Based Upon a True Story: The Tension Between the First Amendment and a Person's Reputation

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I. INTRODUCTION

A. *Premise*

A viable solution to the tension between First Amendment artistic leeway and improper artistic liberties must be obtained in order to protect filmmakers, the film-going audience and, most importantly, those who are depicted in artistic works.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[1] Over the years, this protection has allowed Americans to critique and criticize the status quo and create significant works of art. Without this protection, the free dissemination of news, scholarly ideas, and non-scholarly ideas, would be seriously hampered.

As important as the First Amendment protection is to the American way of life, however, there are some checks on this right. Defamation law, for instance, focuses on protecting "reputations against speech of low constitutional value [w]hen [someone] willfully misrepresents false derogatory statements as fact."[2]

Today, however, there is a category of people that is not getting the

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[1] U.S. CONST. amend. I.

[2] Megan Moshayedi, Comment, *Defamation by Docudrama: Protecting Reputations from Derogatory Speculation*, 1993 U. CHI. LEGAL F. 331, 331.

protection that it needs. It is made up of ordinary people who are either thrust into the public eye by an event or who are incidental to an event. Since they are not public figures, these people have difficulty accessing forums in which they may defend their reputations. Also, as they are not completely anonymous to the public, they are often held to a higher standard when seeking First Amendment protection.[3] Finally, their names and likenesses are exploited for financial gain by use of this contested speech. These are the people we often see depicted in films that are "based upon a true story."

These people, who often lose their anonymity due to mere chance, are being greatly harmed. The misfortunes of these people and their families are slowly creeping into public attention. Recently, for example, Richard Willing of *USA Today* wrote an article describing the current status of this issue, showing plaintiffs' struggles to redress these types of wrongs in cases involving the movies *The Perfect Storm, The Hurricane, Hoodlum*, and *Titanic*.[4] Reputations are sullied and economic losses are incurred by these people and their families. These harms are exacerbated by the nature of the medium used, because the harms are perpetuated with each showing of the film.[5] Thus, there must be a solution to stop the stripping away of peoples' ability to control their names and likenesses from such derogatory fictionalizations of fact.

B. *Structure of Analysis*

Part II of this analysis begins by reviewing the most likely causes of action that these people would use in their defense, libel and publicity rights. The section discusses their development and concludes by looking at their inadequacies in regards to this problem. Part III reviews the most recent case law developments in this troublesome area. Causes of action utilized in the cases will be analyzed demonstrating the need for a national solution. Part IV proposes a solution to the current uncertainties that face both sides of

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[3] *See infra* notes 22, 31, 33, 40.

[4] Richard Willing, *Can Hollywood Handle the Truth?*, USA TODAY, Jan. 8, 2002, at 1A.

[5] *See infra* notes 263-65.

the issue. In addition, disclaimers used by the studios, trying to avoid liability, will be critiqued. Part V concludes the analysis.

II. VIABLE CAUSES OF ACTION?

A. *Defamation*

1. Development of Defamation Standard

Defamation is public communication, including both written and oral statements, that injures the reputation of another.[6] The definition of defamation varies from jurisdiction to jurisdiction.[7] Generally, however, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[8]

The law of defamation runs counter to the First Amendment right to freedom of expression, because it restricts speech.[9] There are three justifications for free speech: 1) open discussion to create a "market-place of ideas," 2) "intelligent self-government" requiring citizens to understand and debate, and 3) the view that in order for people to have true autonomy and self-fulfillment they must be able to express themselves.[10]

Defamation law strikes a balance between First Amendment protection and defamation protection. This balance is clear from the careful crafting of this tort's elements. In order to support an action for defamation, the plaintiff must prove:

> (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to

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[6] Bonnie Docherty, Note, *Defamation Law: Positive Jurisprudence*, 13 HARV. HUM. RTS. J. 263, 264 (2000).

[7] *Id.*

[8] RESTATEMENT (SECOND) OF TORTS § 559 (1977).

[9] Docherty, *supra* note 6, at 266.

[10] *Id.* (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785-88 (2d ed. 1988)).

> negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[11]

Under defamation, there is slander and libel. "Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than [libel]."[12] "Libel consists of the publication of defamatory matter by written or printed words . . . in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words."[13]

The factors for consideration in determining whether defamation is slander or libel are: 1) whether the dissemination was deliberate and premeditated, and 2) the persistence of the defamation.[14] In the context of film, both of these factors weigh in favor of a defendant's liability for libel, because films are deliberately made and they are not transitory in existence.

The Supreme Court has focused the law of libel on whether a defendant is aware of the truth or falsity of what he or she writes or publishes.[15] This process began in *New York Times Co. v. Sullivan*,[16] the first case to apply the First Amendment to libel law.[17]

In this case, an elected official brought a civil libel action alleging he had been libeled in an advertisement carried by *The New York Times*.[18] Even though the statements in the advertisement did not refer to the plaintiff by name, the plaintiff asserted that the statements would be read as accusing the police, and hence him, because he supervised the police conduct described.[19] Also, some of the contested statements

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[11] RESTATEMENT (SECOND) OF TORTS § 558 (1977).

[12] § 568(2).

[13] § 568(1).

[14] § 568(3).

[15] Daniel Smirlock, Note, *"Clear and Convincing" Libel: Fiction and the Law of Defamation*, 92 YALE L.J. 520, 521 (1983).

[16] 376 U.S. 254 (1964).

[17] Smirlock, *supra* note 15, at 521.

[18] 376 U.S. at 256.

[19] *Id.* at 258.

were incorrect, and no effort was made to confirm their accuracy.[20]

The question for the Court was whether "liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech [and] press . . . ."[21] The Court concluded that a public official cannot recover damages for a defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'"—that is, with "knowledge that it was false or with reckless disregard of whether it was false or not."[22] The Court found that, in this context, the threat of suits for damages would "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties,"[23] thus "giv[ing] public servants an unjustified preference over the public they serve."[24]

The next significant case was *Curtis Publishing Co. v. Butts*.[25] Here, the Court's task was to consider the impact *New York Times Co. v. Sullivan* on libel actions instituted by persons who are not public officials, but public figures.[26] Two cases were brought together. Case No. 37 involved an article that alleged that the athletic director of the University of Georgia had conspired to fix a football game.[27]

Case No. 150 involved a news dispatch reporting an eyewitness account of a massive riot at the University of Mississippi over the efforts to enforce a decree ordering that the University enroll a black student.[28] The dispatch stated that plaintiff had taken command of the violent crowd and personally led a charge against federal marshals, encouraging the rioters to use violence and telling them how to combat the effects of tear gas.[29] Plaintiff was a private citizen at the time, but had made statements against physical federal intervention and had his

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[20] *Id.* at 258, 261.
[21] *Id.* at 268.
[22] *Id.* at 279-80.
[23] *Id.* at 282 (quoting Barr v. Matteo, 360 U.S. 564, 571, 579 (1959)).
[24] *Id.*
[25] 388 U.S. 130 (1967).
[26] *Id.* at 134.
[27] *Id.* at 135.
[28] *Id.* at 140.
[29] *Id.*

own following.[30]

The Court held that a "public figure" may recover on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting.[31] As a result, the plaintiff in Case No. 37 could recover, because the defendant had the ability to check the information at issue, but did not do so. The plaintiff in Case No. 150 did not recover, however, because the defendant did not have the opportunity to check the information at issue under the circumstances of the case.[32] Thus, the Court extended *New York Times Co. v. Sullivan*'s actual malice standard to apply to public figures.[33]

Next, in *Gertz v. Robert Welch, Inc.*, the Court addressed the issue of the publication of libelous statements about private citizens.[34] In that case, Officer Nuccio was convicted of second-degree murder for the shooting death of a youth.[35] Elmer Gertz represented the boy's family in the civil action.[36] The defendant published *American Opinion*, which ran a story about the Nuccio trial that stated that the testimony against the officer was false and that the prosecution was part of the Communist campaign against the police.[37] In addition, the story contained false statements that portrayed Gertz as the architect of the "frame-up" and indicated that he was a Communist.[38] In creating this story, the editor made no effort to verify the statements.[39] The defendant argued that Gertz was a public official or public figure, requiring the plaintiff to meet the stringent standard of actual malice.[40]

