

A CALL FOR THE END OF THE FALSE LIGHT INVASION OF PRIVACY ACTION AS IT RELATES TO DOCUDRAMAS

“That the individual shall have full protection in person and property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.”¹

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I. INTRODUCTION

The false light invasion of privacy action, when applied against docudrama² moviemakers, unnecessarily wastes judicial resources,

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

2. Alternate names for “docudrama” are “docu-drama,” “fictionalization,” and “dramatization.” This comment uses the term “docudrama” except when directly quoting another author’s work. Docudrama is “[t]he increasingly popular genre . . . specializ[ing] in revealing the backstage of current events, involving both the famous, . . . the infamous, . . . and even the ordinary,

restricts movie producers' rights to free expression, and indirectly damages the very people it is designed to protect.³ Although based in reality, false light depictions imply qualities about an individual's character that are allegedly misleading and highly objectionable.⁴ Media attorneys advise movie producers to enter into expensive life-story contracts⁵ or risk being sued for false light invasion of privacy.⁶ Movie

when they are caught up in extra-ordinary events." IMAGE ETHICS: THE MORAL RIGHTS OF SUBJECTS IN PHOTOGRAPHS, FILM AND TELEVISION 24 (Larry Gross et al. eds., 1988); accord Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987) ("The docudrama is a dramatization of an historical event or lives of real people, using actors or actresses. Docudramas utilize simulated dialogue, composite characters, and a telescoping of events occurring over a period into a composite scene or scenes."); Ruffin-Steinback v. dePasse, 82 F. Supp. 2d 723, 726 n.1 (E.D. Mich. 2000), aff'd, 267 F.3d 457 (6th Cir. 2001) (citing J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY, § 8.9[A] n.2 (1988)) ("The term 'docudrama' connotes a type of film or novelization in which real-life events are embellished with fictional dramatic events.").

3. Most defendants in false light actions are media figures, for example, moviemakers, news story producers, book publishers, and the like. See, e.g., Time, Inc. v. Hill, 385 U.S. 374, 379 (1967) (concerning an alleged false light depiction in a news story about a play); Parks v. LaFace Records, 329 F.3d 437, 460 (6th Cir. 2003) (determining whether rap song lyrics depicted a civil rights figure in a false light); Heekin v. CBS Broad., Inc., 789 So. 2d 355, 358 (Fla. Dist. Ct. App. 2001) (concerning the broadcast of a segment on *60 Minutes*, a CBS newsmagazine, including interviews juxtaposed with stories and pictures of spousal abuse, and whether the broadcast contained false light invasions of privacy); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 134 (1st Cir. 2000) (considering the depiction, allegedly in a false light, on a *Dateline NBC* newsmagazine.) Seale v. Gramercy Pictures, 964 F. Supp. 918, 923-24 (E.D. Pa. 1997) (considering a claim by a former member of the Black Panthers that the movie *Panther* depicted him in a false light); Tellado v. Time-Life Books, Inc., 643 F. Supp 904, 909 (D.N.J. 1986) (regarding a series of books allegedly including pictures depicting a veteran in a false light during the Vietnam War); Cain v. Hearst Corp. 878 S.W.2d 577, 586 (Tex. 1994) (considering a prison inmate's claim that he had been depicted in a false light by a "newsmagazine"); Fellows v. Nat'l Enquirer, Inc. 42 Cal. 3d 234, 242 (Cal. 1986) (regarding a false light depiction in a news magazine article); Easter Seal Soc'y, Inc. v. Playboy Enter., Inc., 530 So. 2d 643, 645 (La. Ct. App. 1988) (concerning alleged false light depictions in an adult film). However, media figures are not the only defendants in false light actions. Plaintiffs in unfair termination actions sometimes accuse their former employer of depicting the employee in a false light. See, e.g., Sweet v. Tigard-Tualatin Sch. Dist. #23J, No. 03-35455, 2005 WL 19531 (9th Cir. Jan. 5, 2005) (concerning a public school employee's allegations of "invasion of privacy/false light" in conjunction with her assertion that her employment was unjustly terminated). Moreover, public figures are sometimes accused of depicting others in a false light through statements made to the press, or in some other public venue. See, e.g., Flowers v. Carville, 310 F.3d 1118, 1132 (9th Cir. 2002) (claiming that she was a victim of the "Clinton Smear Machine," Gennifer Flowers alleged she was depicted in the public eye in a false light). This comment takes no position on the legitimacy of false light claims used to support actions concerning unjust employment termination or statements made to the media.

4. See West v. Media Gen. Convergence, Inc., 53 S.W.3d 640, 646 (Tenn. 2001) "The facts may be true in a false light claim. However, the angle from which the facts are presented, or the omission of certain material facts, results in placing the plaintiff in a false light." *Id.* at 645 n.5.

5. See, e.g., Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-Based Dramas - What Every Producer's Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 483, 528 (1992) (recommending that docudrama moviemakers obtain waivers or depiction releases from every individual who will be portrayed in the movie).

producers following this advice may be wasting their time and money for two reasons. First, many jurisdictions do not recognize false light as it pertains to docudramas.⁷ Second, even in those jurisdictions that still recognize false light, plaintiffs rarely prevail on their false light claims.⁸

Although plaintiffs rarely prevail on their false light claims, facts underlying false light actions will often support successful defamation actions.⁹ Courts waste judicial resources untangling genuine claims of defamation from duplicative false light claims. Moreover, defamation is not the only recourse for people depicted in docudramas; the right of publicity protects most plaintiffs, as long as they are public figures.¹⁰ False light actions afford almost no discernable additional protection of plaintiffs' rights above and beyond defamation and right of publicity, and further, hinder courts and moviemakers by unnecessarily consuming time and money. The few remaining jurisdictions that recognize false light should stop doing so.

Not all commentators agree that courts should not recognize false light,¹¹ but a growing number of courts are reluctant to recognize such claims.¹² By rejecting the theory, courts are furthering an important social purpose by reducing incentives to act inappropriately. In an attempt to capitalize on fame, or even infamy, individuals put themselves and others in foolhardy and self-serving positions and make decisions they otherwise would not have made. Marketability of a sensational story becomes the overriding concern; ethical considerations take a back seat.

6. See, e.g., *id.* at 504 (stating, "producers must be wary of false light claims and review nondefamatory material with the same diligence as material which is more obviously actionable").

7. *Cain*, 878 S.W.2d at 579 (citing cases in North Carolina, Missouri, New York, Ohio, Virginia, Mississippi, Massachusetts, Washington, and Wisconsin, demonstrating that those states do not recognize false light and further, holding that Texas does not recognize false light). This comment does not suggest that courts should stop recognizing defamation and right of publicity actions. Defamation is discussed *infra* Part II.A. The right of publicity is discussed *infra* Part II.E.

8. See Matthew Stohl, *False Light Invasion of Privacy in Docudramas: The Oxymoron Which Must Be Solved*, 35 AKRON L. REV. 251, 254 (2002) (stating that "false light has become a near impossible claim to prevail upon").

9. See J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 834 (1992) ("The similarities between defamation and false light are so marked that some courts have concluded that if a cause of action for defamation is pled, a cause of action for false light privacy is duplicative and may be dismissed from the case."); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 400 (1960) ("There has been a good deal of overlapping of defamation in the false light cases, and apparently, either action, or both, will very often lie."); see generally Grunfeld, *supra* note 5, at 501-04 (discussing the history of the false light doctrine and its relation to defamation).

10. See *Parks v. LaFace Records*, 329 F.3d 437, 459 (6th Cir. 2003) ("The right of publicity protects the identity of a celebrity from exploitive commercial use.").

11. See Stohl, *supra* note 8, at 254 (calling for an expansion of the false light invasion of privacy action).

12. See *id.*

Individuals' expectations that they must be compensated for even minimal participation in newsworthy stories will not be curtailed unless all courts reject the false light tort, otherwise, the number of spurious cases based "on the presumption that producers must always [pay for rights]"¹³ will continue to grow. If all courts reject the theory, then filmmakers can stop paying large amounts for life-story rights and depiction waivers, and perhaps people will stop conducting their affairs in such a way as to enhance their marketability. If even one jurisdiction continues to recognize false light then docudrama filmmakers anticipating nationwide film distribution, which subjects them to personal jurisdiction in every state, must guard against false light actions.¹⁴ Docudrama filmmakers are unfairly burdened because the prohibitive cost of entering into multiple depiction waivers¹⁵ may prevent them from telling certain stories, curtailing the freedom of expression guaranteed by the First Amendment.¹⁶

False light advocates bemoan the current difficulties for false light plaintiffs and recommend that courts relax restrictions on false light.¹⁷ But at least one commentator has suggested that, in general, the right to privacy is "more socially constructed" than other rights,¹⁸ and another has suggested that false light was created in "the halls of academia," and not in response to tradition, widely shared beliefs, or genuine need.¹⁹ Of the four identified rights to privacy,²⁰ the false light invasion is the one most likely

13. See Colleen M. Hanlon, *Fact-Based Programming: The Issues the Clearance Lawyer Must Address*, 16-WTR COMM. LAW. 8, 10 (1999).

