting any plaintiffs attempt to recover under false light invasion of privacy. *See* Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987). The court held that "as a matter of law, the dramatic overlay supplied by the film does not serve to increase the impact of what plaintiff charges as defamatory since it fairly and reasonably portrays the unassailable beliefs of the Hormans, the record thereof in the Hauser book, and the corroborative results of the authors' inquiries." *Id*.

25. *See Davis*, F. Supp. at 658. The court noted that *Missing, supra* note 21, was not a documentary, a "non-fictional story or series of historical events portrayed in their actual location, a film of real people and real events as they occur," but a docudrama *Id*. In addition, the court stated that while a documentary maintains strict fidelity to fact, a docudrama is a "dramatization of an historical event or lives of real people, using actors or actresses." *Id*. The court continued to write that "docudramas utilize simulated dialogue, composite characters, and a telescoping of events occurring over a period into a composite scene or scenes." *Id.*

26. LIAR LIAR (Universal Pictures 1997) (starring Jim Carrey as a fast-track lawyer who is physically unable to lie for 24 hours due to his son's birthday wish). This section illustrates that the basic foundation of a false light invasion of privacy lawsuit is that the plaintiff be portrayed in a misleading and untruthful way.

liability.[27] One of the first docudrama lawsuits occurred when acclaimed actress Elizabeth Taylor[28] filed suit against American Broadcasting Company (ABC) in 1982 to prevent a made-for-television movie based upon her life, claiming inherent inaccuracies in the private conversations and its defamatory nature.[29]

In order to make docudramas, the producer must secure the right to use an individual's likeness, image, and name as the subject matter, or secondary character, of a film.[30] Rights may be acquired from different

27. *See* Stan Soocher, *Taylor Miniseries Ruling,* ENT. LAW & FIN., Sept. 1994, at 5. ENTERTAINMENT LAW & FINANCE, a New York based industry newsletter which has been in circulation since 1985, covers and reports on all legal entertainment mediums (film, music, television, theater, video, publishing, multimedia, and other related industries), and any current legal disputes (including, but not limited to, false light invasion of privacy and defamation) which it may face.

28. A true screen legend, Elizabeth Taylor, the first actress to be paid one million dollars for a film role, has widely been acknowledged as one of the most, if not the most, recognized and critically acclaimed actresses since the 1940's. ELIZABETH TAYLOR: THE GREATEST STAR, *at* http://www.geocities.com/Hollywood/Boulevard/8612/liz.html. Her original "claim to fame" came in 1944 when she achieved child-star status at age 12 by playing the leading role in Clarence Brown's *National Velvet*, (MGM 1944). ELIZABETH TAYLOR: THE GREATEST STAR, *supra.* In addition to seven divorces and two broken engagements, Elizabeth Taylor has earned three Golden Globes, two Oscars, and numerous lifetime achievement awards. *Id.* Awards: 1957 Special Golden Globe Consistent Performance; 1960 Golden Globe Best Actress in a Motion Picture (Drama), *Suddenly, Last Summer* (Columbia Pictures 1959); 1960 Oscar Best Actress, *Butterfield 8* (MGM 1960); 1966 National Board of Review Award Best Actress, *Who's Afraid of Virginia Woolf?* (Warner Brothers 1966); 1966 New York Film Critics Circle Award Best Actress, *Who's Afraid of Virginia Woolf?,* 1966 Oscar Best Actress, *Who's Afraid of Virginia Woolf?*, 1967 British Film Academy Award Best British Actress, *Who's Afraid of Virginia Woolf?*, 1972 Berlin Film Festival Best Actress Award, *Hammersmith Is Out*, (Cinerama 1972); 1974 Golden Globe World Film Favorite—Female; 1985 Cecil B. DeMille Award Life Achievement, presented by Hollywood Foreign Press Association; 1993 Jean Hersholt Humanitarian Award: statuette presented by Academy of Motion Picture Arts and Sciences; 1993 American Film Institute Life Achievement Award; 1998 Screen Actors Guild Life Achievement Award. Elizabeth Taylor: The Greatest Star, *supra.*

29. *See* Taylor v. American Broad. Co., No. 82, Civ. 6977 (S.D.N.Y. 1982). Taylor's lawsuit alleged four causes of action: (1)misappropriation under New York Civil Rights Law sections 50-51; (2) common law right of privacy violation; (3) trademark confusion and damage to her protectible service marks and trade name under the Lanham Act; and (4) unfair competition. Grunfeld, *supra* note 16, at 509 n.186 (citing Victor A. Kovner, *The Great Docudrama Controversy—Elizabeth Taylor and ABC*, COMM. LAW., Spring 1983 at 1, 8). Taylor claimed that any television movie/docudrama based on her life would, in fact, be a fiction "unless there was somebody under the carpet or under the bed during my 50 years." Grunfeld, *supra* note 16, at 486 (quoting Sobel, *supra* note 16, at 5).

30. *See* Robert Kolker, *Negotiating Tips for Producers Making Television Docudramas*, ENT. L. AND FIN., Sept. 1994, at 1, 4. The easiest way of handling this task is through the use of clearance agreements. *Id*. The agreement primarily has the featured subject of the docudrama consent to the depiction of events from the person's life. *Id*. However, obtaining agreement an agreement can be costly, and many producers are hesitant to pay secondary individuals in order to prevent going over budget. *Id*.

sources, such as journalists, investigators, and, of course, the subject of the docudrama.[31] While most docudrama producers do focus on securing the rights of the primary subject, many times they fail to secure the rights of secondary identifiable characters.[32] Additionally, when the producer fails to secure the rights of depicted parties, the likelihood of a reasonably accurate portrayal of the parties in question would appear to be much more difficult to achieve.[33]

III. PROTECTION FOR FALSELY DEPICTED PARTIES: "MISSING"[34]

According to many practitioners, there are two primary legal principles that afford protection to individuals who did not give prior consent to the production of the docudramas: (1) The right to publicity and (2) The right of privacy.[35] In many jurisdictions, the right of publicity has become a failing argument, thus only the right of privacy

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31. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890). The author opines that no article discussing the right of privacy is complete without mentioning the Warren & Brandeis article. The article has been called "one of the most famous and influential law review articles ever published . . . it single-handedly started a new field of law in the United States." Grunfeld, *supra* note 16, at 495 (quoting J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY § 13[A] (Clark Boardman Co. 1990)). The Grunfeld article asserted that an individual had "the right to enjoy life—right to be let alone," and that an appropriate remedy was need due to the fact that the "press is overstepping in every direction the obvious bounds of propriety and of decency." Grunfeld, *supra* note 16, at 495 (quoting Warren & Brandeis, *supra,* at 193, 195-96).

32. *See* Reed, *supra* note 16, at 1287. The basis for most litigation surrounding docudramas and false light invasion of privacy is the producer's failure to secure the rights of identifiable parties depicted in their film. *Id*. This was the case with the "Temptations" litigation, *see supra* note 21 and accompanying text. *Id.* The last surviving member of the Temptations, Otis Williams, was paid $75,000 to secure releases for the production of a mini-series about "The Temptations" from all prior members of the group and/or their estates. *Id*. Williams failed to do so, and more than eight parties filed suit against the producers of the film. *Id*.

33. The author notes that it would be much more difficult to have both an accurate portrayal of the parties in question, and the avoidance of portraying these secondary characters in a false light due to the fact that the parties who are being portrayed, but not contacted, would have an overwhelming abundance of first-hand knowledge. For example, items such as notes, memories, videotapes, and pictures, could help supply the producers of the motion picture with the requisite materials to ensure historical accuracy, and, in turn, possibly decrease the amount of litigation surrounding the production of motion pictures.

34. MISSING *supra,* note 21. *See also* text accompanying note 21 (discussing a libel action surrounding the motion picture). The author notes that false light invasion of privacy protection has been narrowed so significantly, that its intended protection is missing.