The Court held that *New York Times* was inapplicable to this case, because the plaintiff was a private individual.[41] The Court established

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30 *Id.*
31 *Id.* at 155.
32 *Id.* at 156-59.
33 Smirlock, *supra* note 15, at 522.
34 418 U.S. 323, 325 (1974).
35 *Id.*
36 *Id.*
37 *Id.* at 325-26.
38 *Id.* at 326.
39 *Id.* at 327.
40 *Id.* at 327-28.
41 *Id.* at 352.

a test to determine whether one is a public or private individual. Courts must "look[] to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[42]

The Court reasoned that public officials and public figures enjoy greater access to channels of communication, and as a result, have a better opportunity to counteract false statements.[43] Private parties, on the other hand, are more vulnerable to injury, and the state interest in protecting them is more significant.[44] The Court further reasoned that private individuals deserve greater protection, because they have not voluntarily exposed themselves to increased risk of injury arising from false statements about them.[45] Finally, the Court stated that, so long as they do not impose liability without fault, the states may define their own standards for private citizens.[46]

2. Libel Applied to Based Upon True Stories

a. *Defining the Continuum of Works*

What is the result when libel law confronts supposedly true stories or their fictionalizations? Real events and real people are often used in current movies.[47] The use of these elements strengthens the audience's sense of time and place and enriches its experience of a fictitious reality.[48]

There is a continuum from make-believe to fact. First, "pure fiction connotes [the ability to] successfully suspend[] a reader's view of reality in favor of escape to the fictional medium."[49] There may be

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[42] *Id.*

[43] *Id.* at 344.

[44] *Id.*

[45] *Id.* at 345.

[46] *Id.* at 347.

[47] Diane Leenheer Zimmerman, *Defamation in Fiction: Real People in Fiction: Cautionary Words About Troublesome Old Torts Poured into New Jugs*, 51 BROOK. L. REV. 355, 361 (1985).

[48] *Id.*

[49] Mary Frances Prechtel, Comment, *Classical Malice: A New Fault Standard for*

cases in which the author of pure fiction uses a person's name without any knowledge of the person's existence.[50] The malice standard of fault should shield the defendant from liability in such a case, however, because the defendant harbored no spite or ill will for the subject.[51] In addition, there may be cases in which the author of pure fiction once knew, but forgot the plaintiff. In the absence of ill will on the part of the defendant, these cases also should not result in liability under the malice standard.[52] The author need not scour his or her memory, because it is impossible to harbor ill will toward a forgotten person.[53]

Second, there is roman à clef, which "represents historical events and characters under the guise of fiction."[54] This scenario presents a special difficulty in separating fact from fiction.[55] Liability should be determined using the classical malice fault standard, which requires ill will.[56] If the author in good faith created a false name to disguise the true identity of the character and to prevent harm to the subject, rather than to shield himself or herself, then the author should not be held liable, because the author had no ill will for the subject.[57]

Third, there is faction, a form of art "that treats real people or events in a fictional account."[58] This category of work draws on reality more than roman à clef, because it uses both fact and fiction while making apparent to the audience that the work is an exaggeration.[59] Unlike in roman à clef, the real names of real people are used in faction, and so the author should not be able to use the disguise defense to show the lack of intent to harm the plaintiff under the malice

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Defamation in Fiction, 55 OHIO ST. L.J. 187, 204 (1994).

[50] *Id.* at 205.

[51] *Id.*; *see also* Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947) (following this analysis).

[52] *Id.* at 206.

[53] *Id.* at 207.

[54] WEBSTER'S COLLEGE DICTIONARY 1166 (1st ed. 1991).

[55] Prechtel, *supra* note 49, at 208.

[56] *Id.* at 209.

[57] *Id.*

[58] WEBSTER'S COLLEGE DICTIONARY 477 (1st ed. 1991).

[59] Prechtel, *supra* note 49, at 210.

standard.[60]

Fourth, a docudrama is the "use[] [of] real people as central characters 'to enhance the impact of, and lend credibility to, [fictional] events.'"[61] The issue arises where the author adds fiction to the facts, and the same problem is created as seen in roman à clef.[62] The court in *Davis v. Costa-Gavras* stated that authors of docudramas are creatively interpreting reality, and that minor fictionalization is not evidence of actual malice.[63]

Fifth, fact is defined as "something that actually exists; reality; truth."[64] Courts have been uncomfortable placing subject matter off limits when factual reporting is involved.[65] In *Cox Broadcasting Corp. v. Cohn*, the Court allowed the printing of public records regarding the name of a rape victim, because, once true information is disclosed in this forum, the press cannot be sanctioned for publishing it.[66] Thus, facts receive a great deal of First Amendment protection.

In terms of artistic expression, documentaries would fall under this heading. "A documentary is 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."[67]

b. *Finding the Applicable Spot on the Continuum*

The next step in this analysis is to find where stories that are based upon true stories ("based upon true stories") fit on the continuum. They are neither fact, nor pure fiction. They lie somewhere between these extremes.

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[60] *Id.*

[61] *Id.* at 189 n.13 (quoting David A. Anderson, *Avoiding Defamation Problems in Fiction*, 51 BROOK. L. REV. 383, 393 n.57 (1984) (citing Victor A. Kovner, *The Great Docudrama Controversy—Elizabeth Taylor and ABC*, 1 COMM. & L. 1 (1983))).

[62] *Id.* at 212

[63] Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987).

[64] WEBSTER'S COLLEGE DICTIONARY 477 (1st ed. 1991).

[65] Zimmerman, *supra* note 47, at 379.

[66] 420 U.S. 469, 495-96 (1975).

[67] *Davis*, 654 F. Supp. at 658.

Roman à clef,[68] which changes the names of figures in historical stories in order to safeguard them from harm, is represented by the film *They Were Expendable*. In that film, the likeness of the plaintiff, a Navy commander during Pearl Harbor, was thinly disguised.[69] This category of work does not appear to be a match for our purposes.

Next, faction,[70] which exaggerates the characteristics of and uses the real names of real persons, is exemplified by the novel *The Public Burning*.[71] This novel discusses the trial of the Rosenburgs through the narration of Richard Nixon, fictionalizing Nixon as being involved in the seduction of Ethel Rosenburg.[72] This is not the problem in the context of based upon true stories.

By process of elimination, based upon true stories best fit into the docudrama[73] category. The best examples of this category of work, made-for-television movies, like many of the works at issue in current cases, fictionalize high profile events.[74]

A key docudrama case is *Street v. National Broadcasting Co.*,[75] which dealt with derogatory speculative statements.[76] This case involved the famous trial of nine black youths accused of raping two young white women while riding on a freight train to Alabama.[77] All of the defendants were found guilty and sentenced to death.[78] Subsequently, all of their convictions were reversed and several trials ensued, stirring strong passions and conflicting opinions about the case.[79] During the trials, Victoria Price, the alleged victim, gave some interviews to the press but soon disappeared from public view.[80]

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[68] *See supra* notes 54-57.
[69] Prechtel, *supra* note 49, at 208-09.
[70] *See supra* notes 58-60.
[71] Prechtel, *supra* note 49, at 210-11.
[72] *Id.* at 211.
[73] *See supra* notes 61-63.
[74] Prechtel, *supra* note 49, at 212 n.128.
[75] 645 F.2d 1227 (6th Cir. 1981).
[76] Moshayedi, *supra* note 2, at 334.
[77] 645 F.2d at 1229.
[78] *Id.* at 1229-30.
[79] *Id.* at 1230.
[80] *Id.*

Eventually, a script was written based on a chapter in an historian's book, which was based upon the trial court's findings, and a movie was produced based almost entirely upon the information in the book.[81]

Ms. Price's claims arose out of nine scenes in which she is portrayed in a bad light.[82] The key issue was whether the plaintiff was a public figure, and, thus, whether the higher standard of actual malice should be applied.[83] Employing the *Gertz* test, the court considered: 1) whether a public controversy existed, and 2) the nature and extent of the person's participation in such controversy.[84] The court used several factors to conclude there was a public controversy: the Scottsboro trials had been the focus of public debate, they generated widespread press for years, and they helped change the attitudes towards equal treatment of blacks under the law.[85] As to the nature and extent of the person's participation in the public controversy, the court looked at three factors including: 1) the extent to which participation is voluntary, 2) the extent to which there is access to channels of effective communication to counter the statements, and 3) the prominence of the role played in the controversy.[86]