14. See Grunfeld *infra* note 32 and accompanying text.

15. See *infra* note 141 and accompanying text.

16. *United States v. Paramount Pictures* 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

17. See Stohl, *supra* note 8, at 254.

18. Frederick Schauer, *Free Speech and the Social Construction of Privacy*, 68 SOC. RES. 221, 221 (2001) ("Perhaps the right to privacy is more socially contingent, more socially constructed, and more culturally relative than other rights, or has a degree of social contingency and cultural relativity that other rights do not possess.").

19. Kelso, *supra* note 9, at 786-87.

20. See Prosser, *supra* note 9, at 389. Prosser's four privacy torts are:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Id. Prosser's four privacy torts are similarly catalogued in his HANDBOOK OF THE LAW OF TORTS and LAW OF TORTS. See *Cain v. Hearst Corp.* 878 S.W.2d 577, 578 (Tex. 1994) (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 638 (2d. ed. 1955); *Easter Seal Soc'y, Inc. v. Playboy Enter., Inc.*, 530 So. 2d 643, 645 (La. Ct. App. 1988) (citing WILLIAM L. PROSSER, LAW OF TORTS § 117 (4th ed. 1971) and Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960)) ("Modern development of this tort has seen it analyzed into four distinct branches; the most prominent proponent of this analysis having been Dean William Prosser.").

to engender “concern over where privacy might be going.”²¹ Courts that have not already done so should abandon the tenuous false light invasion of privacy action as it pertains to docudramas.²²

The docudrama is a favored vehicle for filmmakers,²³ and it is easy to see why. Movie ideas may come from many sources, most of which are protected by copyright, but “[t]rue stories are free for the filmmaker to exploit.”²⁴ Not only are true stories often free for the taking,²⁵ but also the public’s prior interest is piqued, which may enhance marketability.²⁶ Moreover, filmmakers may have a desire to bring a true story to the public,²⁷ or “to promote ideas and impact society.”²⁸ Several recent docudramas have enjoyed great box office success and critical acclaim while achieving the filmmaker’s goal of raising awareness.²⁹ Ease of

21. Prosser, *supra* note 9, at 401; *see also Cain*, 878 S.W.2d at 579-80 (“We reject the false light invasion of privacy tort for two reasons: 1) it largely duplicates other rights of recovery, particularly defamation; and 2) it lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law.”).

22. Although this comment focuses on false light actions pertaining to depictions in docudramas, many of the arguments can be used to support a call for abandoning the false light action against book publishers, authors, news reporters and the like.

23. *See Graydon Carter, Editor’s Letter: For Your Consideration. . .*, VANITY FAIR, Mar. 2005, (observing that “Hollywood has entered a post-fictional period, where almost every story worth telling is one that has already been lived.”). Examples of Hollywood movies based on true stories in 2004 alone include: “*The Aviator*, *Ray*, *The Motorcycle Diaries*, *Hotel Rwanda*, *Alexander*, *Finding Neverland*, *Kinsey*, *Beyond the Sea*, *Friday Night Lights*, *The Assassination of Richard Nixon*, *The Sea Inside*, [and] *De-Lovely*.” *Id.*

24. JON M. GARON, *THE INDEPENDENT FILMMAKER’S LAW AND BUSINESS GUIDE* 3 (2002).

25. True stories do not always come without a price tag. Many movie dramatizations are based upon some other source, for example, Warner Brothers purchased the rights to the movie *The Perfect Storm* from Sebastian Junger, author of the book, *The Perfect Storm: A True Story of Men Against the Sea*. Tyne v. Time Warner Entm’t Co., 336 F.3d 1286, 1288 (11th Cir. 2003), *certified question answered* by Tyne v. Time Warner Entm’t., No. SC03-1251, 2005 WL 914193 (Fla. Apr. 21, 2005).

26. GARON, *supra* note 24, at 4. “Audiences seem drawn to true stories, which in turn provide excellent marketing opportunities.” For example, of the three boxing films, *Ali*, *Rocky*, and *On The Waterfront*, “filmmakers and distributors had less difficulty promoting [the only one based on a true story], *Ali*.” *Id.*; *See also* Time, Inc. v. Hill, 385 U.S. 374, 379 (1967) (“It is an inescapable conclusion that [the fictionalization of a true story] was done to advertise and attract further attention.”).

27. *Cf. Hill*, 385 U.S. at 391 (explaining that the author of the play written about a family’s experience during a hostage situation, was interested writing about true crime: “[t]he story theme was inspired by the desire to write about ‘true crime’ and for years before writing the book, he collected newspaper clippings of stories of hostage incidents”).

28. GARON, *supra* note 24, at 4.

29. Some notable examples include: “*Norma Rae*, *Boys Don’t Cry*, *Schindler’s List*, and *Erin Brockovich*.” GARON, *supra* note 24, at 15. *See also* Stohl, *supra* note 8, at 255-56 (listing *Schindler’s List*, *Gandhi*, *JFK*, *Apollo 13*, *Titanic* and others). Recent Academy Award winning docudramas include: *A Beautiful Mind* and *Monster*. *A Beautiful Mind*, <http://www.abeautifulmind.com/> (last visited Apr. 2, 2005) (advertising the film, *A Beautiful Mind*,

marketability, lack of expensive copyright licensing fees, and a desire to raise societal awareness, make the docudrama a popular choice for filmmakers.

Although true stories are theoretically free for the taking, many experts advise filmmakers that they risk being sued unless they obtain the permission of the people portrayed in the movie³⁰ or employ other techniques, such as composite characters and false names.³¹ According to one author, "producers must be wary of false light claims and review nondefamatory material with the same diligence as material which is more obviously actionable."³² Moreover, docudrama filmmakers are advised to obtain "depiction releases" from "all living people portrayed in the docudrama."³³ These admonitions should become largely unwarranted if those remaining jurisdictions that recognize false light stop doing so when a true story has been fictionalized in film.

In Part II, this comment introduces the legal pitfalls and expenses for moviemakers due to the false light invasion of privacy action: compares it to defamation, describes the elements of a false light claim, details the difficulty of prosecuting a successful false light claim, and considers whether justice is served when false light actions succeed. In Part III, this comment suggests that the false light action grants a property right in personal information that can be exploited by people to "sell-out" the interests of others. Finally, in Part IV, this comment concludes that courts should stop recognizing false light.

as the recipient of four Academy Awards); *Monster* - The Official Motion Picture Website, <http://www.monsterfilm.com> (last visited Apr. 2, 2005) (advertising the actress Charlize Theron in the movie *Monster* as the recipient of an Academy Award for Best Actress).

30. GARON, *supra* note 24, at 4. Garon specifically warns against the danger of being sued for libel and warns that "unflattering portraits" may lead to a lawsuit. *Id.* at 4-5.

31. GARON, *supra* note 24, at 16. Techniques recommended for avoiding defamation charges include labeling the work as fiction, and including a disclaimer such as "certain events have been fictionalized," or "are interpretative," and that "certain names and locations have been changed." Hanlon, *supra* note 13, at 9-10. Moviemakers and authors are advised to fictionalize depictions of real people in order to ensure that they do not inadvertently defame anyone. JAMES G. SAMMATARO, HOW TO AVOID REEL LEGAL PROBLEMS: A FILM-MAKING & MULTI-MEDIA GUIDE § 4:11 (2004) (summarizing case law in this area, and recommending several techniques for minimizing liability, including changing names and settings and "tweaking the plot").

32. Grunfeld, *supra* note 5, at 504. *But see* Stohl, *supra* note 8, at 254 (stating that "false light has become a near impossible claim to prevail upon").

33. Grunfeld, *supra* note 5, at 528.

II. FALSE LIGHT: VAGUENESS, INCONSISTENCY, LACK OF PROCEDURAL SAFEGUARDS, AND OVERLAP WITH OTHER ACTIONS

A. False Light Invasion of Privacy – What Is It?

Docudrama filmmakers may be overprotecting themselves from false light invasion of privacy actions, in part because false light is so difficult to define and understand.³⁴ Definitions may be found either in the Restatement (Second) of Torts or in Dean William L. Prosser's much-cited *Privacy* article.³⁵ The Restatement (Second) of Torts recognizes four commonly identified "right[s] of privacy," and classifies false light as one of the four.³⁶ Dean Prosser said the false light invasion of privacy is "[p]ublicity which places the plaintiff in a false light in the public eye."³⁷

Neither of these definitions clearly describes the risk for filmmakers. In general, a docudrama filmmaker risks depicting an individual in a false light by implying that the individual believes, does, thinks, values or does not value in a way that is antithetical to what the individual actually believes, does, thinks, values or does not value.³⁸ Mere falsity is

34. *Flowers v. Carville*, 310 F.3d 1118, 1132 (9th Cir. 2002) ("Judges and legal scholars have puzzled over [false light's] existence.").