35. *See* Reed, *supra* note 16, at 1284. The two concepts, the right to privacy and the right of publicity are interrelated. *Id.* This interrelation is due to the fact that the right of publicity is an offspring of the right to privacy. *Id.* The underlying purpose of the right of publicity "is to protect an individual's proprietary interest in his name or likeness. *Id*. (citing Warren & Brandeis, *supra* note 31 at 193).

can provide any possible relief.[36]

A. Right of Publicity Protection: "Cast Away"[37]

A majority of states have adopted the position that the depiction of plaintiffs' life-stories does not constitute a violation of their right of publicity. Courts have held that sections 46[38] and 47[39] of the Restatement (Third) of Unfair Competition, which was published by the American Law Institute in 1995, are consistent with the position that the right of publicity has not been violated in the depiction of life-stories;[40]

36. *See* Russell G. Donaldson, Annotation, *False Light Invasion of Privacy - Cognizability and Elements*, 57 A.L.R.C. 4th 22 (2001) (offering a collection and analysis of reported state and federal cases applying, construing, or discussing the law relating to the tort of false light invasion of privacy, insofar as those cases have discussed or taken positions relating to the basic cognizability, nature, or particular elements of that cause of action).

37. CAST AWAY (20th Century Fox 2000) (starring Tom Hanks as a Federal Express employee is lost on an abandoned island). In this section, the author notes that in litigation concerning the depiction of plaintiffs' life stories, the courts have cast aside right of publicity protection.

38. Section 46 of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION (Appropriation of the Commercial Value of a Person's Identity. The Right of Publicity), states that "one who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for the purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). *See generally* Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853 (1995); *see also* Oliver R. Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 S.C. L. REV. 709 (1996) (the evaluation of how well the various scholars working under the banner of the American Law Institute have performed with respect to the right of publicity); Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL J. ART & ENT. LAW 227 (1999) (providing an in depth look at the present day need for a federal right of publicity statute).

39. Section 47 of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION. (Use for Purposes of Trade) states that:

> The name, likeness, and other indicia of a person's identity are used 'for the purposes of trade' under the rule stated in § 46 if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use 'for purposes of trade' does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995). *See generally* Goodenough, *supra* note 38 (evaluation of how well the various scholars working under the banner of the American Law Institute have performed with respect to the right of publicity).

40. *See* Ruffin-Steinbeck v. dePasse Entm't, 82 F. Supp. 2d 723, 729 (E.D. Mich. 2000); *see supra* note 21 and accompanying text (the story of The Temptations, the Soul vocal group of the 1960's, as seen from the viewpoint of the last surviving member, and the false light invasion of privacy litigation surrounding it). *See also* Seale v. Gramercy Pictures, 964 F. Supp. 918, 925-27 (E.D. Pa. 1997), *supra* note 21 and accompanying text (discussing the semi-historical film, *Panther*, *supra* note 21, depicting the origins of the Black Panther Party of Self-Defense, and Bobby Seale's,

while other courts have used existing case law to reach the same conclusion.[41]

Furthermore, courts have been hesitant to extend the right of publicity to depictions of life-stories based on First Amendment issues, regardless of whether the work in question is fictional, non-fictional or a combination of both.[42] In fact, where the plaintiff's theory of liability stems from the alleged falsity of the information disseminated, the action is properly considered as an action for defamation or false light invasion of privacy, not as an action for violation of the right of publicity.[43]

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the founder of the Black Panther Party, contention that the motion picture both falsely depicted him and what his organization represented).

41. *See* Whitehead v. Paramount Pictures Corp., 53 F. Supp. 2d 38, 53-54 (D.D.C. 1999) (granting defendant's motion for summary judgement finding that plaintiff's claims that the motion pictures *Bad Company* (Touchstone Pictures 1995), and *Mission Impossible* (Cruise-Warner/Paramount Pictures 1996), were not based upon his autobiographical account of his seven years with the Central Intelligence Agency). In addressing Whitehead's misappropriation claim, which the court liberally construed as an invasion of his right of privacy, the court wrote: "even if Mr. Whitehead could establish that either of the movies was based on his life story, which he cannot, there is no tort for invasion of privacy for appropriating the story of another person's life." *Id*. *See also* Matthews v. Wozencraft, 15 F.3d 432, 438 (5th Cir. 1994) (holding that "the narrative of an individual's life, standing alone, lacks the value of a name or likeness that the misappropriation tort protects").

42. *See id.* at 440. The court further stated:

> We conclude that (the) novel falls within the protection of the First Amendment. It is immaterial whether (the novel) 'is viewed as an historical or a fictional work,' . . . a public figure has no exclusive rights to his or her own life story . . . such life story of the public figure may legitimately extend, to some reasonable degree, to . . . information concerning the individual, and to the facts about him, which are not public . . . thus the life history . . is a matter of legitimate public interest.

Id. *See also* Rogers v. Grumaldi, 695 F. Supp. 112, 121-23 (S.D.N.Y. 1988) (discussed *infra* note 98).

43. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995). The RESTATEMENT notes that in some right of publicity cases indicate "the right to use another's identity in news reports and similar works may be forfeited if the work contains substantial falsifications." *Id.* However, comment c then goes on to say that "such cases are more appropriately regarded as actions for defamation or for invasion of privacy by placing the plaintiff in a false light rather than for infringement of the right of publicity." *Id*. One of the RESTATEMENT'S particular illustrations clearly displays the distinction:

> A is the subject of an unauthorized biography published by B. The biography is entitled "A" and contains a photograph of A on the dust jacket. The biography contains numerous false statements concerning facts and incidents in A's life. B has not infringed A's right of publicity. Whether B is subject to liability to A for false statements contained in the biography is determined under the rules governing liability for defamation or invasion of privacy by placing another in a false light.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c, illus. 6 (1995).

B. Right of Privacy Protection: "Invasion of Privacy"[44]

1. Generally: "The Straight Story"[45]

The right of privacy does not simply involve privacy in the traditional sense of the word. Instead, the right focuses upon both injuries to human dignity and feelings. It is the violation of the right which one has to be left alone and unnoticed if he so chooses. A cause of action for the right of privacy can be triggered by the unpermitted use of any aspect of the plaintiff's persona.[46] The unwarranted appropriation or exploitation of one's personality, publicizing one's private affairs with which the public has no legitimate concern, or wrongful intrusion into one's private activities,[47] each constitute a violation of the right to privacy.

However, the right of privacy offers public figures less protection than it does to non-public persons. If the plaintiff is in such a position that he is "voluntarily in the public eye, such as celebrities and politicians, [he] clearly [will] have less privacy than others, at least as to legitimate reporting of facts reasonably relevant to their public activities."[48] Accordingly, courts provide less protection for those who voluntarily seek public recognition, and, in a sense, come close to

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44. INVASION OF PRIVACY (TriMark Pictures 1996) (involving mental unbalanced man kidnaps a woman to prevent her from having an abortion). While the right of privacy obviously protects individuals from invasion of privacy, this section describes how the right of privacy also offers individuals more expansive protection.

45. THE STRAIGHT STORY (Walt Disney 1999) (the story of a 73 year old man taking a six week trip to mend his relationship with his ill brother). In laying the foundation for the discussion on false light invasion of privacy, the reader is provided with "the straight story," the how and why concerning right of privacy protection to both public and non-public figures.

46. *See Reed*, *supra* note 16, at 185-186 (citing McCarthy, *supra* note 31, at § 5.7 [A-D]) (plaintiffs must be identifiable from defendant's use of plaintiff's attributes, tangible or intangible, including any icon that conjures up the identification of the plaintiff can be used as identification).

47. Shorter v. Retail Credit Co., 251 F. Supp. 329, 329 (D.S.C. 1966) (plaintiff brought action for invasion of privacy claiming that defendant's agent ignored "Keep Out" signs and gathered personal information from plaintiff during a conversation which was conducted in a courteous manner outside plaintiff's house). The court, quoting the South Carolina Supreme Court, wrote that:

> The right of privacy is not an absolute one, and accordingly [define] it as the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimated concern, or the wrongful intrusion into one's private activities, in such a manner as to cause mental suffering, shame, or humiliation to a person of ordinary sensibilities . . . so the right to be left alone might be thought of as a complex of several torts rather than just one.