First, the court found that the plaintiff played a prominent role, because she was the only alleged victim, the major witness for the State, and the sole prosecutrix.[87] Next, it found that the plaintiff had access to effective channels of communication and a realistic opportunity to counteract the statements, because the press clamored to interview her, allowing her to broadcast her views of the occurrences.[88]

Whether the plaintiff voluntarily thrust herself into the forefront of the controversy, was a more difficult issue.[89] The court stated that, if she were raped, then her participation in the legal proceedings was involuntary; however, if she falsely accused the defendants, then her

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81 *Id.*
82 *Id.*
83 *Id.* at 1233.
84 *Id.* at 1234.
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*

participation was voluntary.[90] The court rationalized that, where the issue of truth and voluntariness are the same, and in the absence of other evidence, public figure status should be determined without regard to the voluntariness factor.[91] "In such a case, the other factors . . . would determine public figure status."[92] The court found, however, that there was evidence of voluntariness separate from the issue of truth, because the plaintiff gave interviews and aggressively promoted her version of the case outside of her testimony.[93] Therefore, the court found that the plaintiff was a public figure under *Gertz*.[94]

Next, the court had to decide whether a person could lose public figure status as a result of the passage of time.[95] It held that "once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of that controversy."[96] It reasoned that "[p]ast public figures [living] in obscurity [continue to have] access to channels of communication if they choose to comment on their [past role]."[97]

Finally, no evidence was found to support the malice standard, because there was no showing of knowledge of falsity, or reckless disregard for truth.[98] If a person's story is incorrect, that may make him or her a poor historian, but that alone does not result in liability.[99] This flexible malice standard does have limits, however, and so falsities such as big political lies are actionable.[100] Thus, this case illustrates that defamation law does not hold a speaker liable for presenting discreditable speculation as fact, unless the plaintiff can

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90 *Id.*
91 *Id.* at 1234-35.
92 *Id.* at 1235.
93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.* at 1236.
98 *Id.* at 1236-37.
99 *Id.* at 1237.
100 *Id.*

prove it to be false.[101]

In one other important case, *Masson v. New Yorker Magazine, Inc.*,[102] the Court took up the issue of minor speculation.[103] The plaintiff, a public figure, claimed that he was defamed when quotation marks were used to signify that certain comments were attributable to him, when in fact they were not.[104] The Court rejected the argument that any correction to such statements, beyond grammatical or syntactical changes, proves actual malice.[105] It stated that there is a practical necessity to edit and make intelligible a speaker's rambling comments; as a result, it is expected that quotations may contain some inaccuracies.[106] The Court further held that, unless an alteration results in material change in the meaning of a statement, it is not false and does not constitute libel.[107]

Rational interpretation of a statement has been held to be consistent with First Amendment principles, because is allows for the necessary interpretative license to clarify ambiguous statements by sources.[108] As a result, speculative statements that are faithful to material facts may be disseminated freely, because minimal reputational damage occurs.[109] This speculation resembles opinion, which is privileged, because this does not unjustly harm reputations.[110]

c. *Inadequacy of Libel*

Although libel law has some potential to help plaintiffs in situations where they feel they have been defamed in based-upon-true-story movies, there is one major downfall to this cause of action. According to the current libel law, the deceased cannot be defamed. Meanwhile, many cases involving based-upon-true-story controversies involve

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101 Moshayedi, *supra* note 2, at 334-35.
102 501 U.S. 496 (1991).
103 Moshayedi, *supra* note 2, at 335-36.
104 501 U.S. at 499.
105 *Id.* at 514.
106 *Id.* at 515.
107 *Id.* at 517.
108 *Id.* at 519.
109 Moshayedi, *supra* note 2, at 337.
110 *Id.* at 338.

deceased persons whose family members sue on their behalf.

This centuries-old rule against libeling deceased persons protects against many problems, such as the fear of how long the right lasts after a person's death.[111] This practice has also been adopted in federal defamation law, which provides that "[o]ne who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives."[112] Thus, this cause of action will not be helpful to many wronged plaintiffs.

In Part IV, the analysis will return to libel law. By reviewing the background and analysis above, certain elements of libel law will be used in the creation of a new and improved cause of action.

B. *Publicity Rights*

1. Development of the Right of Publicity

The right of publicity is defined as "[t]he right of [an] individual, especially public figure or celebrity, to control commercial value and exploitation of his name or picture or likeness or to prevent others from unfairly appropriating that value for their commercial benefit."[113]

There are many definitions for the right of publicity; however, most agree that it is "the inherent right of every human being to control the commercial use of his or her identity."[114] Initially, the right came solely from the right of privacy.[115] It evolved from Samuel Warren and Louis Brandeis' 1890 law review article, which acknowledged

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[111] Geoffrey Cowan, *The Future of Fact: The Legal and Ethical Limitations of Factual Misrepresentation*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 155, 160-61 (1998).

[112] RESTATEMENT (SECOND) OF TORTS § 560 (1977).

[113] BLACK'S LAW DICTIONARY 1325 (6th ed. 1990) (citing Presley's Estate v. Russen, 513 F. Supp. 1339, 1353 (D.C. N.J. 1981)).

[114] Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 227, 229 (1999) (quoting J. THOMAS MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY vii (Rev. 1993)).

[115] *Id.* at 230.

one's right to be left alone.[116] Warren and Brandeis concluded that common law was created to protect tangible property and life.[117] Also, as legal systems began to recognize the spiritual nature of humans, the common law expanded to protect intangible possessions and non-physical injuries.[118]

Warren and Brandeis realized that new inventions could record and photograph the most private acts, which could then be distributed to others.[119] They stated that privacy rights must include one's right to determine "to what extent his thoughts, sentiments, and emotions [can] be communicated to others."[120] Thus, privacy rights prevent people from looking into other's private lives, and publicity rights prevent people from exploiting others' public lives.[121]

The common law right of publicity is recognized in less than half of the states.[122] "[It] evolved from breach of confidence and contract, to privacy rights . . . ."[123] The property law approach was adopted early on, in order to address many problems of the privacy law view.[124] "[P]ublicity, is more like property than privacy[, because it can exist] separately from its owner and can potentially generate income even after the celebrity has died."[125]

In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the court first used the phrase "right of publicity."[126] In that case, the defendant, a rival gum manufacturer, induced a ball-player to use his photograph in connection with the sale of its product, during the term

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[116] *Id.* (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

[117] Larry Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1, 4 (1995) (citing Warren & Brandeis, *supra* note 116, at 193).

[118] *Id.* (citing Warren & Brandeis, *supra* note 116, at 193-94).

[119] *Id.* (citing Warren & Brandeis, *supra* note 116, at 195).

[120] Goodman, *supra* note 114, at 230 (citing Warren & Brandeis, *supra* note 116, at 198 (citing Miller v. Taylor, 4 Burr. 2303, 2379 (1769))).

[121] *Id.*

[122] *Id.* at 231.

[123] *Id.*

[124] *Id.* at 232-33 (citing Warren & Brandeis, *supra* note 116, at 200).

[125] Moore, *supra* note 117, at 7.

[126] 202 F.2d 866, 868 (1953).

of plaintiff's contract with the player for similar purposes.[127] The court held that "in addition to and independent of [the] right of privacy, . . . a man has a right in the publicity value of his photograph, . . . and this right might be called a 'right of publicity.'"[128] After the decision in this case, no federal statute developed, and so each state has determined its own approach.[129]

a. *Other Right of Publicity Approaches*

In addition to the varied state approaches, the right of publicity is recognized in the Restatement of Torts.[130] Under the Restatement of Torts, the privacy tort is broken into four categories: a) intrusion into one's seclusion, b) appropriation of one's name or likeness, c) unreasonable publicity in one's private life, and d) false light.[131]

Next, the American Law Institute published the Restatement (Third) of Unfair Competition.[132] Section 46 of this Restatement protects against unfair methods of competition and limits relief to commercial injuries.[133] Injunctive relief, section 48, is based on the nature and extent of the appropriation.[134] Monetary relief, section 49, is either compensatory and measured by loss, or restitutionary and measured by unjust gain.[135]

In jurisdictions that have not codified the right of publicity, these two alternatives are the main sources of common law protection.[136] Since these approaches are not adopted by all states, and the courts have not fleshed out all of the attendant uncertainties, problems will arise. These problems will be examined later in this section and in Part

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[127] *Id.* at 867.