35. Prosser, *supra* note 9, at 389. Many courts rely on either Prosser's definition or that in *The Restatement (Second) of Torts*. See, e.g., *Seale v. Gramercy Pictures*, 964 F. Supp. 918, 923 – 24 (E.D. Pa. 1997) (citing *THE RESTATEMENT (SECOND) OF TORTS* § 652E, § 652E cmt. c (1977)); *Cain v. Hearst*, 878 S.W.2d 577 (Tex. 1994) (citing *THE RESTATEMENT (SECOND) OF TORTS* § 652E); *Fellows v. Nat'l Enquirer, Inc.* 42 Cal. 3d 234, 238 – 39 (Cal. 1986) (citing Prosser, *supra* note 9, at 389 and *THE RESTATEMENT (SECOND) OF TORTS* § 652E). *The Restatement (Second) of Torts* provides:

Publicity Placing Person in False Light

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.

THE RESTATEMENT (SECOND) OF TORTS § 652E (1977). Comment c to § 652E provides some guidance as to the parameters of the false light invasion of privacy violation. It states:

The plaintiff's privacy is not invaded when the 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.

Id. at § 652E cmt. c.

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

37. Prosser, *supra* note 9, at 389.

38. See *THE RESTATEMENT (SECOND) OF TORTS* § 652E cmt. c (1977) ("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.").

insufficient to prove false light.³⁹ Some states have adopted neither the Restatement (Second) of Torts nor Dean Prosser's definition of false light. Confusion and disagreement between the states⁴⁰ and circuits as to what constitutes a false light claim undoubtedly creates uncertainty for docudrama filmmakers, leading them to enter into costly life-story and depiction contracts.

B. False Light and Defamation – Are They the Same Thing?

Although false light is difficult to define, defamation is well understood. Defamation is falsehood that causes injury to a person's reputation.⁴¹ Many courts recognize that defamation actions adequately guard the interests supposedly protected by false light,⁴² and that frequently the same set of facts can be used to demonstrate both.⁴³ Courts are divided as to whether false light and defamation actions are coterminous,⁴⁴ but plaintiffs who allege one often allege the other.⁴⁵ Some courts have trouble distinguishing defamation from false light, and occasionally courts use the terms interchangeably.⁴⁶ Even those courts that appear to understand the difference between defamation and false light

39. See *id.* (“The plaintiff’s privacy is not invaded when the unimportant false statements are made, even when they are made deliberately.”).

40. See *Flowers v. Carville*, 310 F.3d 1118, 1132 (9th Cir. 2002) (identifying differences between California and Nevada with regards to false light).

41. THE RESTATEMENT (SECOND) OF TORTS § 559 (1977).

42. See, e.g., *Cain v. Hearst*, 878 S.W.2d 577, 579-80 (Tex. 1994) (rejecting the “false light invasion of privacy tort,” in part because, “it largely duplicates other rights of recovery, particularly defamation”); *Fellows v. Nat’l Enquirer, Inc.* 42 Cal. 3d 234, 239 (Cal. 1986) (“Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well.”).

43. See, e.g., *Brown v. Hearst Corp.*, 54 F.3d 21, 27 (1st Cir. 1995) (where plaintiff sued a “newsmagazine” claiming both defamation and false light over a “news” show that juxtaposed images of a woodchipper with suggestions that the police suspected him in the brutal murder of his missing wife); *Fellows*, 42 Cal. 3d at 236-38 (discussing facts sufficient to support either defamation or false light, as long as procedural restraints are met).

44. See, e.g., *Fellows*, 42 Cal. 3d at 251 (“[V]irtually every published defamation would support an action for false light invasion of privacy.”).

45. See, e.g., *Flowers v. Carville*, 310 F.3d 1118, 1122 (9th Cir. 2002) (where Gennifer Flowers, President Clinton’s alleged former mistress, asserted both defamation and portrayal in a false light); *Browning v. Clinton*, 292 F.3d 235, 241 (D.C. Cir. 2002) (where Dolly Kyle Browning, another alleged former Clinton paramour, asserted both defamation and portrayal in a false light); *Brown*, 54 F.3d 21 at 27 (asserting that plaintiff’s false light privacy claims are merely a restatement of his defamation claim.).

46. See generally *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723, 731-33 (E.D. Mich. 2000), *aff’d*, 267 F.3d 457 (6th Cir. 2001) (failing to distinguish false light claims from defamation claims); *Busey v. Bd. of County Comm’rs of Shawnee County, No. 01-C-626*, 2004 WL 1965673, at *8 (Kan. Dist. Ct. Sept. 2, 2004) (stating “[d]efamation and false light/invasion of privacy are usually treated the same”).

often recognize the difficulty distinguishing between the two.⁴⁷ Commentators add to the confusion by citing as examples of false light cases that actually arise in defamation.⁴⁸

Although many courts confuse or combine false light with defamation,⁴⁹ some courts distinguish the two. A few jurisdictions recognize a limited class of non-defamatory communications that are, nonetheless, false light invasions of privacy.⁵⁰ These jurisdictions differentiate the harm, the recovery, or the available defenses in false light and defamation actions. According to some courts, in false light actions the recovery is for the mental distress caused by the false light depiction. In defamation actions, the recovery is for the damaged reputation.⁵¹ In a few states, false light defendants are not protected by the same procedural safeguards, such as statutes of limitations and requirements concerning

47. *Easter Seal Soc'y, Inc. v. Playboy Enters., Inc.*, 530 So. 2d 643, 645-46 (La. Ct. App. 1988) (“[C]onfusion is spawned by a general failure to distinguish clearly between defamation and invasion of privacy, including the false light subdivision.”).

48. Stohl, *supra* note 8, at 257 (stating that “motion pictures in which lawsuits over the false depiction of real life individuals in docudramas have included *The Temptations*, *Missing*, [and] *Donnie Brasco*.”). Each of these movies spawned cases that arose in defamation and not false light. See *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723 (E.D. Mich. 2000), *aff'd*, 267 F.3d 457 (6th Cir. 2001) (discussing *The Temptations*); *Cerasani v. Sony Corp.*, 991 F. Supp. 343 (S.D.N.Y. 1998) (discussing *Donnie Brasco*); *Davis v. Costa-Gavras*, 654 F. Supp. 653 (S.D.N.Y. 1987) (discussing *Missing*). In *Ruffin-Steinback*, a television mini-series relating the story of the *Temptations* prompted litigation by some of the *Temptations*' family members. *Ruffin-Steinback*, 82 F. Supp. 2d at 726-27. The court applied the standard for defamation to both the plaintiffs' defamation and false light claims. See *id.* at 731-34. Thus, the court did not specifically address the false light claims. See *id.* at 731-33. John Cerasani's claims against Sony Corp. were that the fictionalized version of events in the movie *Donnie Brasco* defamed him and that Sony had unlawfully used his identity. See *Cerasani v. Sony Corp.*, 991 F. Supp. 343 (S.D.N.Y. 1998). The crux of Cerasani's case was his defamation claim. See *id.* On Sony's motion, the court dismissed the case. *Id.* at 358. *Davis* was a libel case concerning *Missing*, the movie dramatization of a true story depicting events in Chile. See *Davis v. Costa-Gavras*, 654 F. Supp. 653 (S.D.N.Y. 1987). No false light claims were made. See *id.*

49. *Easter Seal*, 530 So. 2d at 646 (lamenting that there is “a general failure to distinguish clearly between defamation and invasion of privacy, including the false light subdivision”); Kelso, *supra* note 19, at 787 (stating “the supposed existence of false light has confused courts and practitioners who remain uncertain as to the scope of the tort and the types of defenses which may be asserted”); see generally *Ruffin-Steinback*, 82 F. Supp. 2d at 731-33 (where the court fails to distinguish between the defamation and false light claims).

50. *Cain v. Hearst*, 878 S.W.2d 577, 586 (Tex. 1994) (Hightower, J., dissenting) (citing *Time, Inc. v. Hill*, 385 U.S. 374, 384-85 n.9(1967); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 87 (W. Va. 1983); Prosser, *LAW OF TORTS* 813 (4th ed. 1971); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364, 367 n.16, 396 (1989)) (“[T]he court rightly notes, as do many courts and commentators, that there are communications which, based on their content, are not defamatory but may be false light violations of privacy because they are highly offensive.”). See also *Flowers*, 310 F.3d at 1132 (“In Nevada, however, false light extends beyond defamation in one respect: A plaintiff need not show injury to reputation.”).