Id. at 330 (quoting Meetze v. Associated Press, 95 S.E.2d 606, 608 (S.C. 1956)). *See also* Aquino v. Bulletin Co., 154 A.2d 422 (Pa. Super. Ct. 1959).

48. *Seale*, 964 F. Supp. at 923 (quoting McCarthy, *supra* note 31 at § 5.9 [B][1].

estopping them from claiming a violation of their right to privacy.

2. False Light Invasion of Privacy: "Private Lies"[49]

False light invasion of privacy, which is a subdivision of the right of privacy, has been "variously defined" as "the right to be let alone" and "the right to an 'inviolate personality.'"[50] Accordingly, when an individual has such a right, other individuals have a duty not to violate that right.

The Restatement (Second) of Torts has recognized false light invasion of privacy as a distinct cause of action. Section 652E (Publicity Placing Person in False Light) of the Restatement (Second) of Torts provides:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:

> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

While some states have adopted the Restatement,[51] others have reached the same ends through existing case law.[52]

The basic finding of false light invasion of privacy is best described as protecting something that is private to the plaintiff, his "inviolate personality," his private self, his image of himself.[53] The tort of false

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49. PRIVATE LIES (MRG Entertainment 1998). False light invasion of privacy is much like a private lie. To be portrayed in a false light, the statement in question must be false, or a lie. Additionally, false light invasion of privacy is the violation of something which the plaintiff keeps private, his inviolate personality. *See* RESTATEMENT (SECOND) OF TORTS § 625E.

50. *Seale*, 964 F. Supp. at 923 (quoting McCarthy, *supra* note 31, at § 5.9[B][1]).

51. *See id.* at 336 (court predicting that the Pennsylvania Supreme Court will clarify the law concerning the right of publicity in Pennsylvania by adopting § 46 of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION).

52. *See* Easter Seal v. Playboy Enter., 530 So. 2d 643, 646-47 (4th Cir. 1988) (citing Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1388 (La. 1979) (providing a comprehensive survey of Louisiana cases on the subject of false light invasion of privacy, and adopting the four branch analysis of *Dean Prosser and the Restatement (Second) of Torts*, whose position as reporter allowed his view to be incorporated into the current substitute for the general common law, the American Law Institute's Restatements) and Pack v. Wise, 155 So. 2d 909, 913 (La. App. 3d Cir. 1963) (quoting Hamilton v. Lumbermen's Mut. Cas. Co., 82 So. 2d 61, 63 (La. App. 1st Cir. 1955)).

53. *Id.*

light invasion of privacy affronts that private self by publicizing a public display in a manner which is both unreasonable and false. If the publicity is an accurate portrayal of the public display, and is not unreasonable and false, then the plaintiff has no actionable privacy interest, even if the publicity has caused embarrassment, offense, or damage.[54]

In a false light invasion of privacy action, the defendant's duty is to avoid unreasonable invasions of plaintiff's "inviolate personality." There is no duty to avoid reasonable, accurate publicity because it embarrasses and offends. "Fault" flows from conduct that is unreasonable and contains falsity or fiction.[55]

IV. THE DE FACTO DISAPPEARANCE OF THE PROTECTION OFFERED BY FALSE LIGHT INVASION OF PRIVACY: "GONE WITH THE WIND"[56]

A. The Confusion Between False Light Invasion of Privacy and Defamation: "Dazed and Confused"[57]

It would seem reasonable to assume that courts would be unwilling to apply a doctrine in which there is general confusion and no clear understanding; as is the case with false light invasion of privacy. Due to the general failure of both courts and practitioners alike to clearly distinguish between defamation[58] and false light,[59] there is a de facto

54. *See Id.* at 645. The plaintiffs, individuals who were filmed at a Mardi Gras parade, complained that when stock video footage of the parade was used as background scenes for a pornographic movie, that their appearance in the film was unauthorized, and placed them in an objectionable false light before the public. *Id*. Due to the fact that the focus of the movie was sex and drugs, plaintiffs claimed that because of their appearances in the film they have suffered ridicule and embarrassment. *Id*. The court held that the plaintiffs appeared as no more than backdrops and had no literary or logical connection to the attitudes or behaviors exhibited in the film, and, therefore, there was no actionable claim for false light invasion of privacy. *Id*.

55. *Id*. at 648.

56. GONE WITH THE WIND (Selznick International Pictures 1939) (an epic story judged by many to be the greatest motion picture of all time). In this section, the author addresses the overall disappearance of false light invasion of privacy protection.

57. DAZED AND CONFUSED (Gramercy Pictures 1993) (based on the adventures of incoming high school and junior high students on the last day of school, in May of 1976). The author notes that numerous law students, attorneys, practitioners, and courts alike, while not actually dazed, are quite confused in being able to distinguish between the separate torts of defamation and false light invasion of privacy.

58. *See* Bryson v. News America Publ'n, Inc., 174 Ill. 2d 77, 87 (1996) (holding that to state a cognizable claim for defamation, a plaintiff must allege a defamatory statement, the statement must be of and concerning the plaintiff, and cause damage to the plaintiff's reputation.). The court noted that "a statement is considered defamatory if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with

disappearance of the protection offered by the action of false light.[60] While the action of defamation is to protect a person's interest in a good reputation, false light is meant to protect the personal dignity of the individual.[61] However, this distinction, and the protection offered by

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her." *Id.* at 87 (citing Kolegas v. Heftel Broad. Corp., 154 Ill. 2d 1, 10 (1992); RESTATEMENT (SECOND) OF TORTS § 559 (1977). The court continued that "a statement or publication may be defamatory on its face. . . however, even a statement that is not defamatory on its face may support a cause of action for defamation if the plaintiff has pled extrinsic facts that demonstrate that the statement has a defamatory meaning." *Id.* at 87 (citing Morrison v. Ritchie & Co., 4 Fraser, Sess. Cas., 645, 39 Scot. L. Rep. 432 (1902)) (holding that a report that plaintiff gave birth to twins considered defamatory, where plaintiff proved, as extrinsic fact, that some readers knew that the plaintiff had been married only one month)). *But see supra* note 21, Davis v. Costa-Gavras 619 F. Supp. 1372 (S.D. N.Y. 1985) (holding that as a matter of law there was no reasonable basis for the inference of a defamatory statement against the plaintiff).

59. *See generally* Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed,* 64 N.Y.U. L. REV. 364 (discussing North Carolina's and Missouri's rejecting or severely restricting the doctrine of false light invasion of privacy).

60. *See* Cain v. Hearst Corp. 878 S.W.2d 577 (Tex. 1994) (court held, in a 5 to 4 decision, that Texas does not recognize the tort of false light invasion of privacy, finding that the tort merely duplicates other torts, such as defamation, and that the tort unnecessarily abridges free speech). The author notes that while the majority opinion obviously carried the day, the dissenting opinion, in favor of false light invasion of privacy, not only appeared to understand the tort, where the majority did not, but was more persuasive in reaching its conclusion. Where the majority found false light as duplicative of defamation, the dissent noted the difference between defamation and false light invasion of privacy by commenting that "defamation preserves an individuals' reputation interest, but false light invasion of privacy, as the other branches of the right of privacy, safeguards an individuals' sensitivities about what people know and believe about them." *Id.* at 586 (Hightower, J., dissenting) (citing Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1276 n.42 (1993); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1352 (stating that privacy as a tort notion reflects an instinct in the common law to preserve an individual's inviolate personality); Bryan R. Lasswell, Comment, *In Defense of False Light: Why False Light Must Remain A Viable Cause of Action*, 34 S. TEX. L. REV. 149, 156, 163, 172 (1993); Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 958 (1968)). Additionally, the dissent noted that the requisite level of publicity needed for a cause of action to arise differs. *Id.* at 587. False light requires "significantly broader publication that does defamation . . . defamation only requires publication to a single individual, but false light requires widespread dissemination." *Id.* at 587 (citing Walter D. Fisher, Jr., Note, Renwick v. News & Observer Publ'g Co.: *North Carolina Rejects the False Light Invasion of Privacy Tort*, 63 N.C. L. REV. 767, 776 n.73 (1985)). Most importantly, the dissent states that the majorities conclusion that many, if not all, of the injuries redressed by the false light tort are covered by defamation is, in fact, "plainly wrong as a matter of logic." *Id.* at 588. The dissent goes on to write that the fact "that false light covers some of the injuries covered by defamation in no way leads to the conclusion that defamation covers most of the injuries covered by false light." *Id.* Finally, the dissent addresses the majorities conclusion that false light invasion of privacy would unnecessarily abridge free speech under both the Texas and United States Constitutions by stating that the majorities questioning of the "constitutional viability of false light invasion of privacy (is a) cursory and unsatisfactory analysis . . . the court fails to address the United States Supreme Court's acceptance of false light invasion of privacy." *Id.* at 588 (citing Time, Inc. v. Hill, 385 U.S. 374, 387-90 (1967)).