[128] *Id.* at 868.

[129] J. Steven Bingman, Comment, *A Descendible Right of Publicity: Has the Time Finally Come for a National Standard?*, 17 PEPP. L. REV. 933, 936 (1990).

[130] RESTATEMENT (SECOND) OF TORTS § 652A (1977).

[131] *Id.* §§ 652B-E.

[132] RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995).

[133] *Id.* § 46 cmt. a.

[134] Goodman, *supra* note 114, at 235 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995) § 48).

[135] *Id* (citing § 49 cmt. a).

[136] *Id.*

III.

b. *Federal Law and the Right of Publicity?*

No federal right of publicity exists. However, federal trademark law—specifically, section 1125(a)(1)(A) of the Lanham Act, which is broad in scope—can be used to protect individuals.[137] The law protects against "dece[ption] as to the affiliation, connection, or association, . . . origin, sponsorship, or approval of . . . goods, services, or commercial activities by another person."[138] However, plaintiffs only take this approach when their right of publicity claims under state law or common law fail.[139] Otherwise, the trademark statute is insufficient, because its goals of protecting trademark owners and the public from unfair competition and confusion are different than those of publicity rights.[140]

c. *Rationales for the Right of Publicity*

First, right of publicity law seeks to prevent unjust enrichment.[141] In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court stated that "[t]he rationale for [protecting the right of publicity] is . . . [one] of preventing unjust enrichment by the theft of good will."[142] The plaintiff was an entertainer who performed a "human cannonball" act, the entire performance comprising a total of fifteen seconds.[143] The defendant, a reporter, attended a fair where the act was to be performed and filmed it, even though plaintiff had asked him not to do so.[144] This footage was later broadcast on television.[145]

The Court stated that entertainment enjoys First Amendment

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[137] 15 U.S.C. § 1125(a)(1)(A).

[138] *Id.*

[139] Goodman, *supra* note 114, at 247.

[140] *Id.*

[141] H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1, 16 (1992).

[142] 433 U.S. 562, 576 (1977).

[143] *Id.* at 563.

[144] *Id.* at 563-64.

[145] *Id.* at 564.

protection.[146] As a result, "neither the public nor [the defendant] will be deprived of the benefit of [the] performance as long as [the] commercial stake in [it is] recognized."[147] A failure to protect entertainers' commercial interests would decrease their incentive to create, and would freely confer a benefit upon people that they normally would pay to obtain.[148]

The second rationale is the need to protect against the "[d]ilution of a celebrity's commercial value and a . . . diminution in [their] demand."[149] In *Midler v. Ford Motor Co.*, Bette Midler refused to perform in a commercial; however, undeterred, the defendant used a backup singer, who sounded just like the plaintiff, for the commercial.[150] The court accepted the view that an artist's value can be enhanced by the ability to refuse to license one's identity to advertisers, and that overexposure can impede an artist's ability to attract quality offers in the future.[151]

Next, there is the right to maintain one's personal autonomy.[152] This right provides the most compelling argument when others use a celebrity's publicity in offensive ways, thereby tarnishing his or her image by association with disreputable products, and perhaps leading to a public perception that a celebrity is greedy.[153]

2. The Right of Publicity Applied to Based Upon True Stories

There is great uncertainty that the right of publicity cause of action can be of help with regard to problems that arise from based upon true stories. "In most states, the right of publicity only applies to uses of an image associated with a commercial product."[154] As a result, using

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[146] *Id.* at 578.

[147] *Id.*

[148] *Id.* at 576 (quoting Klaven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 331 (1966).

[149] Hetherington, *supra* note 141, at 16.

[150] 849 F.2d 460, 461 (1988).

[151] Hetherington, *supra* note 141, at 17.

[152] Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 1992 BYU L. REV. 597, 605.

[153] *Id.* at 606.

[154] Lauri Deyhimy, Comment, *Why Seeing Is No Longer Believing:*

another's image in a film will often fall outside of the protection of this right.[155] In states that do not provide protection, films would be considered expressive works, which are protected by the First Amendment.[156]

If film is not excluded from protection, one must determine whether another's identity in the work can give rise to a right of publicity claim.[157] A common justification for the use of a real person's name and likeness in films is to attract attention and to enhance the value of essentially fictitious expression.[158] The author's creative efforts should determine whether protection should attach, and works that only serve to take advantage of another's identity would serve as a basis for liability.[159]

There have been some successes in the use of this cause of action. These successful claims have been brought by well-known people who are alive and able to sue. For example, in *Marcinkus v. NAL Publishing, Inc.*, a well-known person sued on the grounds that the defendants had appropriated his likeness in order to enhance the realism of their fictional novel.[160] The court found that the prominent placement of plaintiff's name, and the quotations that were attributed to the character using plaintiff's name and office, supported the plaintiff's claim of appropriation. As a result, the defendants' motion to dismiss was denied.[161]

Contrary to the previous case, there can be great obstacles for the non-famous plaintiff. Most noteworthy, "there is a split of opinion among jurisdictions as to whether a 'non-celebrity' should have the right to sue for the commercial value of unpermitted use of personal identity . . . ."[162] It has been argued that, because those thrust into the eye of the public do not have an economic incentive, they have no right

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Misappropriation of Image and Speech, 19 LOY. L.A. ENT. L. REV. 51, 64 (1998).

155 *Id.*

156 *Id.*

157 *Id.* at 65.

158 *Id.*

159 *Id.* (citing Peter L. Fletcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1604-05 (1979)).

160 522 N.Y.S.2d 1009, 1010 (1987).

161 *Id.* at 1014.

162 Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 542 n.2 (1993).

of publicity.[163]

The modern view, followed by a majority of courts, rejects this erroneous interpretation by some judges and holds that the right of publicity is an inherent right possessed by everyone from birth.[164] However, due to the lack of uniformity between jurisdictions, valid right of publicity claims brought by non-celebrity plaintiffs may not be heard.

An additional hurdle to these plaintiffs is the balancing of the First Amendment "newsworthiness" defense against their right to control the representation of their persona.[165] A person's right of publicity usually will be outweighed by this First Amendment consideration when it conflicts with the free dissemination of thoughts, ideas, and newsworthy events.[166]

The California Supreme Court has established a widely-accepted test for newsworthiness.[167] In *Briscoe v. Reader's Digest Ass'n, Inc.*, the factors used were the following: "[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety."[168] After a determination of newsworthiness has been made, fact-based works, which have more social value and generally deserve a greater need for dissemination, should receive less right of publicity protection.[169] As a result, facts will obtain greater First Amendment protection, consistent with the analysis applied in libel law.

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[163] Bridgette Marie de Gyarfas, *Right of Publicity v. Fiction-Based Art: Which Deserves More Protection?*, 15 LOY. L.A. ENT. L. REV. 381, 390 (1995).

[164] J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1710 (1987).

[165] Gyarfas, *supra* note 163, at 391.

[166] *Id.* (citing Rosemont Enters., Inc. v. Random House, Inc., 294 N.Y.S. 2d 122, 129 (1968)).

[167] *Id.* at 394.

[168] 4 Cal. 3d 529, 541 (1971) (citation omitted).

[169] Gyarfas, *supra* note 163, at 396.

3. Inadequacies of the Right of Publicity

Apart from the requirement of commercial use in many states, the problems of the non-famous, and the hurdle of the newsworthy exception, there are more devastating shortcomings of the right of publicity cause of action.

a. *Descendibility?*

The most devastating deficiency of the right of publicity is that not all states that recognize the right allow for it to survive a person's death. This is important, because, as stated earlier, many based-upon-true-story controversies involve deceased persons.