51. *Flowers*, 310 F.3d at 1132 (quoting *PETA v. Bobby Berolini, Ltd.*, 895 P.2d 1269, 1274 n.4 (Nev. 1995)).

pleading and proof, as are defendants in defamation actions.⁵² All courts agree that the truth is a defense to a defamation allegation,⁵³ but states disagree as to whether the truth is also a defense to false light.⁵⁴ More consistent judicial treatment of defamation among the states and circuits provides certainty for plaintiffs and filmmakers alike. Jurisdictional treatment of false light varies widely from state to state, undoubtedly leading to forum-shopping and further burdening those jurisdictions that still recognize false light.⁵⁵

Jurisdictional inconsistency over false light violates docudrama filmmakers' First Amendment guarantees of freedom of expression.⁵⁶ Inconsistency leads to vagueness, and "vagueness . . . raise[s] special First Amendment concerns because of its obvious chilling effect on free speech."⁵⁷ Filmmakers cannot know what behavior to guard against when even the courts are uncertain about what constitutes a false light depiction.⁵⁸ Fear of inadvertently depicting someone in a false light, and

52. See *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355, 358 (Fla. Dist. Ct. App. 2001) (holding that the statute of limitations for defamation claims does not apply to false light claims, unless the plaintiff alleges both a defamation claim and a false light claim based on the same facts. The statute of limitations for defamation is two years, but the statute of limitation for false light is four years.). *But see Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 134 (1st Cir. 2000) (reasoning that, since the same set of facts was used to support both a defamation claim and a false light claim, the actual malice requirement that applies to defamation under Maine law, must also be applied to the false light claim); *Brown v. Hearst Corp.* 54 F.3d 21, 27 (1st Cir. 1995) (citing *Hill*, 385 U.S. 374) ("We think it worth adding that 'false light' privacy claims are not all of a piece, but Willis' claim is simply a restatement of his defamation claim under a different heading. That being so, it is not imaginable that it could escape the same constitutional constraint as his defamation claim."); *Fellows v. Nat'l Enquirer, Inc.* 42 Cal. 3d 234, 239 (Cal. 1986) ("The substantial overlap between the two torts [defamation and false light invasion of privacy] raised from the outset the question of the extent to which the restrictions and limitations on defamation actions would be applicable to actions for false light invasion of privacy.").

53. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489-90 (1975); *Brown*, 54 F.3d at 25 ("A common defense to a charge of defamation is 'truth.'").

54. *Compare West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 646 n.5 (Tenn. 2001) ("The facts may be true in a false light claim.") with *Easter Seal Soc'y, Inc. v. Playboy Enters., Inc.*, 530 So. 2d 643, 647 (La. Ct. App. 1988) ("If the publicity is not . . . false, then plaintiff has no actionable privacy interest, even if the publicity has caused embarrassment, offense, or damage.").

55. At one extreme are those jurisdictions that do not recognize false light. See, e.g., *Cain*, 878 S.W.2d at 579 (stating, "[t]oday we join those jurisdictions that do not recognize the false light invasion of privacy action," and citing additional jurisdictions that do not recognize false light). At the other extreme are those jurisdictions that permit false light claims with little or no procedural safeguards. See, e.g., *Heekin*, 789 So. 2d at 358 (failing to subject the plaintiff's false light claim to the statute of limitations that is applied to defamation claims).

56. See generally *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (noting that vague laws are unconstitutional deprivations of due process because they do not provide fair warning, and further, may inhibit the exercise of First Amendment freedoms).

57. *Reno v. ACLU*, 521 U.S. 844, 845 (1997).

58. See *supra* notes 34, 40, 46, 47, and 49.

uncertainty over how to avoid doing so, inevitably causes docudrama filmmakers to overcompensate, which unconstitutionally restricts their freedom of expression.⁵⁹

Plaintiffs alleging defamation frequently toss in a false light claim,⁶⁰ since there is no penalty for doing so. The court may rule that the defamation action is procedurally prohibited but the false light claim is proper.⁶¹ Courts thus invite spurious false light claims. Each claim must be carefully evaluated, and the facts that support defamation actions must be untangled from those that merely support false light actions. False light claims waste judicial resources since they rarely survive even in those jurisdictions where false light is still recognized.⁶² Rejecting the false light invasion of privacy action would end this wasteful use of judicial resources.

C. *The Difficulty of Demonstrating False Light Invasion of Privacy*

Although docudramas are often the subject of lawsuits, successful false light claims are rare⁶³ for several reasons. In many jurisdictions,

59. See *Grayned*, 408 U.S. at 109 (“Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” (internal citations omitted)). Media attorneys advise docudrama filmmakers to omit or avoid filming certain content. See e.g., John J. O’Connor, *A Thriller, Perhaps, But is it the Truth?*, N.Y. TIMES, Dec. 8, 1990, § 2 at 1 (“[W]e have lawyers – boy do we have lawyers! . . . [T]he ‘demands of line-by-line legal vetting’ led to the dropping of ‘one of the best scenes, with the discovery that some key figures had never met.’” (quoting an HBO senior vice president discussing a docudrama)); See also *supra*, note 6. At least one commentator’s description of a docudrama filmmaker’s duty with regard to avoiding depicting movie subjects in a false light is less than illuminating. See Stohl, *supra*, note 8 (“In a false light invasion of privacy action, the defendant’s duty is to avoid unreasonable invasions of plaintiff’s ‘inviolate personality.’”). Unfortunately the term “inviolate personality,” a term that apparently originated with Warren & Brandeis’ *Right to Privacy*, is still employed by some courts, often with little explanation. Warren & Brandeis, *supra* note 1, at 205; *Cason v. Baskin*, 20 So. 2d 243, 209 (Fla. 1945); *Easter Seal Soc’y, Inc. v. Playboy Enters., Inc.*, 530 So. 2d 643, 646-47 (La. Ct. App. 1988).

60. See, e.g., *Flowers v. Carville*, 310 F.3d 1118, 1132 (9th Cir. 2002) (where Gennifer Flowers sued James Carville, George Stephanopoulos and Hillary Clinton over the “Clinton smear machine.” For every defamation claim, Flowers raised an identical false light claim.); *Browning v. Clinton*, 292 F.3d 235, 241 (D.C. Cir. 2002) (plaintiff asserted both defamation and portrayal in a false light).

61. See, e.g., *Flowers*, 310 F.3d at 1132. Flowers’ defamation claims were barred because she could not demonstrate damage to her reputation. *Id.* The false light claims were allowed, based on the theoretical possibility that Flowers could demonstrate subjective harm even without damage to her reputation. *Id.* at 1132-33.

62. See, e.g., *Easter Seal Soc’y, Inc. v. Playboy Enters., Inc.*, 530 So. 2d 643, 650 (La. Ct. App. 1988) (where state law recognized the false light invasion of privacy action, but the court dismissed the case because “plaintiffs have failed to establish the essential elements to sustain actions for . . . false light”).

63. *Kelso*, *supra* note 19 (analyzing over six hundred false light cases, and failing to find any case “in which false light was actually necessary to a proper decision”).

false light invasion of privacy is not recognized.⁶⁴ Moreover, some jurisdictions erect procedural barriers to relief, such as requirements concerning special pleadings and burdens of proof.⁶⁵ In jurisdictions that still recognize false light, the plaintiff must generally satisfy a three-pronged test.⁶⁶ First, he must demonstrate that he has been portrayed in a false light.⁶⁷ Second, he must show that the light in which he is portrayed would be highly offensive to a reasonable person.⁶⁸ Finally, he must show that his right to privacy outweighs the defendant's First Amendment rights.⁶⁹

64. *Cain v. Hearst*, 878 S.W.2d 577, 579 (Tex. 1994). The *Cain* court stated that Texas "join[s] those jurisdictions that do not recognize the false light invasion of privacy action" and cited cases that purportedly declare that the following states do not recognize a false light invasion of privacy cause of action: North Carolina, Missouri, Ohio, Virginia, Mississippi, Massachusetts, Washington and Wisconsin. *Id.* In most jurisdictions, false light invasion of privacy is a common law claim, but in New York, Florida, and others, false light is statutory. See *Richardson v. Newburgh Enlarged City Sch. Dist.*, 984 F. Supp. 735, 748 (S.D.N.Y. 1997) (citing *Groden v. Random House Inc.*, 61 F.3d 1045, 1049 (2d Cir. 1995); *Hurwitz v. United States*, 884 F.2d 684, 685 (2d Cir. 1989); *Howell v. New York Post Co.*, 612 N.E.2d 699, 703 (N.Y. 1993)) ("[T]here simply is no common law right of privacy under New York law.")

65. See, e.g., *Fellows v. Nat'l Enquirer, Inc.*, 42 Cal. 3d 234, 251-52 (Cal. 1986) ("We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory . . . pleading and proof of special damages are required.")