61. *See Easter Seal,* 530 So. 2d at 646. The action for defamation and the actions for

false light has almost completely vanished from the legal map.

B. The Erosion of False Light Invasion of Privacy Protection: "Gone In Sixty Seconds"[62]

A civil right to privacy is not recognized by every United States jurisdiction.[63] Most of the other jurisdictions that do recognize a civil right to privacy have slowly eroded away any protection originally provided by the false light invasion of privacy claiming that those interests are already properly protected by actions in defamation. Additionally, these jurisdictions claim that any other interests within the scope of the false light action are not worth protecting at the expense of the more vital freedoms, such as freedom of speech and freedom of the press.[64]

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invasions of privacy "should be carefully distinguished. *Id.* The former is to protect a person's interest in a good reputation . . . The latter is to protect a person's interest in being let alone." *Id.* at 646 (quoting W.P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS§ 117 (5th ed. 1984)). *See also* RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (1976). The relation between false light invasion of privacy and defamation is explained in the following manner:

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

Id.

62. GONE IN SIXTY SECONDS (Touchstone Pictures 2000) (starring Nicholas Cage as a car thief who must steal 50 cars in a single night). The steady erosion or disappearance of false light invasion of privacy protection, in historic perspective, appears more like the undetected work of a theif in the night.

63. *See* Nathan E. Ray, *Let There Be False Light: Resisting the Growing Trend Against an Important Tort*, 84 MINN. L. REV. 713 (2000) (discussing the disturbing trend of states, such as Texas, Minnesota, and North Carolina, rejecting the false light invasion of privacy tort without a careful and critical examination).

64. *See* Russell G. Donaldson, Annotation, *False Light Invasion of Privacy - Cognizability and Elements*, 57 A.L.R. 4th 22 (2001) (presenting a collection and analysis of reported state and federal cases applying, construing, or discussing the law relating to the tort of false light invasion of privacy, insofar as those cases have discussed or taken positions relating to the basic cognizability, nature, or particular elements of that cause of action).

1. The Restatement (Second) of Torts: "The Beautiful Illusion"[65]

The Restatement (Second) of Torts originally appears to offer individuals false light protection.[66] However, the Restatement then begins to immediately whittle away any protection that it may have provided through the comments. For example, comment c states:

> The plaintiff's privacy is not invaded when unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.

Courts have then used the comment "major misrepresentation" standard to raise the standard of false light of invasion to almost unreachable heights.

A telling example is the "Panther" litigation.[67] In 1996, civil rights activist Bobby Seale, co-founder of the Black Panther Party, sued Gramercy Pictures, producers of the docudrama *Panther*,[68] a movie about the early years of the Black Panther organization, for false light invasion of privacy. In particular, Seale contended that a gun-purchasing scene in the film portrayed him in a false light. The scene was set in a closed room with no windows and depicts the character who plays Bobby Seale, along with other Party members, engaging in the purchase of guns from an Asian gun dealer. The following dialogue takes place during the gun-purchasing scene:

> GUN DEALER: Nothing wrong with that pistol.
>
> JUDGE: The serial number's been filed, man. Cop catches you with this he has an excuse to say you either stole it or 'offed' somebody with it.

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65. THE BEAUTIFUL ILLUSION (Nadya Wynd 2001). This section will address the RESTATEMENT (SECOND) OF TORTS, and its appearance of providing false light invasion of privacy protection. Unfortunately, the author notes, any real false light invasion of privacy protection is merely illusory.

66. *See supra* note 10 and accompanying text (providing the RESTATEMENT (SECOND) OF TORTS definition of false light invasion of privacy).

67. *See supra* note 21 and accompanying text (discussing the semi-historical film, *Panther* (Gramercy Pictures 1995), depicting the origins of the Black Panther Party of Self-Defense, and Bobby Seale's, the founder of the Black Panther Party, contention that the motion picture both falsely depicted him and what his organization represented).

68. *See supra* note 21 and accompanying text (discussing the semi-historical film, *Panther*, and its depiction of the Black Panther Party's origins, and Bobby Seale's, contention that the motion picture's portrayal of him amounted to false light invasion of privacy).

> GUN DEALER: I don't want no trouble. No cops coming to me about these guns.
>
> NEWTON: No trouble here. You got a permit to sell, we got cash. All perfectly legal.
>
> GUN DEALER: These are worth a lot more.
>
> SEALE: I thought you were a revolutionary, man. Look, we can't afford 'em unless you cut us some slack. But, you treat us right, we'll be doing a lot of business. . . All right? . . . [W]onderful.
>
> GUN DEALER: Thank you.
>
> SEALE: Let's go.[69]

At trial, Seale testified that he and other Party members did not purchase illegal guns in the back room of an Asian gun runners house, but instead purchased the guns legally at the B.B.B. department store, a local Oakland department store in sunny California. However, the court found that Seale was not portrayed in a false light, and the differences between the gun-purchasing scene and the real life events were nothing more than mere "minor factual inaccuracies."[70] Yet, for the court to classify the scene which is a fairly obvious inference of illegal dealings cloaked under the language of legitimacy as a "minor factual inaccuracy" appears to be a stretch.

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69. *Seale*, 964 F. Supp. at 924.

70. *See id*. The author is greatly troubled by the court's classification of this scene as a minor misrepresentation and not false light invasion of privacy. For example, the court wrote:

> The scene does not portray Bobby Seale engaging in the purchase of illegal guns. To the contrary, the scene portrays Bobby Seale engaging in the purchase of legal guns. Indeed, the actor playing the role of Huey Newton clearly states: 'All perfectly legal.' The scene also refers to the fact that the Party members were aware that the gun dealer had a permit to sell guns.

Id. at 925. However, the author notes that it appears as if the court missed the underlying implication of both the setting and the dialogue. Certainly, the author notes, it would seem to be a universal truth that whenever an individual prefaces a sentence with "No trouble here," that, in fact, there is trouble, and usually a significant amount of it to follow. Additionally, the court notes that while the Black Panthers never, in fact, purchased guns from an Asian gun dealer in a dark room, they were given guns by a Black Panther Party sympathizer of Japanese ancestry, Richard Aoki. *Id*. The author is even more troubled by the court's findings here. Besides the fact that Aoki should have brought suit for false light invasion of privacy (due to the fact that the motion picture portrayed him as a shady Asian gun dealer). The author is of the opinion that, following the courts reasoning, a future docudrama could portray a friend lending another friend money in real-life as a bribe or an extortion payment in the film without fear of litigation.

2. First Amendment Constitutional Restriction to the Claim of False Light Invasion: "Absence of Malice"[71]

Courts have tended to give docudrama producers substantial leeway, basing their decisions primarily on the freedom of speech privilege afforded to the media by the First Amendment.[72] Additionally, comment d of the Restatement makes clear that the false light invasion of privacy incorporates the First Amendment's constitutional protections.[73]

Accordingly, by using a standard of actual malice, many courts default on the side of the fairly over-broad First Amendment protection for docudrama producers.

A public figure cannot recover for a false light claim, unless he proves by clear and convincing evidence that the defendant published the false portrayal with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.' Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication' or acted with a 'high degree of awareness of . . . [its] falsity.'[74]

Moreover, comment d of the Restatement states that, "Pending further enlightenment from the Supreme Court, this section provides that

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71. ABSENCE OF MALICE (Columbia Pictures 1981) (film starring Paul Newman as a warehouse owner whose life is turned upside down after a prosecutor leaks a false story to the press). In this section, First Amendment considerations are addressed, specifically the "absence of malice" rule regarding public figures and false light invasion of privacy claims.