A major precedent against descendibility was created when the California Supreme Court, in *Lugosi v. Universal Pictures*,[170] held that "the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime."[171] The Court stated that, after Lugosi's death, his name entered the pubic domain.[172]

Currently, there are several different state approaches. Some states hold that a person's publicity right dies with that person.[173] Other states provide for survival of the right, so long as it was exploited during the person's lifetime.[174]

In 1999, California—an important jurisdiction with regard to this issue—passed the Astaire Celebrity Image Protection Act, section 990 of the California Civil Code.[175] This Act created "freely transferable property rights in the name, voice, signature, photograph or likeness of any deceased person provided any of these attributes had commercial value at the time of the person's death."[176] With this and other previous revisions, California corrected earlier exploitation problems

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[170] 25 Cal. 3d 813 (1979).

[171] *Id.* at 824.

[172] *Id.* at 823.

[173] Goodman, *supra* note 114, at 258.

[174] *Id.*

[175] Joseph J. Beard, *Fresh Flowers for Forest Lawn: Amendment of the California Post-Mortem Right of Publicity Statute*, 17 ENT. AND SPORTS LAW. 1, 1 (Winter 2000).

[176] CAL. CIV. CODE §§ 990(a), (h) (West Supp. 1993).

by eliminating the requirement that a plaintiff live to assert his right of publicity claim.[177]

Surprisingly, Georgia always recognized the descendibility of the right of publicity. In *Martin Luther King, Jr. Center For Social Change, Inc. v. American Heritage Products, Inc.*,[178] the court held that "a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life."[179]

The court further stated that, if the right dies with the person, then its economic value during life would diminish, because a premature death would impair continued commercial use.[180] Thus, parties would be deterred from purchasing long-term publicity rights, since they could exploit them freely after the person's death.[181]

b. *Unfairness*

The lack of a federal statute regarding the right of publicity creates confusion, inconsistency, and a lack of predictability.[182] Without a federal statute with defined elements, stepping into the legal realm of a different state will remain a big gamble for plaintiffs in right of publicity cases.[183]

c. *Forum Shopping*

Next, these state inconsistencies create the problem of forum shopping.[184] This legal term of art is defined as the act of looking for the state with the most favorable laws for one's case.[185] A

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177 Moore, *supra* note 117, at 22.

178 694 F.2d 674 (11th Cir. 1983).

179 *Id.* at 683.

180 *Id.* at 682.

181 J. Joseph Bodine, Jr., Comment, *A Picture Is Worth $775.00: The Right of Publicity, an Analysis and Proposed Test*, 17 CAP. U. L. REV. 411, 427 (1988).

182 Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 NOVA L. REV. 1013, 1045 (1995).

183 Bingman, *supra* note 129, at 960-61.

184 Goodman, *supra* note 114, at 244.

185 *Id.*

consequence of this practice is that attorneys cannot give their clients proper advice on their questions concerning publicity rights, because there is no way to determine where the client will be sued.[186]

d. *Choice of Law Problems*

Again, as a result of the statutory uncertainties, the nature and scope of the client's right of publicity will depend upon what law applies.[187] Choice of law analysis will then be required for right of publicity cases. Generally, courts will apply the law of the plaintiff's domicile, looking to the place where the property is located.[188] Once a right of publicity has been proven to exist, the court may then apply the law of the state having the greatest interest.[189]

There are two approaches accepted by a majority of states in deciding which state has the greatest interest.[190] First, there is interest analysis advanced by Brainerd Currie, where governmental policies underlying the laws of the states involved are examined.[191] This approach is forum-centered, requiring the use of forum law if the forum has a significant interest in enforcing its substantive law.[192] California uses a more widely accepted version of this approach, requiring courts to determine which state would be most impaired if its policy were not followed.[193]

Second, there is the significant contacts test, which has been instituted in some jurisdictions in response to claims that the interest analysis test is ad hoc and unworkable.[194] Under this approach, which is qualitative in nature, courts attempt to determine the state with the greatest interest in the matter by finding contacts that relate to the

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[186] *Id.*

[187] Stanley Rothenberg & Eric P. Bergner, *Candle in the Wind: Would Elton John's Publicity Rights Extinguish with His Death?*, 46 J. COPYRIGHT SOC'Y U.S.A. 75, 75 (1998).

[188] *Id.* at 75-76.

[189] *Id.* at 76-78.

[190] Richard Cameron Cray, Comment, *Choice of Law in Right of Publicity*, 31 UCLA L. REV. 640, 651-52 (1984).

[191] *Id.* at 652.

[192] *Id.*

[193] *Id.*

[194] *Id.*

purpose of the law in conflict.[195] Factors to be considered under this approach are domicile, forum, state of incorporation, and place of contract.[196]

e. *Enforcement Problems*

Schumann v. Loew's, Inc.[197] demonstrates that this patchwork system also creates problems in enforcing the right of publicity both nationally and internationally. In that case, the plaintiffs, the great grandchildren of the famous composer Robert Schumann, sued over the film *Song of Love*, which portrayed both Schumann's mental illness and that of his sister.[198] The plaintiffs alleged that the film was made without their consent and that it led to reputational harm by instilling in the minds of the public that the plaintiffs currently have or someday will be subject to mental illness.[199]

The plaintiffs claimed that exhibition of the film violated their rights and their great grandfather's rights, and pled sixty-one causes of action for every state and country in the world.[200] The court found that Connecticut, as well as sixteen other states' laws, did not provide right of publicity protection, and so it dismissed the plaintiffs' claims.[201] The court found there to be a cause of action in thirty other states and the British Isles, but that it existed only for living persons.[202]

In the states providing for inheritance of the right, the plaintiffs could not prove they were the heirs or that the right had descended to them, as opposed to someone else.[203] Finally, as to the common law countries, the court assumed that, without evidence to the contrary, their law was the same as New York law, which did not recognize such

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195 *Id.* at 652-53.
196 *Id.* at 653.
197 135 N.Y.S.2d 361 (1954).
198 *Id.* at 364.
199 *Id.*
200 *Id.* at 364-65.
201 *Id.* at 365.
202 *Id.* at 366.
203 *Id.* at 369.

a right.[204] As a result of this lack of a consistent standard for the right of publicity, results will vary from state to state.[205]

III. THE CURRENT SITUATION

A. *Recent Cases*

Today, where "based upon a true story" is often the hook for successful movies, people are increasingly feeling wronged by inaccurate portrayals.[206] In 1997, there were two high-profile controversies involving the films *Hoodlum* and *Titanic*.[207]

In *Hoodlum*, Thomas Dewey, former New York district attorney, was portrayed as a D.A. on "the take."[208] However, according to best historical evidence, Dewey was known to be rigidly honest.[209] His surviving family members complained to the producer of the film, MGM, but they were met with a response stating that, "MGM has not violated any legally recognizable right . . . of either your father or your family."[210] Since Dewey was dead, Dewey's family members could not maintain a suit for libel, and so their only recourse was to make their case to the press.[211] MGM refused to make an apology to them and, eventually, they gave up.[212]

After the release of *Titanic*, residents of Dalbeattie, Scotland, near Glasgow, started a publicity campaign against the producer of that film, Twentieth Century Fox.[213] In the film, William Murdoch, an officer on the ship, was portrayed as shooting panicked passengers and,

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[204] *Id.* at 366.

[205] Moore, *supra* note 117, at 29.

[206] John T. Aquino, *Socko! Boffo! Wrong! But Don't Expect Much Help From Libel Laws*, WASHINGTON POST, July 1, 2001, at B01.

[207] Willing, *supra* note 4, at D1.

[208] Beard, *supra* note 175, at 26.

[209] Aquino, *supra* note 206, at B01.

[210] *Id.*

[211] Cowan, *supra* note 111, at 160.

[212] Willing, *supra* note 4, at D1.