66. *Campbell v. Lyon*, No. 00-2275, 2001 WL 1658895 at *3 (4th Cir. Dec. 27, 2001).

To state a claim for false light invasion of privacy, a plaintiff must prove (1) that the defendant gave 'publicity to a matter concerning another that places the other before the public in a false light'; (2) that 'the false light in which the other person was placed would be highly offensive to a reasonable person'; and (3) that 'the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.'

Id. (quoting *Bagwell v. Peninsula Reg'l Med. Ctr.*, 665 A.2d 297, 318 (Md. 1995)). Although elements satisfying a false light claim vary from state-to-state, this paper discusses the general requirements as cited in the Restatement (Second) of Torts, and includes a final "actual malice" test applied by many courts. See *id.* The Restatement (Second) Torts: Privacy § 652E describes false light as:

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.

THE RESTATEMENT (SECOND) OF TORTS § 652E (1977). The "actual malice" element is required by some courts in order to guard the defendant's first amendment rights. See *Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123, 139-41 (2d Cir. 1984) (applying the "actual malice" test in order to protect the defendant publisher's First Amendment rights); *Flowers*, 310 F.3d at 1132 (stating that "actual malice" is a requirement in a false light claim).

67. *Campbell*, 2001 WL 1658895.

68. *Id.*

69. *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967).

1. The First Prong – Portrayal in a False Light

Many false light claims do not survive the first prong – portrayal in a false light.⁷⁰ Courts apply a factual analysis to determine whether the plaintiff has been portrayed in a false light, and exercise discretion when considering whether a docudrama actually depicts an individual in a false light, or whether minor embellishments such as invented dialog, situations, and the general tone of the production amount merely to creative license for the purpose of telling a compelling and entertaining story.

Seale v. Gramercy Pictures illustrates that minor inaccuracies and embellishments do not constitute a false light depiction.⁷¹ After evaluating the facts in *Seale*, the court ruled that Seale's case could not survive the first prong.⁷² Bobby Seale, a former leader of the Black Panthers, sued Gramercy Pictures claiming that Gramercy depicted him in a false light in the docudrama *Panther*.⁷³ The court first considered whether Seale's claim that the scene illustrating his participation in purchasing guns presented him in a false light.⁷⁴ In the docudrama, Seale was "shown in a closed room engaging in the purchase of guns from an Asian gun dealer."⁷⁵ According to Seale, the movie "'does not represent what my organization is about, and to falsely portray me . . . in some back room somewhere as though we're buying illegal guns, it was sunny California. We were not in a dark room. We went to a department store to buy the guns.'"⁷⁶ The court found that Seale had not been portrayed in a false light, stating that the scene does not depict Seale as participating in any illegal act and that it was a "substantially accurate account" of Seale's activities.⁷⁷

70. See, e.g., *Easter Seal Soc'y, Inc. v. Playboy Enters., Inc.*, 530 So. 2d 643, 648 (La. Ct. App. 1988) ("It is initially the role of the court to determine whether false matter has the potential to place plaintiff in an objectionable false light; that is, the court initially determines as a matter of law whether defendant's conduct was unreasonable."). In *Easter Seal*, footage of the plaintiffs participating in a parade was "interspersed with the action of the main characters" in an "adult" film. *Id.* The court stated, "[t]he portrayal of plaintiffs is as nothing more than what they were, parade participants. There is no suggestion that these parade participants have any connection with the characters, themes, or action content of the movie. There is no portrayal of falsity or fiction; there is no 'false light' portrayal." *Id.* at 648.

71. *Seale v. Gramercy Pictures*, 964 F. Supp. 918, 919-20 (E.D. Pa. 1997).

72. *Id.* at 925.

73. *Id.* at 919-20, 922.

74. *Id.* at 925.

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

76. *Id.* at 924-25.

77. *Id.* at 925.

2. The Second Prong – A Reasonable Person Would be Offended by the Portrayal

If a reasonable person of “ordinary sensibilities” would not be offended by the portrayal, then the claim will not survive the second prong.⁷⁸ Not all depictions in a false light are actionable; the depiction must be highly “offensive to a reasonable person.”⁷⁹ The judicial system’s growing refusal to find that a reasonable person would be offended by the portrayal accurately reflects society’s changing moral standards; what once was deemed highly objectionable is barely noteworthy today.

A comparison of *Cason v. Baskin*⁸⁰ with the more recent *Easter Seal v. Playboy Enters., Inc.*,⁸¹ demonstrates the evolution of the reasonable person standard with regard to the right to privacy. Both courts applied a reasonable person test.⁸² Although *Cason* concerned a public disclosure of embarrassing private facts about the plaintiff, rather than a false light invasion of privacy, the same “reasonable person” test was applied.⁸³ *Cason*, a Florida case from 1945, concerned a book penned by Marjorie Kinnan Baskin⁸⁴ portraying “a rather vivid and intimate character sketch” of the local census agent.⁸⁵ Zelma Cason alleged that she was the fictitiously named census agent, and that local residents would recognize her and believe that she used profanity in her everyday speech.⁸⁶ The Florida Supreme Court found in *Cason*’s favor, ruling that she stated a

78. *Easter Seal Soc’y, Inc. v. Playboy Enters., Inc.*, 530 So. 2d 643, 648 (La. Ct. App. 1988) (declining to agree that a movie that “concentrates on drugs and sex ... is automatically objectionable and offensive to a reasonable person,” and finding no “actionable invasion of privacy.”)

79. THE RESTATEMENT (SECOND) OF TORTS § 652E (1977).

80. *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1945).

81. *Easter Seal*, 530 So. 2d at 643.

82. *See Cason*, 20 So. 2d at 251 (quoting 41 AM. JUR. § 934) (“The right of privacy is relative to the customs of the time and place, and it is determined by the norm of the ordinary man.”); *Easter Seal*, 530 So. 2d at 643.

83. *Id.* at 251. The *Cason* court uses the umbrella term “right to privacy” without specifying which of the four identified rights to privacy is implicated. *Id.* A reading of the case indicates that privacy subtype is the public disclosure of embarrassing private facts. *Id.* The reasonable person test is common to both false light and public disclosure of embarrassing private facts. Compare THE RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977) (“One who gives publicity to a matter concerning the private life of another is subject to liability . . . if the matter publicized is of a kind that would be highly offensive to a *reasonable person*.”) (emphasis added), with RESTATEMENT (SECOND) OF TORTS § 652E(a) (1977) (“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 . . . the false light in which the other was placed would be highly offensive to a *reasonable person*.”) (emphasis added).

84. Baskin’s penname is Marjorie Kinnan Rawlings, and she is the Pulitzer Prize winning author of *The Yearling*. Margaret McKenzie, *Blood of Her Blood*, PALM BEACH POST, April 2, 2005, at 1D. *Cross Creek* is still in print, and sold 3000 copies in 2004. *Id.*

85. *Cason*, 20 So. 2d at 247.

86. *Id.* at 246.

“prima facie case of an invasion of the right of privacy.”⁸⁷

In *Cason*, the court agreed that the plaintiff’s right to privacy was invaded by portrayal as a woman who used profanity.⁸⁸ More than forty years later, the reasonable person test was employed in *Easter Seal* with contrasting results.⁸⁹ In *Easter Seal*, a moviemaker spliced video of participants in a charitable event into an “adult” film.⁹⁰ The plaintiffs complained that they had been depicted in a false light and “suffered ridicule and embarrassment,” as well as “damage to their reputations.”⁹¹ The court disagreed, stating “that because a movie is produced and published by *Playboy* and concentrates on drugs and sex, [there is no implication that] the movie is automatically objectionable and offensive to a reasonable person.”⁹² The evolution of the reasonable person test is clear. In 1945, a portrayal of a woman using profanity was deemed highly objectionable to a reasonable person.⁹³ In 1988, a portrayal of persons in an “adult” film concentrating on “drugs” and “sex” was not.⁹⁴

Courts correctly view fictionalized depictions in light of the mores of the moment.⁹⁵ The burden on the subject of a fictionalized depiction to demonstrate damage in a permissive society is necessarily high. Courts should continue to protect movie producers from false light invasion of privacy claims by carefully considering whether the fictionalized depiction would be offensive to a reasonable person.

3. The Third Prong - The First Amendment as a Bar to False Light Invasion

The plaintiff may demonstrate that a docudrama portrays her in a false light and that the portrayal would be offensive to a reasonable person, but still fail to show that maintaining her right to privacy does not infringe on

87. *Id.* at 247. At trial, *Cason* prevailed. *Cason v. Baskin*, 30 So. 2d 635, 640 (1947); see also *Armstrong v. H & C Communications, Inc.*, 575 So. 2d 280, 282 (Fla. App. 5 Dist. 1991) (discussing *Cason’s* procedural history). *Baskin* appealed and the case returned to the Florida Supreme Court. *Id.* Hearing the case for the second time, the Florida Supreme Court held that, while *Baskin* had wrongly invaded *Cason’s* privacy, the evidence showed no actual harm. *Cason*, 30 So. 2d at 640. Thus, *Cason* was entitled only to nominal damages and not to punitive or actual damages. *Id.* at 640.