72. *See* Grunfeld, *supra* note 16 at 485-86 (citing Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987) (court basing its First Amendment protection on the fact that docudrama scenes are a "hybrid of fact and fiction which however do not materially distort the analysis. . . [it should] be remembered that they fairly represent the source materials for the film believed to be true by the filmmakers . . . [and] leeway is properly afforded to an author who thus attempts to recount a true event").

73. *See* RESTATEMENT (SECOND) OF TORTS § 652E cmt. d (1977). Comment d of the Restatement states that "the free-speech and free-press provisions of the First Amendment have been held to apply to the common law of defamation and to impose certain restrictions on the availability of defamation actions." *Id*. The comment goes on to say that a public official "could not recover for a false and defamatory publication unless he proved by clear and convincing evidence that the defendant had knowledge of the falsity of the statement or acted in reckless disregard of its truth *Id.* (citing New York Times Co. v. Sullivan 376 U.S. 254 (1964)). The comment goes on to note that "pending further enlightenment from the Supreme Court, that liability for invasion of privacy for placing the plaintiff in a false light may exist if the defendant acted with knowledge of the falsity of the statement or in reckless disregard as to truth or falsity." *Id*. The comment continues, however, to state that "the question of whether there may be liability based on a showing of negligence as to truth or falsity" is still left open. *Id*.

74. *Seale*, 964 F. Supp. at 924 (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991)).

liability for invasion of privacy for placing the plaintiff in a false light may exist if the defendant acted with knowledge of the falsity of the statement or in reckless disregard as to truth or falsity." However, comment d continues to explicitly state "the caveat leaves open the question of whether there may be liability based on a showing of negligence as to truth or falsity."

In addition to allowing the docudrama producers such a high standard, the level of "knowledge of the falsity of the statement or in reckless regard as to the truth or falsity," courts have, assigned the highest burden of persuasion in civil cases ("clear and convincing evidence") to the plaintiff;[75] making recovery in a false light invasion of privacy case a near impossibility. Once again the "Panther" litigation provides a disheartening example.

Again, Bobby Seale claimed that a scene which depicted him and Eldridge Cleaver, a member of the Black Panther Party, engaging in a verbal argument after the assassination of civil rights leader Martin Luther King Jr. portrayed him in a false light. According to Seale this "Seale-Cleaver Confrontation" scene falsely depicted him as losing his control and leadership of the Black Panther Party, in addition to portraying an argument which never took place.[76] While the court

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75. *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) (court holding that the First Amendment limits California's libel law stating that since plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice). Other courts have extended this rule of law to false light invasion of privacy cases, *see supra* note 74 (court citing to *Masson* in holding that public figure cannot recover under false light invasion of privacy without clear and convincing evidence).

76. *See Seale*, 964 F. Supp. at 926. The relevant scene depicts the following confrontation between Cleaver and Seale taking place:

CLEAVER: No, No, No, No more words. No more sitting, no more praying, waiting for the pigs to kill us. Later for lying down. Later for waiting to get shot like dogs. Nonviolence died in Memphis, died with Dr. King. Now, now we got the fucking guns, it's time to use them.

SEALE: Brother Eldridge, I hear you. But I disagree. And we both know Huey disagrees too. Yeah, we got guns, but the pigs got more guns, the pig has got the National Guard. Now I ain't afraid to fight, but we ain't stupid either. This here is a time to be smart Brother Eldridge.

CLEAVER: Later for all that . . .

SEALE: No later for you.

TYRON: Now listen up man, what are we going to forget about Huey and his trial? Start killing pigs? Start the revolution now? With one of our leaders in jail.

CLEAVER: Yea.

TYRONE: Man if we do that, Huey is a dead man. We're all dead. No man we stay cool . . .

CLEAVER: Later for that. It is time to intensify the struggle. That is what it is!

Id.

At trial, Seale testified that there never was an argument with Eldrigde Cleaver in the days following the Martin Luther King, Jr.'s assassination, and that the film falsely depicted him as losing this leadership and control of the party. *Id*. At trial Seale testified that the film did "not represent what my organization is about, and to falsely portray me sitting up there arguing with

surprisingly agreed that the scene did in fact depict Bobby Seale in a false light,[77] it went on to cite that due to the First Amendment protection of dramatizations, Seale was unable to meet his burden of proof. The court stated that the record was "devoid of clear and convincing evidence that the Defendants acted with malice,"[78] and entered judgement for the defendants.

The court noted that "in docudrama, minor fictionalization cannot be considered evidence or support for the requirement of actual malice."[79] Additionally, the defendants had presented evidence that they undertook substantial efforts to ensure the historical accuracy of the docudrama, including the hiring of two expert consultants. Therefore, the court reasoned, that the defendants had not acted with knowledge that was false or with reckless disregard.[80] However, the court's

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Eldridge Cleaver to usurp my authority, that's wrong." *Id*.

77. *See Seale* 964 F. Supp. at 928. In finding that Seale was depicted in a false light the court wrote that "the Defendant's portrayal of Bobby Seale in the Seale-Cleaver Confrontation scene, as well as the Defendant's failure to include in the film a portrayal of Bobby Seale's leadership at the April 7, 1968 rally where he urged the Black Panther Party members to return to their homes and to only use their guns in self-defense, does not depict Bobby Seale in the light he deserved. It depicts him in a false light." *Id.* The court found this scene to present Seale in a false light because it "provides the false impression that following the assassination of Martin Luther King, Jr. in 1968, Bobby Seale lost his control and leadership of the Black Panther Party to Eldrigde Cleaver." *Id.* at 927. Additionally, the court wrote that the scene was misleading because it did "not set forth Bobby Seale's position as an advocate of non-violence against the police." *Id*. The author notes his confusion, as to the courts rationale here. The distinction the court seems to draw between minor factual inaccuracies, *see supra* note 69 and accompanying text, and false light invasion of privacy seems indistinguishable.

78. *Id.* at 929. The court stated that "the record in this case is devoid of clear and convincing evidence that the Defendants acted with malice; that is, with knowledge that it was false or with reckless disregard as to whether it was false or not." *Id.* at 928. *But see infra* note 95 and accompanying text (discussing the issue that since the film had two well-informed historical consultants that this could be used to meet the requisite reckless disregard standard).

79. *Seale,* 964 F. Supp. at 928 (quoting Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987)). *See infra* note 80 and accompanying text (discussing the rationale of the court citing to a non-false light invasion of privacy case in which the preeminent issue was minor fictionalization, while the *Seale* court had already held that the plaintiff was portrayed in a false light, beyond minor fictionalization).

80. *Seale,* 964 F. Supp. at 928. The court cited language from the "MISSING" case. *See supra* notes 21 & 34 and accompanying text (litigation regarding the motion picture which explores the real-life experiences of Ed Horman, an American father who goes to a South American country in search for his missing son, a political activist), stated that "in docudrama, minor fictionalization cannot be considered evidence or support for the requirement of actual malice." *Id*. at 928 (quoting Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987)). The court had, however, already found that the scene in question was not a "minor fictionalization," but rather displayed Seale in a false light. *Id.* at 928. False light by definition is when a person is placed in a "highly offensive" light. *Id*. at 923 (citing RESTATEMENT (SECOND) OF TORTS § 652E)). The author observes that it is not clear how the court can hold that the plaintiff was portrayed in a false light, but then dismiss the issue by stating that the record was devoid of clear and convincing evidence that the defendants

findings would appear to be counter-intuitive; after all if the producers had the services of two expert consultants, would they not have been more likely to discover the scene falsely depicted Bobby Seale?