[213] *Id.* at D1.

in the end, killing himself.[214] Testimony from actual witnesses to the event, however, states that Murdoch gave his lifejacket to a passenger and then died when he was washed overboard while trying to deploy a lifeboat.[215]

Dorothy Grace Elder, a Glasgow newspaper columnist, stated, "This rubbish did harm to the truth and needless cruelty to a good man's name, all in the name of some insipid story."[216] Filmmakers countered by arguing that other accounts mentioned a shooting by an officer, making this scene fair game.[217] In the end, the campaign obtained a $5,000 check from the studio without ever filing a suit.[218]

In 1999, the film *The Hurricane* and its depiction of ex-professional boxer Joey Giardello created additional controversy over these types of films.[219] Giardello boxed professionally for twenty years, and he was very successful, holding the middleweight championship from 1963 to 1965.[220] In the movie, Rubin "Hurricane" Carter (Denzel Washington), is shown decisively beating Giardello, however, and Carter is depicted as having lost that match only as a result of a racially motivated decision.[221]

According to Giardello, he was barely injured in the actual match and he won a clear decision. His version of events is supported by some writers who were present at the match.[222] He is most upset that "[t]his is about my reputation as a fighter . . . I got grown kids and grandchildren who never saw me fight. They look at that [movie], what are they supposed to think?"[223] Giardello sued the filmmakers, who settled out of court for an undisclosed amount, and the director was forced to make a statement on the DVD version of the film that

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214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*
218 *Id.*
219 *Id.*
220 *Id.*
221 *Id.*
222 *Id.*
223 *Id.*

there was "no doubt" that Giardello was a great fighter.[224] However, Giardello's request to have the DVD appended with actual footage from the fight was refused.[225]

Gerson Zweifach, attorney for the filmmakers, stated that many times "events need to be condensed and dramatized in order to make a film since it is impossible to convey things such as all the legal proceedings in a case."[226] He stated "there were two elements at work here: 1) to address the logistical issues there was an effort to condense, characters were composed and there was a creation of composite highlights of the fight; and 2) the subject matter contained inherently controversial events since there is subjectivity in the ring and in a court."[227]

Zweifach added that "condensing must be done in order to make the film watchable and coherent."[228] Also, "the standard is a good faith effort to convey an honest interpretation of an inherently subjective and controversial sequence of events."[229] He thinks that "a right of publicity claim is bogus where there is a legitimate effort to report historical events."[230] In his view, "Mr. Giardello is an historical figure who does not own his story, and has the ability to speak out against the film and discredit it."[231] This argument is in line with libel and right of publicity analyses, which tend to give greater First Amendment protection to facts.

Since libel law is not helpful to plaintiffs in cases in which many of the defamed people are dead or the material is deemed to be factual, a new trend is developing. While legislation to extend legal standing for libel suits to families of the deceased fail out of a concern that too many lawsuits will chill the speech of biographers and historians, plaintiffs are resorting to claims for "unauthorized misappropriation

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[224] *Id.*

[225] *Id.*

[226] Telephone Interview with Gerson Zweifach, Partner, Williams & Connolly LLP (Feb. 22, 2002).

[227] *Id.*

[228] *Id.*; *see also supra* text accompanying notes 105-6.

[229] *Id.*; *see also supra* text accompanying note 108.

[230] *Id.*

[231] *Id.*

and invasion of privacy."[232] One recent case demonstrating this new trend involves the film *The Perfect Storm*. This film depicts the unprecedented October 1991 storm off the coast of Gloucester, Massachusetts—a "perfect storm"—that caught the crew of the swordfish boat "The Andrea Gail," which was lost at sea.[233] The plaintiffs in a pending Florida lawsuit against the film's producer, Warner Brothers, are the divorced wife and children of the boat's captain Billy Tyne; the divorced wife and child of crewman Dale Murphy; and fisherman Douglas Kosko, who withdrew from the crew before the event occurred.[234] The plaintiffs claim that Warner Brothers did not have the right to create a film concerning this event without first seeking their permission and compensating them.[235] Specifically, the Tyne family complains that the film was less than flattering to Billy Tyne.[236] According to their attorney Stephen Calvacca, Billy Tyne's "character was a fairly obsessed, despondent, reckless individual who seemingly put his own life and the lives of his crew members at risk to fight the big storm, to fight the good fight, to beat his subtle love interest."[237] The legal causes of action put forward in the case are: 1) the film portrays Billy Tyne in a false light, 2) Warner Brothers disclosed private facts about plaintiffs in the film, and 3) the plaintiffs are protected under Florida's Commercial Misappropriation statute.[238]

Plaintiffs will be faced with an obstacle under the common law

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[232] Aquino, *supra* note 206, at B01.

[233] Defendants' Memorandum of Law in Support of Dispositive Motion to Dismiss at 1, Tyne v. Time Warner Entertainment Co., (M.D. Fla. 2002) (No. 6:00CV-1115-ORL-22-C). On February 4, 2004, this case will go before the Florida Supreme Court regarding a state issue (case number SC03-1251). Following this, the case will go back to the Eleventh Circuit regarding the appeal filed on June 7, 2002, in which plaintiffs contest the summary judgment decision in favor of the defendants (case number 0213281F).

[234] *Id.* at 2.

[235] *Id.*

[236] Peter King, *Not-So-Perfect Storm*, CBSNEWS.com, *at* http://www.cbsnews.com/stories/2000/08/30/entertainment/main229199.shtml/ (Aug. 30, 2000).

[237] *Id.*

[238] Defendants' Memorandum of Law in Support of Dispositive Motion to Dismiss, *supra* note 233, at 2-3.

false light invasion of privacy cause of action. As a general rule, this action may only be maintained by living persons.[239] However, the plaintiffs argue that other jurisdictions provide support for their standing in this action, focusing on the injury sustained by the surviving relatives in protecting their rights in the decedent, and protecting against their own humiliation.[240] Warner Brothers argues that the reason for the rule is to prevent spurious claims solely for emotional injury, and that the expansion of those with standing should only be done by the legislature.[241]

As to the second cause of action, common law public disclosure invasion of privacy, the Murphy plaintiffs allege that facts about Dale Murphy's relationship with his ex-wife Debra Tigue and son Dale Murphy, Jr., and his ex-wife's relationship with another man were publicly disclosed.[242] "The elements of this tort are (1) publication, (2) of a private fact, (3) that is highly offensive, and (4) unrelated to a matter of public concern."[243]

Warner Brothers argues that Murphy's portrayal is related to the subject of the film and the events were part of a best-selling book by Sebastian Junger depicting the tragedy, which was undoubtedly of public concern.[244] It adds that "[o]nly in cases of flagrant breach of privacy . . . or obvious exploitation of public curiosity where no legitimate public interest exists . . . should a court substitute its judgment for that of the publisher."[245]

The plaintiff's respond that the scenes involving them, the portrayal of Ms. Tigue having a relationship with another man and the role of

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[239] Plaintiffs' Opposition to Defendants' Dispositive Motion for Summary Judgment, at 26, Tyne v. Time Warner Entertainment Co., (M.D. Fla. 2002) (No. 6:00CV-1115-ORL-22-C) (citing Loft v. Fuller, 408 So.2d 619 (Fla. Dist. Ct. App. 4th DCA 1981)).

[240] *Id.* at 26-27 (citing *Loft*, 408 So. 2d at 624).

[241] Defendants' Memorandum of Law in Support of Dispositive Motion to Dismiss, *supra* note 233, at 6.

[242] *Id.*

[243] *Id* (citing Cape Publications, Inc. v. Hitchner, 549 So. 2d 1374, 1377 (Fla. 1989)).

[244] *Id.* at 2, 7-8.

[245] *Id.* at 9 (citing Dresbach v. Doubleday & Co., Inc., 518 F.Supp. 1285 (D. D.C. 1981)).

Murphy in the lives of both Ms. Tigue and Dale Murphy Jr. were knowingly manufactured.[246] They argue that these fabrications were what the Supreme Court has ruled against in other cases.[247] Finally, they argue that disclosure of Ms. Tigue's sexual life and Murphy, Jr.'s private life are not newsworthy to the public.[248]

The last cause of action, which is the one that has the best chance of success, is brought by plaintiffs under Florida Statutes section 540.08 ("[u]nauthorized publication of name and likeness").[249] The statute provides that

> (1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness . . . without the express written or oral consent . . . by: (a) Such person; or . . . b) If such person is deceased, any person . . . from among a class composed of her or his surviving spouse and surviving children. (2) [A]ny person . . . having the right to give such consent . . . may bring an action to enjoin . . . and to recover damages for any loss or injury sustained . . . including an amount which would have been a reasonable royalty, and punitive or exemplary damages.[250]

Warner Brothers argues that for the plaintiffs to succeed, they have to prove that their names and likenesses were used with a "commercial or advertising purpose."[251] Warner Brothers claims that under *Loft v. Fuller*, the inclusion of their names and likenesses in a work of expression, such as a movie, does not constitute such a purpose.[252] The court stated that it was "irrelevant that the book and movie were both designed with profit in mind, [it did] not amount to the kind of commercial exploitation prohibited by the statute."[253] The court noted

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[246] Plaintiffs' Opposition to Defendants' Dispositive Motion for Summary Judgment, *supra* note 239, at 29.