88. *Cason*, 20 So. 2d at 646-47.

89. *Easter Seal*, 530 So. 2d at 644.

90. *Id.*

91. *Id.* at 645.

92. *Easter Seal*, 530 So. 2d at 645, 649.

93. *Cason*, 20 So. 2d at 247.

94. *Easter Seal*, 530 So. 2d at 649.

95. See *Prosser, supra* note 9, at 400 (“[I]t must be something that would be objectionable to the ordinary reasonable man under the circumstances, and that, . . . the hypersensitive individual will not be protected. . . . something of a ‘mores’ test must be applied.”).

the filmmaker's First Amendment rights.⁹⁶ In many jurisdictions, if the plaintiff is a public figure, her false light claim will fail unless she can demonstrate "by clear and convincing evidence," that the docudrama was made with "actual malice."⁹⁷ The Supreme Court stated that actual malice is "knowledge that the statements are false or in reckless disregard of the truth."⁹⁸ The rationale for applying the actual malice requirement to false light claims has to do with the relation between false light and defamation.⁹⁹ Since defamation requires a showing of actual malice,¹⁰⁰ some courts insist that false light adhere to the actual malice requirement, especially when the facts would support a defamation claim as well as a false light claim.¹⁰¹ To do otherwise would permit a plaintiff to skirt the actual malice requirement of defamation, merely by alleging false light instead.¹⁰²

The Supreme Court applied the actual malice requirement in *Time, Inc. v. Hill*.¹⁰³ The facts behind *Hill* are somewhat convoluted. Three prison escapees commandeered the Hill family residence, taking the family captive.¹⁰⁴ Inspired in part by the Hill family saga and in part by other true-life events, Joseph Hayes penned a novel entitled *The Desperate Hours*.¹⁰⁵ After the novel proved widely successful, it was adapted into a Broadway play, also called *The Desperate Hours*.¹⁰⁶ *Life Magazine* ran an

96. See, e.g., *Cason*, 20 So. 2d at 251 ("But the right of privacy has its limitations. Society also has its rights. The right of the general public to the dissemination of news and information must be protected and conserved."); *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at *3 (Mass. Dist. Ct. Mar. 3, 2004) ("The right of privacy is unquestionably limited by the right to speak and print."); *Hanlon*, *supra* note 13, at 9 (citing *Virgil v. Time*, 527 F.2d 1122, 1128-29) (stating that "[u]nder the First Amendment, liability may be imposed for violation of the right of privacy . . . only where the matter publicized is not of legitimate concern to the public").

97. See *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002) (citing cases that address the actual malice standard in the U.S. Supreme Court, the Court of Appeals for the Seventh Circuit, and the D.C. Circuit).

98. *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967).

99. *Brown v. Hearst Corp.*, 54 F.3d 21, 27 (1st Cir. 1995).

100. *Hill*, 385 U.S. at 387.

101. See *Brown*, 54 F.3d at 27 (citing *Hill*, 385 U.S. 374) ("We think it worth adding that "false light" privacy claims are not all of a piece, but Willis' claim is simply a restatement of his defamation claim under a different heading. That being so, it is not imaginable that it could escape the same constitutional constraint as his defamation claim.").

102. See *id.*

103. *Hill*, 385 U.S. at 377.

104. *Id.* at 377-78.

105. *Id.* at 377.

106. See *Hill*, 385 U.S. at 377-78. In addition to the Broadway adaptation, the novel, *The Desperate Hours*, by Joseph Hayes was made into a movie starring Humphrey Bogart and Fredric March released in 1955. The Internet Movie Database (IMDb), <http://imdb.com> (last visited Apr. 3, 2005). A movie remake of *The Desperate Hours* starring Mickey Rourke and Anthony Hopkins was released in 1990. The Internet Movie Database (IMDb). Although the original events occurred near

article describing the play entitled *True Crime Inspires Tense Play*.¹⁰⁷ Neither the play nor the novel was the subject of a lawsuit, but the Hills sued *Life Magazine* claiming that *True Crime Inspires Tense Play* depicted them in a false light.¹⁰⁸ Although the Hill hostage situation merely inspired the novel that evolved into the play, the *Life* article implied that the play was a faithful dramatization of the Hills' experience.¹⁰⁹ Moreover pictures, supposed reenactments of the convicts abusing the Hill family in their own home, accompanied the article.¹¹⁰ The Hills objected to both the article and the pictures, claiming they had suffered no actual mistreatment at the hands of the convicts, and that *Life Magazine* had mischaracterized the entire encounter.¹¹¹ The Hills won and were awarded \$30,000 in compensatory damages.¹¹² On review, the Supreme Court agreed that a jury could reasonably find that *Life* intended to falsely depict the Hill family's travails but remanded for consideration of the First Amendment issues in light of the actual malice standard.¹¹³ After *Hill*, courts must guard the docudrama filmmaker's First Amendment rights by refusing to recognize false light claims unless the fictionalized depiction constitutes "knowing falsity or reckless disregard of the truth."¹¹⁴

Filmmakers are protected from false light claims by the actual malice standard. Thus, plaintiffs who demonstrate that they have been portrayed in a false light, and that the portrayal would be offensive to a reasonable person, must further show knowing falsity or recklessness under the actual malice standard. Very few false light plaintiffs successfully demonstrate all three prongs of a false light claim.

D. How False Light Actions Tie Up the Courts

While many false light actions fail, occasionally plaintiffs prevail long enough to keep the courts busy and force the media figure to expend untold resources defending the action. The complicated procedural history of a recent Florida case demonstrates how judicial resources can be wasted by false light claims. In *Heekin v. C.B.S. Broadcasting, Inc.*, the Florida District Court of Appeal overturned a lower court's grant of summary

Philadelphia, the 1990 movie was set in Idaho. The Internet Movie Database (IMDb).

107. *Hill*, 385 U.S. at 377.

108. *Id.* at 376.

109. *Id.* at 378.

110. *Id.* at 377-78.

111. *Hill*, 385 U.S. at 378.

112. *Id.* at 379 (where the "original jury trial awarded \$50,000 compensation. . . [but the] Appellate division ordered a new trial at which the court awarded \$30,000").

113. *Id.* at 393-94, 397-98.

114. Grunfeld, *supra* note 5, at 502-03 (stating that the *Hill* court held false light claims to an actual malice standard).

judgment ruling that the two-year statute of limitations imposed on actions for defamation does not apply to false light actions unless a defamation action could also be brought on the same facts.¹¹⁵ The case was remanded to the lower court.¹¹⁶ On remand, the trial court dismissed the case again.¹¹⁷ Following dismissal by the trial court, the Florida District Court of Appeal dismissed Heekin's petition for certiorari,¹¹⁸ and affirmed on appeal.¹¹⁹

If Heekin had alleged both defamation and false light, his claim would have been barred by Florida's two-year statute of limitations on defamation actions; but since he alleged only portrayal in a false light, the two-year statute of limitations did not bar his false light claim.¹²⁰ In other words, if CBS had defamed Heekin by stating unequivocally that he was a batterer, the statute of limitations would have barred not only his defamation claim but also his false light claim.¹²¹ Only because CBS did not defame Heekin was it required to defend against false light,¹²² needlessly expending Florida's judicial resources.¹²³ Outright defamatory statements are arguably more harmful than false light depictions, but in Florida, false light plaintiffs receive more favorable treatment than do defamation plaintiffs.¹²⁴

115. *Heekin v. CBS Broad., Inc.* 789 So. 2d 355 (Fla. Dist. Ct. App. 2001), *rev. denied*, 799 So. 2d 216 (Fla. 2001) (unpublished table decision). Heekin objected to a "60 Minutes segment concerning domestic violence . . . [in which] an interview with Heekin's former spouse and pictures of her with their children. . . [were] aired in juxtaposition to stories and pictures of women who had been abused, battered, and killed by their domestic partners." *Id.*

116. *Id.*

117. *News Updates*, SARASOTA HERALD TRIB., July 31, 2003, at B1.

118. 838 So. 2d 1156 (Fla. Dist Ct App. 2003) (unpublished table decision).

119. *Heekin v. CBS Broad. Inc.*, 895 So. 2d 417 (Fla. Dist. Ct App 2005) (unpublished table decision); *Heekin v. CBS Broad. Inc.*, 892 So. 2d 1027 (Fla. Dist. Ct App 2004) (unpublished table decision).

120. *Heekin v. CBS Broad., Inc.* 789 So. 2d 355, 358 (Fla. Dist. Ct. App. 2001).