V. RECOMMENDATIONS AND COMMENTARY: "THE RIGHT STUFF"[81]

A. *The Failure of the Present Test: "Mission Impossible"*[82]

The present system used by courts has failed to bring about fair and proper results in false light invasion of privacy legal actions in the motion picture industry. Presently, for a plaintiff to prevail on an action for false light invasion he must show that the defendants gave publicity to a false matter concerning the plaintiff which would be highly offensive to a reasonable person, and that the defendants had knowledge or acted in reckless disregard as to the falsity of the publicized matter. Additionally, the burden of persuasion is on the plaintiff. The plaintiff must then meet his burden through clear and convincing evidence.[83] Quite simply, this present test used by the courts is nearly impossible to meet.

Through the present standard, as shown especially by the "Panther" litigation, any legal claim to recover against the motion picture industry through the use of false light is over before it begins. A change is badly needed in order to prevent the motion picture industry from further damaging the personal dignity of unsuspecting public figures through the use of false and misleading scenes in docudramas.

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acted with reckless disregard by citing to a case, *Davis*, in which the key issue is minor fictionalization.

81. THE RIGHT STUFF (Warner Brothers 1983) (a docudrama chronicling the beginning of the American space program). In this section, the author proposes "the right stuff," recommendations on how to improve the present system regarding false light invasion of privacy cases.

82. MISSION IMPOSSIBLE (Warner/Paramount Pictures 1986) (motion picture starring Tom Cruise as a secret agent). Under the present test, the author suggests that for a plaintiff to prevail in a false light invasion of privacy case, it is a near impossibility.

83. *See Masson,* 501 U.S. at 510 (holding that if the plaintiff is a public figure, under the First Amendment, he cannot recover for libel [since extended to false light invasion of privacy] unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice).

B. *Shifting the Burden of Persuasion: "Trading Places"*[84]

One possible solution is to shift the burden of persuasion in false light invasion of privacy docudrama cases. The entire "burden of proof"[85] usually falls on the same party at trial. Such is presently the case in false light invasion of privacy suits, where the burden falls on the plaintiff. However, there are times when it is proper to separate this burden of proof. The court may place the burden of production on one party, and the burden of persuasion on the other. In these cases, once the burden of production is satisfied, the burden of persuasion "shifts" to the other party.

While this would be extremely effective in false light cases regarding docudramas, unfortunately there is little chance for success. At any rate, once the plaintiff were to make out a prima facie case (meets the burden of production) that he was portrayed in a false light; the burden of persuasion would shift to the docudrama producers. Then the producers would be responsible to prove that the false portrayal was not done with actual malice.

Shifting the burden of persuasion would be an appropriate measure due to the contractual idea of comparative advantage.[86] However, courts have traditionally provided docudrama producers substantial leeway, based primarily on First Amendment freedom of speech.[87] This type of

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84. TRADING PLACES (Paramount Pictures 1983). (a comedy starring Eddie Murphy and Dan Aykroyd as two individuals who, without warning, are rapidly switched to opposite sides of the social spectrum). In this section the author explores the possibility of shifting the burden of persuasion from the plaintiff to the defendant in false light invasion of privacy cases, or, in other words, have the burden of persuasion trade places.

85. FED. R. EVID. 301. The Federal Rules of Evidence defined the burden of proof by writing:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Id. This burden of proof is also known as the "bursting bubble" theory. FED. R. EVID. 301 advisory committee's note (citing Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937)). In other words, presumptions which fall under this rule are "given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. *Id*. However, Federal Rule 302 addresses presumptions controlled by state law in civil actions. FED. R. EVID. 302. The state rule states that "in civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law." *Id.*

86. *See infra* article section V-C-2 and accompanying text (describing the "comparative advantage" theory and its potential application to false light invasion of privacy litigation).

87. *See* Grunfeld, *supra* note 16 at 485-86 (citing both Davis v. Costa-Gavras, 654 F. Supp.

broad adjustment would not only be met with extreme apprehension, but, more than likely, no success at all.

C. Lowering the Burden of Persuasion: "Sense and Sensibility"[88]

It is important to remember that while there are many defects in the present handling of false light invasion claims and the actions of the motion picture industry, the problems must be approached thoughtfully and effectively; often viable solutions are only brought about through small, incremental steps. Therefore, a less extreme approach in correcting the current problems with false light invasion of privacy and docudramas would be needed. One such approach would be for the burden of persuasion to remain on the plaintiff, however, the burden would be lowered. Accordingly, the most realistic solution would quite likely be to simply lower the burden of persuasion from "clear and convincing evidence" to "preponderance of the evidence."

By lowering the burden of persuasion, two primary objectives would be accomplished. First, it would provide the plaintiff with a burden of persuasion that is the most generally applicable standard used in the law. Second, it would be more likely to impose liability upon the party with the comparative advantage in reducing the likelihood that an individual's personal dignity would be injured. Additionally, the primary argument against lowering the burden of persuasion, the adverse impact on First Amendment freedom of expression, would be a minor issue due to the basic rationale of defamation lacking First Amendment protection.

1. Most Generally Applicable Burden of Persuasion: "The Burden of Proof"[89]

The present burden of persuasion in false light invasion of privacy

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653, 658 (S.D.N.Y. 1987) ("Leeway is properly afforded to an author who thus attempts to recount a true event") and U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .")). In fact, motion pictures were first acknowledged by the United States Supreme Court as having First Amendment protection in *Burstyn v. Wilson*, see *infra* note 97 and accompanying text (discussing a state's inability to censor motion pictures under the First and Fourteenth Amendments). Grunfeld, *supra* note 16, at 487 n.18. Defendants may raise affirmative defenses such as consent, privilege, or disclaimer. *Id.* at 486.

88. SENSE AND SENSIBILITY (Columbia Pictures 1995) (adapted from the Jane Austen novel of the same name). The author notes that lowering the burden of persuasion in false light invasion of privacy cases would be quite sensible.

89. BURDEN OF PROOF (Danielle Weinstock 1992) (television movie based upon the best selling Scott Turow, attorney turned author, novel of the same name). The author discusses the plaintiff's required burden of persuasion in false light invasion of privacy cases.

cases is that of clear and convincing evidence. However, this standard requires a higher burden of persuasion than is generally needed in most civil cases. In civil litigation ordinarily the burden of persuasion is framed in terms of a "preponderance" of the evidence.[90] Therefore, if courts were to lower the burden of persuasion to a preponderance of evidence,[91] it would not be seen as a radical or excessive change; but instead be viewed as a minor shift to improve the application of the law.

2. Comparative Advantage: "Insured Against Loss"[92]

By courts lowering the burden of persuasion to "preponderance of evidence;" the ensuing result would be that the party with a comparative advantage in preventing the adverse result would be more likely to be held accountable than under the "clear and convincing" standard. The basic premise behind "comparative advantage" is simply that the court assigns the loss to the party who could have more readily reduced or avoided the adverse result. As a result, false light invasion of privacy, in regards to motion picture litigation, would become a more fair and socially just rule.

In docudrama lawsuits based on false light invasion of privacy, the plaintiff is required to prove that the defendant/producer had knowledge or acted recklessly in presenting the plaintiff in a false light. However, the basic idea behind false light is to protect the unsuspecting individual's personal dignity, integrity, and sense of selfhood.[93] The key word being unsuspecting. Many times, such as the case with Joey Giardello in "The Hurricane" litigation, the plaintiff is completely unaware of the docudrama until he is viewing it at the movie theater. Surprisingly, the court still requires the person with no experience in the movie industry, the person who was unaware that the movie was being

90. *See* RESTATEMENT OF THE LAW, THIRD, THE LAW GOVERNING LAWYERS (2000).

91. *See* Tigg Corp. v. Dow Corning Corp., 962 F.2d 1119, 1124 n.2 (1992) (defining preponderance of evidence as "such evidence as, when weighed against that opposed to it, has more convincing force; and thus the greater probability of truth . . ."); *see also* Sweeney v. Urban Redevelopment Auth., 235 A.2d 143, 144 (1967).

92. INSURED AGAINST LOSS (American Mutoscope & Biography 1900). The author suggests that the theory of comparative advantage be applied to false light invasion of privacy cases. In turn, this would have the effect of shifting accountability to the party who could have taken the necessary precautions to avoid litigation. In other words, comparative advantage would insure the "innocent party," the unsuspecting public figure, from any "loss," being portrayed in a false light.