[247] *Id.* (citing Time, Inc. v. Hill, 385 U.S. 374 (1967); Spahn v. Messner, 21 N.Y.2d 124 (1968)).

[248] *Id.*

[249] *Id.* at 14.

[250] *Id.*

[251] Defendants' Memorandum of Law in Support of Dispositive Motion to Dismiss, *supra* note 233, at 10-11.

[252] *Id.* at 11 (citing *Loft*, 408 So. 2d at 622-23).

[253] *Id.* at 12 (citing *Loft*, 408 So. 2d at 623).

that a broad view of the right of publicity would chill the freedom of press and speech.[254]

The plaintiffs argue that the movie itself is a commercial venture, and the term commercial purpose "includes activity beyond simple product endorsement."[255] They say a narrow interpretation renders the newsworthiness exception worthless, because everything but advertising would be permitted.[256] They also say the *Loft* case is distinguishable, because no claim of false statements was made.[257]

In addition, plaintiffs note *Messenger v. Gruner + Jahr USA Publisher*,[258] where the court stated that New York law and Florida law regarding publicity rights were essentially equivalent,[259] and that the New York Court of Appeals under *Binns-Spahn*, has stated that a work "may be so infected with fiction, . . . it cannot . . . fulfill the newsworthiness exception."[260] The plaintiffs argue that their dispute is such a case of infection, because the film consists of calculated falsehood with only a small strand of truth.[261]

The Perfect Storm plaintiffs, by using a commercial misappropriation statute, have entered uncharted waters.[262] While such a cause of action is a possible silver lining within a cloudy area of the law, it is far from reliable. It suffers from many of the problems that were introduced in Part II's discussion of the inadequacies of the right of publicity. In relying upon such a statute, plaintiffs face the difficult hurdles of commercial use, the problem of the non-famous, the newsworthiness exception, lack of fairness, and forum shopping.

A very challenging obstacle to the plaintiffs' case is their attempt to use New York law as precedent to demonstrate their cause of action

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[254] *Id.* at 12-13 (citing *Loft*, 408 So. 2d at 621).

[255] Plaintiffs' Opposition to Defendants' Dispositive Motion for Summary Judgment, *supra* note 239, at 17.

[256] *Id.* at 18-19.

[257] *Id.* at 20 n.7.

[258] 994 F. Supp. 525 (S.D.N.Y. 1998).

[259] Plaintiffs' Opposition to Defendants' Dispositive Motion for Summary Judgment, *supra* note 239, at 22.

[260] *Id.* at 25 (citing Messenger ex rel. Messenger v. Gruner + Jahr Printing and Pub., 94 N.Y.2d 436, 446 (2000)).

[261] *Id.*

[262] Aquino, *supra* note 206, at B01.

has validity by showing that Florida has adopted the New York approach. In order for the plaintiffs to succeed at trial, the judge must be greatly enlightened as to this dense area of the law, and he or she must rule in the plaintiffs' favor on several close calls. All of these challenges exist even without the troublesome worry of descendibility that often pokes its ugly head into these matters.

Prevailing by use of this cause of action seems very unlikely, because there may be hesitation on the part of the judge, who may be reluctant to open the courthouse doors to too many cases involving inappropriate plaintiffs. Regardless of the outcome of this case, however, a new cause of action must be created in order to adequately provide a remedy for deserving plaintiffs—the non-famous who are thrust into the public eye, and the incidentals, who have few options for their own defense.

IV. PROPOSED CAUSE OF ACTION

A. *Rationale*

A strong justification for a new cause of action is that—like broadcast media, which has a pervasive presence in the lives of Americans today[263]—films have an equivalent or greater impact on society. In the past, this negative impact had a shorter lifespan.[264] Today, however, in light of the popularity of video and DVD sales and rentals, false portrayals and their harms may continue indefinitely.[265]

As society strives to obtain information faster, films are becoming a key component in many people's history education.[266] This was precisely Joey Giardello's concern with regard to *The Hurricane* dispute: how his family and public will perceive him as a result of the film.[267] Consequently, if this ex-boxer and historical figure has trouble rectifying the matter, then how can the aggrieved non-famous be

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263 FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

264 Aquino, *supra* note 206, at B01.

265 *Id.*

266 Cowan, *supra* note 111, at 159.

267 *See supra* note 223.

expected to deal with this problem, when they have less clout and less ability to access the media?

B. *Elements of the Proposed Solution*

The non-famous who are thrust into the public eye—including incidental characters to public events—must be able to rely upon a federal cause of action. Congress wields the power to enact such a statute under the Interstate Commerce Clause.[268] Such an action should contain elements of both libel and the right of publicity, because the wrong imposed on victims encompasses both reputational harm as well as commercial harm to victims and their families. The proposed cause of action has three prongs that are to be examined when dealing with the based-upon-a-true-story problem.

Under prong one, a court must look to the type of speech involved in the dispute. This determination will require looking at the continuum mentioned above. A court must be ascertained whether the relevant classification is pure fiction, roman à clef, faction, docudrama, or fact.[269]

Where the work is found to be closest to fact, the First Amendment will reign, and the creator's work will be protected. On the other hand, the closer the work is to fiction, the less protection it deserves, because this speech is not newsworthy and thus requires less First Amendment safeguarding. Fiction, not held up as an assertion of fact, is designed to help the audience escape from reality, not learn about it.[270] Fiction's lower threshold of First Amendment protection offers more protection for plaintiffs in these controversies. If fiction is combined with fact, as in docudramas, the subsequent elements of this proposed cause of action must be analyzed to form a conclusion in this gray area.

Under the second prong, a court must look to the type of person involved in the dispute. If the person is a public official or public figure, as mentioned earlier, then he or she is harder to defame, giving filmmakers greater artistic leeway to depict such persons about whom

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[268] U.S. CONST. art. I, § 8, cl. 3.

[269] *See supra* notes 49-67.

[270] *Prechtel*, *supra* note 49, at 202.

society is most interested in learning.[271] The proposed cause of action is drawn very narrowly to afford First Amendment protection for creative freedom.

The proposed cause of action has the goal of protecting only people thrust into the public eye by an event, those in the gray areas between public and private figures, as well as non-famous people who are incidental characters to a notable event. Other plaintiffs, the famous, may have recourse under existing causes of action or through their media clout.[272] Even if they do not have such a recourse, then one could argue that they intentionally lost their right to some privacy in order to obtain their celebrity status, and so they do not deserve more protection than is currently available.[273]

Under the third prong, after determining the type of work and person at issue, a court must assess whether a reasonable person would find that there is room for interpretation as to the depicted events. If such room for interpretation is found, then this element weighs in favor of First Amendment leeway for the creator.

An example of such room for interpretation can be found in the film *JFK*, Oliver Stone's film depicting a conspiracy to kill President John F. Kennedy.[274] Since the truth regarding the assassination of President Kennedy is hotly debated, this example is a prime candidate for passage under prong three. While some may say it is radical, Stone's interpretation of the event is at least remotely plausible. Also, because the public knows that the crime remains unsolved, it will not misinterpret the movie as representing fact, and so Stone's speculative speech will be permissible.[275]

The third prong is meant to include the actual malice standard that is required in libel law. If a reasonable person would find that the interpretation is completely implausible, then this shows a reckless

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[271] *See supra* notes 83-94 (mentioning the higher standard and describing the *Gertz* test for determining whether someone is a public figure requiring it).

[272] *See supra* note 43.

[273] *See supra* note 45.

[274] Willing, *supra* note 4, at 1A.