121. *Id.* ("A plaintiff may not avoid the two-year statute of limitations for defamation actions by simply renaming the defamation action as one for false light invasion of privacy. In this case, . . . Heekin has alleged that the publication of truthful, nondefamatory facts was done in such a manner as to cast him in a false light in the public eye.").

122. *Id.* at 358-59.

123. In addition to favoring false light over defamation plaintiffs, The Florida courts seem prepared to grant false light more favorable treatment than right of publicity plaintiffs. *Cf.* *Tyne v. Time Warner Entmt't.*, No. SC03-1251, 2005 WL 914193 at 6 (Fla. Apr. 21, 2005) (ruling that the First and Fourteenth Amendments protect motion pictures from right of publicity claims, but leaving open the possibility that false light claims may be viable). *Tyne* concerns *A Perfect Storm*, a docudrama based on the true story of the sinking of the *Andrea Gail* in a tempest. *Id.* at *1.

124. *See generally Heekin*, 789 So. 2d 355.

E. False Light and the Right of Publicity – Whose Interests are Protected?

Unauthorized docudramas of a public figure's life-story are generally prohibited because the right of publicity grants public figures the sole prerogatives to their own life-story.¹²⁵ The right of publicity is the right to control the merchandising of one's own name, photograph, signature, voice, image, and so on.¹²⁶ Many plaintiffs who cannot prevail on a false light claim or defamation claim are still protected by their right of publicity.¹²⁷ For example, when Elizabeth Taylor sued American Broadcasting Company (ABC) to enjoin production of a docudrama based on her life, her cause of action was rooted in her right of publicity, and not a claim of false light invasion of privacy.¹²⁸ Taylor succinctly summed up her right of publicity by declaring: "I am my own commodity."¹²⁹ Before the case was heard, ABC dropped the project.¹³⁰

The right of publicity protects celebrities like Elizabeth Taylor as well as individuals who become public figures due to their involvement in a newsworthy event.¹³¹ The right of publicity protects all living public figures including "anyone who has arrived at a position where public

125. Although a public figure's life may not be fictionalized for commercial gain without permission, the First Amendment guarantees the right to produce non-fictionalized news-stories and biographies. *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543 (N.Y. 1966), *vacated on other grounds*, 387 U.S. 389 (1967), *adhered to on remand and reargument*, 233 N.E.2d 124 (N.Y. 1967).

126. See *Parks v. LaFace Records*, 329 F.3d 437, 460 (6th Cir. 2003) ("A right of publicity claim . . . grants a celebrity the right to protect an economic interest in his or her name. . . . All that a plaintiff must prove in a right of publicity action is that she has a pecuniary interest in her identity, and that her entity has been commercially exploited by a defendant."); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (stating that the right of publicity "is the right to prevent others from using one's name or picture for commercial purposes without consent"); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983) ("[T]he right of publicity protects the celebrity's pecuniary interest in the commercial exploitation of his identity.") (internal citation omitted).

127. See, e.g., *Parks*, 329 F.3d at 442 (involving a civil rights figure who sued a record company and musical group over a rap song entitled *Rosa Parks*, with the appeals court affirming the dismissal of defamation and false light claims but reversing a right of publicity claim); *Carson*, 698 F.2d at 832, 834, 836 (suing Here's Johnny Portable Toilets, Inc. alleging both violation of his right to privacy and of his right of publicity, with the court dismissing the right to privacy claims but permitting the right of publicity claims). *But see e.g., Douglass*, 769 F.2d at 1131, 1138 (involving plaintiff who sued an adult magazine, claiming pornographic photographs depicted her in a false light and violated her right of publicity with the courts allowing both her false light claims and her right of publicity claims).

128. Lionel S. Sobel, *The Trials and Tribulations of Producing Docu-Dramas: Tales of Elizabeth Taylor and John Delorean and Network Program Standards*, 5 ENT. L. REP. 3, 3 (1983).

129. *Id.*

130. *Id.*

131. *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 909 (D.N.J. 1986) (involving a Vietnam veteran's suit for use of a war photograph in which he appeared).

attention is focused on him as a person.”¹³² Limiting right of publicity actions to public figures does not imply that there are few people who can bring right of publicity actions; quite the contrary, docudramas are usually focused on newsworthy events or celebrity activities.¹³³ The main characters portrayed in a docudrama are protected by the right of publicity and do not require the additional protection afforded by the false light invasion of privacy action.¹³⁴

Docudramas may focus on one or two main characters but also include several secondary characters, typically acquaintances, bystanders, employees and family members of the main character.¹³⁵ Thus, docudrama filmmakers often enter into contracts with main characters and with numerous secondary characters.¹³⁶ Docudrama filmmakers enter into life-story contracts with the main subject of a docudrama to avoid right of publicity actions and other claims.¹³⁷ Since the right of publicity does not protect secondary characters, docudrama filmmakers often enter into depiction waivers with secondary characters in order to avoid false light claims.¹³⁸

The potential of entering into a lucrative depiction waiver or other contract with a movie production company¹³⁹ may motivate secondary characters to conduct themselves so as to enhance the marketability and profitability of a story. In effect, the perceived ability of secondary characters to sell a story may motivate them to “sell-out” the true subject of the story, the main character.¹⁴⁰ For movie producers entering into contracts with secondary characters the aggregate expense can quickly

132. *Id.*

133. See *Introduction: A Moral Pause*, Gross, *supra* note 2, at 24.

134. Although seemingly protected by the right of publicity, public figures sometimes allege false light invasion of privacy. See *Seale v. Gramercy Pictures*, 964 F. Supp. 918 (E.D. Pa. 1997) (alleging a false light invasion of privacy over a former Black Panther’s depiction in a docudrama called *Panther*).

135. See Grunfeld, *supra* note 5, at 530. See, e.g., *Tyne v. Time Warner Enter.*, No. SC03-1251, 2005 WL 914193, slip op. at 1 (Fla. Apr. 21, 2005) (where family members of the main characters depicted in the docudrama *A Perfect Storm*, who were briefly depicted in the movie, made several claims including false light invasion of privacy).

136. See generally Grunfeld, *supra* note 5, at 530; Oliver R. Goodenough, *Avoiding Legal Trouble*, N.Y. L.J., Nov. 24, 1989, at 29.

137. Grunfeld, *supra* note 5, at 521-33.

138. Grunfeld, *supra* note 5, at 528-29.

139. Grunfeld, *supra* note 5, at 530 (stating that “today, people are more aware that their portrayal has value and are more likely to demand large sums of money”).

140. See Grunfeld, *supra* note 5, at 530. In the past, non-central characters, such as family members and acquaintances, signed “Depiction Releases” for modest sums of money. Grunfeld, *supra* note 5, at 530. With enhanced awareness of the value of these releases, even individuals with modest roles are demanding large sums of money. Grunfeld, *supra* note 5, at 530.

escalate.¹⁴¹ Only the main character of a story should have the right to sell it, a right that is guaranteed by the right of publicity.¹⁴² As Elizabeth Taylor put it: “I am my own commodity.”¹⁴³ Elizabeth Taylor should have the right to sell her story; her employees, acquaintances and other peripheral figures should not have such a right.

III. IT’S TIME TO TURN THE LIGHT OFF

Elizabeth Taylor was on to something when she identified herself as her own commodity. A thing is said to be “commodified” when it can be exchanged for money or other commodities.¹⁴⁴ Even non-tangible things such as ideas, rights and tasks, can be bought and sold.¹⁴⁵ Privacy law has “commodified” personal information – giving an individual’s unique experiences a value that can be exchanged in the marketplace for money. Privacy is itself a form of intangible property.¹⁴⁶ Although “commodification” of personal information may be beneficial,¹⁴⁷ certain forms of commodification have inevitable negative consequences.¹⁴⁸ In particular, life-story commodification has encouraged some individuals to regard their personal life-story, and the life-stories of others, in monetary terms. For those individuals, the worth of maintaining personal privacy, “the right to be left alone,”¹⁴⁹ has little or no import in the face of a big payoff. Some people are willing to sell-out not only themselves, but also others, in their quest to cash-in on a lucrative movie or book deal.¹⁵⁰ The false light invasion of privacy action encourages this behavior by

141. For example, the producer of *Kent State* obtained releases from eighty-five people. Grunfeld, *supra* note 5, at 530.

142. See Grunfeld, *supra* note 5, at 507.

143. Sobel, *supra* note 128, at 3.

144. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 118 (1996) (“[C]ommodification is characterized by (1) exchanges of things in the world (2) for money, (3) in the social context of markets, and (4) in conjunction with four indicia of commodification in conceptualization. . . [The] four conceptual indicia. . . are (i) objectification, (ii) fungibility, (iii) commensurability, and (iv) money equivalence.”).

145. See *id.* at 118.

146. Warren & Brandeis, *supra* note 1, at 193 (“[T]he term ‘property’ has grown to comprise every form of possession – intangible as well as tangible.”).