93. *See* Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1265 (1993) (in depth look at the right of privacy and the legal and moral implications of the surveillance and monitoring of employees in the modern day workplace).

filmed, and the person who has been injured, to prove that he was portrayed in a false light with actual malice. Unfortunately, this task is nothing more than an exercise in futility. Although, ideally, the court would shift the entire burden to the defendants to prove that they had not acted with malice; the lowering of the burden of persuasion would, at least, increase the possibility that the plaintiff may recover if portrayed in a false light.

Many times the producers hire numerous experts to consult on the accuracy of the docudrama; such was the case with the production of *Panther*.[94] Surprisingly, in that case, the court ruled that retaining two experts on the Black Panther Party was evidence that the defendants had not portrayed Seale in a false light with actual malice.[95] Yet, simply because movie producers have legal consultants, would courts be willing to use this as evidence that there was no copyright infringement in intellectual property actions; probably not. Instead, would this not be convincing evidence that a major misrepresentation was not due to negligence.

Ideally, to reach the most fair and legitimate outcome, the producers should be required to prove that the false portrayal was accidental, and unintended. However, since it would be unlikely for courts to take that position, the courts should at least lower the burden of persuasion to make it more possible for the party with the comparative disadvantage to recover. Therefore, by lowering the standard from "clear and convincing" to "preponderance of the evidence," courts will enable legitimate plaintiffs a more reasonable opportunity to recover.

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94. PANTHER (Gramercy Pictures 1995), *see supra* note 21 and accompanying text.

95. *Seale*, 964 F. Supp. at 928. The court explained that "the evidence presented at trial by the Defendants demonstrates that they undertook substantial efforts to ensure the historical accuracy of the film's depiction of Bobby Seale. The Defendants retained the services of two consultants to work on the film's production . . ." *Id*. Additionally, the court stated that since the screenwriter and co-producer was a sympathizer and admirer of the Black Panther Party, that the Plaintiff has failed to carry his burden of proving actual malice. *Id*. The author opines that the court's rationale appears counter-intuitive. Regardless whether the screenwriter was an admirer of the Black Panther Party or not, the film had two consultants. *Id.* at 928. These two consultants had testified that they had verified the historical accuracy of certain scenes through the use of numerous books written by members of the Black Panther Party. *Id*. Therefore, the author notes that since these consultants had extensively researched the Black Panther Party history, and, therefore, were aware that such a confrontation never took place, it seems difficult not to reach the finding that the inclusion of the false Seale-Cleaver confrontation scene, which the court earlier noted portrayed Seale in a false light, *see supra* note 77, was not sufficient to meet the requisite reckless disregard standard. *Id.*

3. Unprotected Expression: "The People vs. Larry Flynt"[96]

The primary argument against lowering the burden of persuasion is that such an action would have an adverse impact on First Amendment freedom of expression. It is quite clear that motion pictures are entitled to First Amendment protection. In fact, the Supreme Court clearly stated that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."[97] Additionally, courts have been mindful of the

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96. THE PEOPLE VS. LARRY FLYNT (Columbia Pictures 1996) (docudrama starring Woody Harrelson as controversial pornography publisher, Larry Flynt, and his courtroom exploits for First Amendment freedom of speech protection). Larry Flynt, the publisher of the pornographic magazine *Hustler*, initiated numerous First Amendment cases. *See generally* Hustler Magazine, Inc., v. Falwell, 485 U.S. 46 (1988) (holding that respondent could not recover for intentional infliction of emotional distress by reason of publication of an ad parody without showing the false statements were published with actual malice or reckless disregard of the truth); Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188 (9th Cir. 1989) (holding that an individual and two representatives of the National Organization for Women could not pursue constitutional claims against a magazine or its publisher where neither were state actors); Leidholdt v. L.F.P., Inc., 860 F.2d 890 (9th Cir. 1988) (holding that an article published in pornographic magazine was constitutionally protected as an expression of opinion in a public debate, and mere indication of sanction award at lower court level divested appellate court of jurisdiction for lack of finality); Ault v. Hustler Magazine, Inc., 860 F.2d 877 (9th Cir. 1988) (holding that the adult magazine's article featuring appellant as "Asshole of the Month" was constitutionally protected opinion foreclosing her claims of libel, invasions of privacy by placing her in a false light, and intentional infliction of emotional distress); Fudge v. Penthouse International, Ltd., 840 F.2d 1012 (1st Cir. 1988) (holding that the magazine story characterizing schoolgirls as "amazons" constituted opinion protected by the First Amendment, not fact, and was not actionable as libel, nor was the story so outrageous as to constitute intentional infliction of emotional distress); Guccione v. Hustler Magazine, Inc., 800 F.2d 298 (2nd Cir. 1986) (reversing judgment for public figure in libel action because statement he was an adulterer was substantially true when adulterous conduct was of long duration and there was relatively short period of time between divorce and article publication); Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985) (remanding the case for a new trial despite the fact that plaintiff had a cause of action against defendant, a sexually explicit magazine publisher, for portraying plaintiff in a false light); Flynt v. Rumsfeld, 2002 U.S. Dist. LEXIS 145 (2002) (holding that the magazine was not entitled to a preliminary injunction because it failed to show that the Department of Defense denied it the access sought or that it necessarily would have been denied the access if it had pursued the matter with the department); U.S. Postal Serv. v. Hustler Magazine, Inc., 630 F. Supp. 867 (D.D.C. 1986) (holding that the United States Postal Service could not prohibit a publisher from mailing a sexually explicit magazine to the offices of member of Congress because his right to petition Congress outweighed the members' right to privacy in their offices).

97. Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (holding that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious"). While the court did hold that motion pictures were entitled to First Amendment protection; however, the author notes that this case did not address any defamation or false light invasion of privacy arguments. Instead, the litigation was centered around a motion picture distributors's argument that a New York statute which permitted the banning of motion picture films on the grounds that they were "sacrilegious" was an unconstitutional abridgement of free speech and a free press. *Id.* at 497. However, the court cited *U.S. v. Paramount Pictures, Inc.,* 334 U.S. 131, 166 (1948) which stated that: "We have no doubt that moving pictures, like newspapers

importance of the First Amendment's protections and the potential danger of levying civil sanctions which might inhibit artistic expression, and have been careful about imposing liability in connection with motion pictures.[98] However, due to the basic rule that speech or writing that is defamatory is generally not protected by the First Amendment;[99]

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and radio, are included in the press whose freedom is guaranteed by the First Amendment." *Burstyn*, 343 U.S. at 502 n.12. In effect making it clear that "it cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitude and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Id*. at 501 (citing INGLIS, FREEDOM OF THE MOVIES 20-24 (1947), KLAPPER, THE EFFECTS OF MASS MEDIA (1950); Note, *Motion Pictures and the First Amendment*, 60 YALE L.J. 696, 704-08 (1951)). The court went on to explain that "the importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." *Id*. at 503. The author notices that at no point in its opinion did the court state that the First Amendment offers protection for motion pictures to defame or the place an individual in a false light. *See also* Kingsley Intl. Pictures Corp. v. Regents of Univ. of N. Y., 360 U.S. 684 (1959); *but see* Jacobellis v. Ohio, 378 U.S. 184 (1964).

98. *See* Rogers v. Grimaldi, 695 F. Supp. 112 (S.D.N.Y. 1988) (court holding that all of plaintiff's claims failed as a matter of law due to the fact that motion picture in question was a work of protected artistic expression). The plaintiff, Ginger Rogers, famous dancer/actress of Hollywood's Golden Age (the 1930's & 40's), filed suit claiming that the motion picture *Ginger and Fred* (MGM 1986) misappropriated her name and public image. *Rogers*, 695 F. Supp. at 113. Additionally, Rogers claimed that the immoral behavior of the actress in the motion picture portrayed Rogers in a false light. *Id*. at 112. In finding for the defendants the court wrote:

> It is at once apparent, when we deal with the content of a book or motion picture, that we deal with no ordinary subject of commerce. Motion pictures, as well as books, are a 'significant medium for the communication of ideas'; their importance 'as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform,' and like books, they are a constitutionally protected form of expression notwithstanding that 'their production, distribution, and exhibition is a large-scale business conducted for private profit.