[275] Moshayedi, *supra* note 2, at 343.

disregard for the truth of the actual events.[276] The Supreme Court has approved of such a rational interpretation standard.[277]

By including this prong, there is one final safeguard and opportunity for defendants to prove that their works have First Amendment merit, and were not made merely to prostitute the subject's name. These non-public figures should have neither their characters, nor their family's characters, misrepresented for the sake of telling a good story or making a profit.[278]

This proposed cause of action will remedy the current problems and give the plaintiffs a chance to right the wrong which has been done to them. For instance, even if a plaintiff is alive to argue libel or right of publicity, defendants may claim the events are newsworthy and must be reported, thus making it difficult for plaintiffs to prevail. However, in reality, as shown in the recent cases, the work is a fictional use of real people.

Stephen Calvacca, attorney for plaintiffs in *The Perfect Storm* dispute, put it best when he stated, "Fiction portrayed as fiction is protected speech. Fiction masquerading as fact, is not."[279] This wrongful interpretation must be avoided, and this can be done through the proposed cause of action.

C. *Descendibility*

In addition to the elements of the proposed cause of action, some logistical matters must be addressed. First, the right must be descendible without a showing of exploitation. By borrowing from the right of publicity, it can be argued that, like other property rights, i.e., copyright, one's interest in one's name should not end at death.[280] With scavengers seeking to trade on the value of the deceased, logic suggests that people who have the closest connections with a decedent should be the ones to have control over any property interest in that

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[276] *See supra* note 22.

[277] *See supra* notes 108-10.

[278] Aquino, *supra* note 206, at B01.

[279] King, *supra* note 236.

[280] James M. Left, *Not for Just Another Pretty Face: Providing Full Protection Under the Right of Publicity*, 11 U. MIAMI ENT. & SPORTS L. REV. 321, 361 (1994).

decedent's name and likeness.[281] Heirs or trustees should be given the ability to control such property rights, because, presumably, this is most conducive approach to granting the decedent's dying wishes. In addition, because it is more likely that the heirs or trustees' own names and likenesses will be used in connection with any depiction of the decedent, they are in the best position to look out for and maintain the decedent's good reputation.

Finally, in light of the fact that these victims were thrust into the limelight, the requirement of exploitation should be irrelevant, because, the depicted persons being dead, exploitation could not occur. Rather, the view that all people possess commercial value should be adopted.[282] As a result, there are varying degrees of commercial value in one's name that can increase or decrease with the passage of time.[283] To fail to recognize the value of each person's persona would be to allow the non-famous to be used and abused without mercy.

D. *Duration*

Another point for clarification is the duration of the right. The right to protect one's name should endure indefinitely. Future generations' interest in their name continues indefinitely. To provide otherwise would be to encourage people who desire to misrepresent a person's name and likeness to merely wait until that person's right terminated, pushing the abuse to a later date, but not eliminating it.[284]

Although copyright ownership can be very personal, it is not completely analogous, because there is a policy limitation on copyright protection in order to prevent the stifling of creativity.[285] After the designated term, the importance of the property interest wanes and the creation is released into the public domain.[286] Contrary to a copyright,

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[281] Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1236 (1986).

[282] Goodman, *supra* note 114, at 253 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995)).

[283] *Id.* at 254.

[284] *See supra* notes 180-81.

[285] 17 U.S.C.S. § 302(a) (2002) (limitation is life of the author plus 70 years).

[286] Kevin S. Marks, *An Assessment of the Copyright Model in Right of Publicity*

the need to stop abusive depictions of a person's name or likeness never wanes, because protecting a person's reputation is too important a right.

A better analogy of the problem is a comparison to trademark law. Both a trademark and a person's name are used to represent something. Trademark law provides for continuous protection.[287] As a result, a person's name, which has a more intimate component to it than an entity's good name, deserves no less protection.

E. *Remedies*

First, the proposed solution must provide for injunctive relief. This is important, because the main goal of such a lawsuit is not a financial one. Instead, it aims to prevent the tragic tarnishing of good people's names. Stephen Calvacca has stated that, "[t]he suit[] [is] not about money. The movie[] [is] about money. The way a society decides who's right or wrong is by awarding money."[288]

Second, the proposed solution must provide for money damages, and, in cases where the defendant acted with extreme disregard for the truth, punitive damages.

To counter the charges, defendants will have the usual defenses. They can claim truth, fair comment, privilege, and the newsworthy exception. These defenses would work smoothly under the proposed cause of action. They would not, however, be used as shields to mislead the courts.

F. *An Additional Safety Valve*

As always, parties would be free to agree to a settlement to avoid this problem area. Studios may contract with living parties and/or descendants, or obtain waivers. Though some critics may suggest that this would prove difficult, it will not prove so difficult in reality. If filmmakers desire to say whatever they would like in order to make a

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Cases, 70 CALIF. L. REV. 786, 794 (1982).

[287] 15 U.S.C.S. § 1059(a) (2002).

[288] Theo Emery, *Family of Drowned Sea Captain Sues Filmmakers of "The Perfect Storm,"* NAPLES DAILY NEWS, Aug. 30, 2000, available at http://web.naplesnews.com/00/09/florida/d497539a.htm.

story more interesting to the public, while also using real names of the parties, then they not only must obtain the property rights in any underlying work, but they also must obtain the property rights of the named persons.

If the subject is alive, such as a person who escaped the tragedy of September 11, 2001, then the creators of a based upon true story of the event could simply enter into a contract with that person. If they cannot obtain such a contract, then they still could present a story without using the subject's name or likeness, unless such a use fits into one of the provided defenses to liability. If use of the subject's name or likeness does fit into an exception, there still would be protection from absurd fictionalizations of the truth.[289]

For deceased persons, obtaining the rights may take more effort. The rights of the deceased, however, would descend like any other property right: by will or intestate laws.

By encouraging contracts between parties, this regime would allow all parties to obtain certainty. The deceased would be protected by their family members, and the living incidental relatives would be able to contract for the fictionalization of their reputations and personas if they choose to do so.

Finally, disclaimers also could be used. Disclaimers by themselves, however, are not sufficient, because, as currently utilized in films, their placement in small font at the end of a film accomplishes very little but to add to the length of the film's running time. Where filmmakers try not to harm the subject of the film, a disclaimer that the depiction used was not the undeniable truth, if used conspicuously, would reinforce the good faith abidance by prong three of the proposed rule.

One way to use disclaimers to support a defense would be to follow the lead of film director Robert Zemeckis, and place them in the credits before *and* after the film.[290] Due to the nature of film, however, a viewer could miss both of these warnings if the viewer begins viewing a film late and then leaves before the closing credits roll. Also, many home viewers may fast forward through these disclaimers. Thus, this

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[289] *See supra* note 107-10.

[290] Deyhimy, *supra* note 154, at 71.

practice is only an additional safeguard to the tenets embodied in the three-pronged approach. If the filmmakers know it is a close call as to whether the subject is a public figure or not, and as to whether the speech is fact or fiction, but they believe that their portrayal is a plausible one, then a proper disclaimer attempt would buttress their arguments under the third prong.

V. CONCLUSION

It is imperative that a national cause of action be crafted in order to protect the non-famous and incidentals who are thrust into the public eye by chance or misfortune, and who are then made the subject of a based-upon-true-story films. Currently, these people have some of the most intimate parts of their lives—their names and likenesses—tragically tarnished, without any means by which to stop this practice. Traditional approaches such as libel and right of publicity claims are not helpful in many cases, because most of these films are made after the subject is deceased, and so no one has standing to bring such claims.

Based upon true stories, while very lucrative endeavors for filmmakers, can harm families of those depicted by inaccurate portrayals.[291] This classic "conflict [is] between a filmmaker's right to interpret history and a family's desire for respect."[292]

The proposed cause of action in this analysis is a solution to the problem. It is narrowly tailored, only carving out a right for the non-famous, who are involuntarily placed in the limelight, and incidental persons, who have nowhere else to turn. Most importantly, the proposed cause of action protects First Amendment speech and creativity.

If filmmakers would follow this analysis, as well as the other supplemental suggestions, the based-upon-true-story quandary would be significantly solved. As a result, both filmmakers and the subjects of these films would be protected from the current uncertainties that arise in connection with the use of the names and likenesses of real people. Finally, the film-going audience would benefit from the

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[291] Aquino, *supra* note 206, at B01.

[292] *Id.*

adoption of this solution, because the law would help prevent them from being misled as to the truth of historical events.