147. One can imagine that an example of a beneficial use of commodified personal information might include internet usage data or ad popping in exchange for free internet service.

148. RADIN, *supra* note 144, at 163. “Commodification of significant aspects of personhood cannot easily be uncoupled from wrongful subordination.” *Id.*

149. Warren & Brandeis, *supra* note 1, at 193 (stating “the right to life has come to mean the right to enjoy life - the right to be let alone”).

150. See, e.g., *AILEEN: LIFE AND DEATH OF A SERIAL KILLER* (Columbia Tristar 2003) (displaying documentary footage of various acquaintances and officials attempting to profit from their association with a murderer, and allegedly affecting the outcome of her trial. The defendant was executed after pleading no contest.).

commodifying an individual's personal experiences.

The right to cash-in and other questionable motives underlie recent actions in several high-profile criminal cases. Scott Peterson, Michael Jackson, Terry Nichols and Martha Stewart employed jury consultants to lookout for "stealth jurors" – people who maneuver their way onto the jury to manipulate the outcome or make a profit from subsequent movie or book deals.¹⁵¹ Possibly some juror candidates expect that the more dramatic and thrilling the trial, the greater the likelihood that a filmmaker will produce a docudrama based on the proceedings, with the requisite depiction waivers and payments to members of the jury.¹⁵² Juror manipulation perverts the criminal justice system, but jurors are not the only ones with a profit motive and access to the accused. Friends, relatives, acquaintances, police officers and lawyers may attempt to manipulate events to maximize their own opportunity for profit.

Consider Aileen Wuornos, a serial killer who was put to death in Florida for murder.¹⁵³ She originally stated that she was acting in self-defense,¹⁵⁴ but changed her story when both her attorney and her adopted mother encouraged her to plead guilty.¹⁵⁵ Subsequently, Wuornos' adopted mother, lawyer, girlfriend, and several police officers either profited or attempted to profit from their connection to Wuornos.¹⁵⁶ Her adopted mother and lawyer sold interviews for as much as \$25,000.¹⁵⁷ Wuornos' ex-girlfriend, originally a murder-suspect herself, enticed Wuornos to confess and subsequently entered into contracts with filmmakers.¹⁵⁸ In addition, peddling information about the case to a movie

151. Catherine Elsworth, *Jackson jurors face testing time as world tunes into courtroom*, THE DAILY TELEGRAPH, Jan. 29, 2005, at 15; Donna Horowitz, *The State; Jury Questioning to Resume in Peterson Trial; Attitudes toward law enforcement emerge as a key issue. Consultants will help attorneys pick those seen as the most favorable to their side*, L.A. TIMES, Apr. 5, 2004, at B5; *Stealth Jurors Steal Justice*, N.Y. DAILY NEWS, Apr. 4, 2004, at 46; Jesse Seyfer, *Weeding out liars takes priority in jury selection; High profile cases: background checks, analyzing questionnaires among tactics*, SAN JOSE MERCURY NEWS, Apr. 4, 2004, at 1.

152. Grunfeld, *supra* note 5, at 530 (stating that "today, people are more aware that their portrayal has value and are more likely to demand large sums of money").

153. Paul Pinkham, *'Damsel of Death' Aileen Wuornos Executed*, THE FLORIDA TIMES-UNION, Oct. 10, 2002, at A1.

154. *Id.* See also Roger Ebert, *Riveting Doc Paints a Portrait of Real 'Aileen'*, CHICAGO SUN-TIMES, Jan. 30, 2004, at 33.

155. AILEEN: LIFE AND DEATH OF A SERIAL KILLER, *supra* note 150.

156. AILEEN: LIFE AND DEATH OF A SERIAL KILLER, *supra* note 150; THE SUNDAY TIMES, Oct. 10, 2004, at 33 ("[G]iven how Wuornos's story was put up for sale to film companies by the police, her lover, and even her adopted mother, a born-again Christian, you are left feeling slightly uncomfortable.").

157. AILEEN: LIFE AND DEATH OF A SERIAL KILLER, *supra* note 150.

158. AILEEN: LIFE AND DEATH OF A SERIAL KILLER, *supra* note 150; *Across the USA: News From Every State*, USA TODAY, Feb. 11, 1991, at 8A ("Lawyer has been hired by 3 sheriff's

production company led to the dismissal of three police officers.¹⁵⁹ While Aileen Wuornos ultimately died at the hands of the state, many of her companions profited from her story. The perceived availability of the false light right to privacy action may have encouraged some of these people to expect to profit from their peripheral involvement in Wuornos' life. The false light right to privacy action should be discarded because it may harm the very people it should protect.

When privacy law grants individuals the right to cash-in at others' expense, something must be changed. The courts should stop protecting people who seek to profit at the expense of others. The real owners of the true-life stories that lie behind docudramas should continue to be protected by their right of publicity. Eliminating the false light invasion of privacy action will help reduce the danger that bystanders and side characters, those who are not protected by a right of publicity, will sell-out those who are.

Society, supported by the courts, generally chooses the things that can be commodified. Society has chosen not to commodify some things. For example, kidney selling, child brokering, and prostitution are illegal.¹⁶⁰ The false light invasion of privacy action serves, in part, to commodify rights that should not be commodified – the right to sell other people's personal stories. The false light invasion of privacy action was established by the courts, and therefore, can be eradicated by the courts.

Societal standards help to establish law, and the law helps mold society.¹⁶¹ By “giving rise to . . . new forms of ‘property’ (personality

investigators, prosecution witness Tyria Moore to get movie contract. Moore was ex-lover of Aileen Wuornos, woman suspected in serial killings of 7 men.”)

159. AILEEN: LIFE AND DEATH OF A SERIAL KILLER, *supra* note 150. *Across the USA: News From Every State*, USA TODAY, *supra* note 158, at 8A. Plenty of people profited from the Aileen Wuornos story; at least two movies, two documentaries, an opera, and numerous books have been written about Aileen Wuornos. The two movies were *Monster* and *Overkill: The Aileen Wuornos Story* (1992 TV). *Monster* - The Official Motion Picture Website, *supra* note 29; The Internet Movie Database (IMDb), *supra* note 106. Documentaries include *Aileen Wuornos: The Selling of a Serial Killer* (1992) and *Aileen: Life and Death of a Serial Killer*. See *AILEEN - Life and Death of a Serial Killer*, available at <http://www.aileenfilm.com> (last visited Apr. 2, 2005); Nick Broomfield's official website, at <http://www.nickbroomfield.com> (last visited Apr. 2, 2005). A recent search of Amazon.com recovered at least five books about Aileen Wuornos: *Lethal Intent* by Sue Russell, *Dead Ends: The Pursuit, Conviction and Execution of Female Serial Killer Aileen Wuornos, The Damsel of Death* by Michael Reynolds, *On a Killing Day: The Bizarre Story of Convicted Murderer Aileen Lee Wuornos*, by Dolores Kennedy, *The Female Homicide Offender: Serial Murder and the Case of Aileen Wuornos*, by Stacey L. Shipley and Bruce A. Arrigo, and *Monster: My True Story*, by Aileen Wuornos and Christopher Berry-Dee. Amazon, <http://www.amazon.com> (last verified Jan. 10, 2005); see also *Wuornos Opera*, at <http://www.wuornos.org> (last verified Feb. 19, 2005) (discussing *Wuornos*, the opera based on Aileen Wuornos).

160. RADIN, *supra* note 144, at 7.

161. Douglas Litowitz, *The Social Construction of Law: Explanations and Implications*, 21

rights, software licenses), and new causes of action,” the judicial system encourages certain types of societal behavior.¹⁶² If the judiciary can change behavior by creating new forms of property, then the judiciary should be able to change behavior by dissolving these forms of property.

At least one author has suggested that “the right to privacy is more socially contingent, more socially constructed, and more culturally relative than other rights, or has a degree of social contingency and cultural relativity that other rights do not possess.”¹⁶³ Since the right to privacy is a social construction with limited societal benefits, courts should stop recognizing the false light invasion of privacy action.

IV. CONCLUSION

Courts should stop recognizing false light as it pertains to docudrama filmmakers. There are many reasons to abandon the false light claim as it pertains to docudramas. For one, handling spurious false light claims wastes judicial resources. In addition, defamation and right of publicity adequately protect plaintiffs. Moreover, the expectation of a large payout leads people to focus on the marketability of their story, rather than on ethical concerns. False light is a social construction and, as such, is a prime candidate for dissolution. Courts should reject false light claims against docudramas.

STUDIES IN LAW, POLITICS, AND SOCIETY 215, 218 (Austin Sarat & Patricia Ewick eds., 2000) (“Law does not merely stand above and regulate a pre-existing society, but is already ‘on the ground’, causing a society to exist in a particular way.”).

162. *Id.* at 220.

163. Schauer, *supra* note 18, at 221.