Id. at 116-17 (quoting University of Notre Dame Du Lac v. Twentieth Century-Fox Corp., 22 A.D.2d 452 (1965). Roger's claim, however, should be distinguished from Giardello's claim, *supra* section I of this article and accompanying text, or Seale's claim, *supra* section IV-B-1 of this article and accompanying text. While Giardello's and Seale's claims were based upon their personal histories being misrepresented in docudramas; Roger's claim was, instead, based upon a fictional character, in a fictional motion picture, who made a living in Italian cabarets imitating Ginger Rogers. *Rogers*, 695 F. Supp. at 114. The author opines that Roger's claim for false light protection was based upon a misunderstanding of the law. *See also* Time, Inc. v. Sand Creek Partners, L.P., 825 F. Supp. 210 (1993).

99. *See* Beauharnais v. Illinois, 343 U.S. 250, 256 (1952) (court affirming the Illinois supreme court and the trial court holding that the statute in question did not violate U.S. Const. amend. XIV). The petitioner, president of a group called the White Circle League, was convicted for distributing bundles of lithographs and literature that portrayed depravity, criminality or lack of virtue of black citizens, and called upon city officials to halt the invasion of white people, their property, neighborhoods, and persons by black citizens. *Id*. at 250. This literature was in violation of an Illinois criminal libel statute. *Id*. at 251. *See also* Journal-Gazette Co. v. Bandido's, Inc., 712 N.E.2d 446 (1999) (holding that "the rights under the First Amendment are not absolute, for they must be weighed against other societal interests). For example, because society has a strong interest in protecting attacks upon individual reputation, the law of defamation was created." *Id*. at 451. *Cf.*

it would be fair to extend this basic principle, and to provide the same limitations on freedom of expression in regards to false light invasion of privacy.

As mentioned earlier, when discussing claims based on depictions of life-stories and First Amendment issues, comment c to section 47 of the Restatement states that where the plaintiff's theory of liability stems from the alleged falsity of the information disseminated, the action is properly considered as an action for defamation or false light invasion of privacy.[100] Therefore, if the Restatement considers both defamation and false light as possible actions to recover for falsity of information, it would be quite realistic to assume that the courts would accordingly extend the same basic limitations on First Amendment protection to both defamation and false light claims. Therefore, the examination of this issue will be based upon the underlying principles of the courts' treatment of freedom of expression and defamation.

Although, under the general rule, it would not appear that the First Amendment would be at issue, there are a few exceptions to the basic rule. The one such exception that would most likely apply to docudramas and the false light invasion of individual public figures is the "public figures" exception. This exception states that freedom of speech bars a civil libel judgment for criticism of public figures.[101] The basic underlying rationale is that a public figure has significant access to channels of communication in order to counteract false statements.[102]

Dickson v. Dickson, 529 P.2d 476 (Wash. Ct. App. 1974) (stating that when an individual's exercise of free speech infringes upon another's interest in privacy, the value of the speech must be balanced against the intrusion it makes on the other's interest, such speech may be enjoined when it is not deemed paramount and no other adequate remedy at law exists).

100. Ruffin-Steinbeck v. dePasse Entm't, 82 F. Supp. 2d 723, 731 (E.D. Mich. 2000) (holding that the scope of the right of publicity does not depend on the fictional or non-fictional character of the work while dismissing plaintiff's argument that the right of publicity should extend to the defendants' actions in this case because the depiction of the plaintiff was partially fictionalized and untrue).

101. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (petitioner found not to be a public figure, holding that the state interest in compensating a private figure required a different rule and that the states could define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injuries to a private individual). In discussing the petitioner's defamation claim, the court noted that under the exception, also known as the *New York Times Exception*, that if the petitioner was deemed a public figure, the respondent could "escape liability unless [the] petitioner could prove publication of defamatory falsehood 'with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Id.* at 327 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)).

102. *See id.* at 344. The court reasons that the primary remedy for any defamation victim (and by extension false light invasion of privacy victim) is self-help. *Id*. The individual should use "available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Id*. The court then stated that since public figures enjoy significantly greater

This exception would seem to disallow the basic limitation on First Amendment protection. However, this is only the starting point of the analysis, not the end.

As stated, the basic rationale of the exception is that the public figure has significant access to channels of communication to counteract false statements. However, this rationale does not effectively apply to the problem with modern day docudramas, and, accordingly, should be distinguished.

In regards to most defamation cases, the defamatory statement is usually distributed through the newspaper or newscast of the "relevant community;"[103] at which point the defamed public figure will most likely receive equal attention from the relevant community when he attempts to counteract the false statements. In short, the relevant community that is exposed to the defamation will be more likely to also hear the defamed party's side. However, in regards to the modern day docudrama, this is simply not the case. With the incredible volume of people who see motion pictures, it is almost impossible for the defamed figure to receive equal attention. For example, in "The Hurricane" litigation, Joey Giardello would be a public figure due to the fact that he is a Hall of Fame Boxer from the 1950's. However, the possibility of him having significant access to channels of communication in order to counteract the false statements is completely unrealistic, if not impossible; clearly the rationale of the exception is not being met.[104]

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access to the channels of communication and, therefore, have a more realistic opportunity to contradict any false statements, they are less vulnerable to injury than private individuals. *Id.* Surprisingly, the court, went on to explain in a footnote that the opportunity for rebuttal through significant channels of communication "seldom suffices to undo harm of defamatory falsehood." Gertz, 418 U.S. at 344 n.9. The court continued that "indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Id.* Finally, the court stated that "those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved . . . they invite [the] attention and comment." *Id*. at 345.

103. "Relevant community" is simply the author's short-hand term to describe the community, or general locality, in which the alleged defamatory statement, or false light portrayal, would be received with, at least, a minimal interest due to the public figure's general participation in the community as discussed in *Gertz v. Robert Welch, Inc., see supra* notes 100 and 101 and accompanying text, (a citizen may become a "public figure" if he achieves general fame or notoriety in the community) *See id*.

104. The author notes that as a Hall of Fame Boxer from the 1950's, realistically, Joey Giardello would, at best, only have significant access to individuals who are still fans of middleweight boxing from the 1950's (the author opines that certainly this number could not be more than a few thousand people). By contrast, *The Hurricane* was viewed by ten's of millions of people. The Internet Movie Database *at* <http://us.imdb.com/Title?0174856>. Therefore, the author suggests that it would be extraordinarily unrealistic to claim that if Giardello were to attempt to publicly dispute his false light portrayal in the opening scene of *The Huricane*, that he would

It is not uncommon for a docudrama to be presented many years, sometimes decades, after the original presentation. Which, once again, leaves the party presented in a false light, unable to use his "public figure" status to receive equal attention. Clearly, docudramas and false light invasion of privacy do not meet the rationale of the exception. Accordingly, docudrama cases should be distinguished, and the exception should not apply. Instead, the small protective limitation on freedom of expression for false statements should be allowed in regards to docudramas.

VI. CONCLUSION: "THE VERDICT"[105]

Protection provided by the false light invasion of privacy has been narrowed, to the point of non-existence. The courts have failed to protect unsuspecting individuals from overzealous film-makers in the creation of motion pictures, specifically docudramas. In order to protect unsuspecting and unaware public figures from wrongful depiction, the courts needs to modify and expand the current state of the doctrine of false light invasion of privacy. An effective way to solve these problems, without violating any First Amendment considerations, is through small, incremental steps. The first and key step the courts need to make simply lowering the burden of persuasion from "clear and convincing evidence" to "preponderance of evidence." This will, in turn, make it easier to impose liability upon the party with the comparative advantage in reducing the likelihood that such a distortion would occur, the producer of the misrepresenting docudrama.

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have available to him the same "channel of effective communication" to offer an effective rebuttal.

105. THE VERDICT (Phil Goldstone Productions 1925). The author's final summation regarding false light invasion of privacy in order for the reader to arrive at a final verdict.