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ABSTRACTS

BOOK REVIEW

Of and Concerning Real People and Writers of Fiction

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and
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This is the first book, and in it the author has written of experience which is now far and lost, but which was once part of the fabric of his life. If any reader, therefore, should say that the book is "autobiographical" the writer has no answer for him: it seems to him that all serious work in fiction is autobiographical—that, for instance, a more autobiographical work than "Gulliver's Travels" cannot easily be imagined.

But we are the sum of all the moments of our lives—all that is ours is in them: we cannot escape or conceal it. If the writer has used the clay of life to make his book, he has only used what all men must, what none can keep from using. Fiction is not fact, but fiction is fact selected and understood, fiction is fact arranged and charged with purpose. Dr. Johnson remarked that a man would turn over half a library to make a single book; in the same way, a novelist may turn over half the people in a town to make a single figure in his novel. This is not the whole method but the writer believes it illustrates the whole method in a book that is written from a middle distance and is without rancour or bitter intention.

—Preface to *Look Homeward Angel* by Thomas Wolfe

I
Introduction

Thomas Wolfe escaped suit by the people of his hometown of Asheville, North Carolina, but not their disapprobation.[1] His pref-

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1. The book caused a furor in Asheville. So vivid were the characterizations that ministers denounced Wolfe from their pulpits, men met on street corners to complain about their not-so-favorite son, and women devoted their social club meetings to tirades against

ace presents the dilemma of a writer caught between inspiration and potential litigation for libel. Despite the label "fiction," novels, short stories, and poems are often perceived as containing at least kernels of fact. Characters concocted from the clay of the author's life are held to be, in fact, representations "of and concerning" actual people.[2] Libel actions result from slender reeds of recognition, even when the persona of the real person is almost completely eclipsed by the imaginary attributes of the character.[3]

This article examines the problem of real people and writers of fiction, a problem exemplified by three recent cases, *Pring v.*

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the novel. Wolfe also received obscene letters and death threats. *See* T. WOLFE, THE STORY OF A NOVEL 18-19 (1936). The people who populated his book resembled their real life models both in name and behavior, and while the rest of the country had no idea who was who, the residents of Asheville were all too aware of the correlation. *See* F. WATKINS, THOMAS WOLFE'S CHARACTERS 6-7, 9-11 (1957). The author knew that his work would wound his former neighbors, but he also knew that not writing the book would significantly injure him as an artist. In a letter to a friend he wrote, "I will soften all I can but I cannot take out all the sting—without lying to myself and destroying the book." *See* E. NOWELL, THOMAS WOLFE—A BIOGRAPHY 137 (1960). The young writer portrayed in Philip Roth's *The Ghost Writer* (1979) faced a similar dilemma: injure his family by writing, or sacrifice his main source of inspiration.

2. In common law terms, the "of and concerning" language is known as the colloquium. It is one of the elements to be proved in a libel action. Unless the plaintiff can establish that the defamation refers to him or reasonably is understood to refer to him, he cannot prevail. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 746-51 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 564 (1977); *see infra* text accompanying notes 125-33.

3. Wolfe himself was the victim of such a lawsuit later in his career when his Brooklyn landlord complained of a "portrayal" in the story *No Door*. Marjorie Dorman claimed that she had been libelously depicted as Mad Maude Whittaker and asked for $50,000 in damages. Her two sisters and their father joined in the suit, each claiming $25,000 in damages because Wolfe had written that Mad Maude's sisters and father were "all touched with the same madness." *See* E. NOWELL, *supra* note 1, at 342. Because of the popular sentiment built up against Wolfe over his first novel, Scribner's, the publisher and co-defendant, decided to settle the case out of court. *See* F. WATKINS, *supra* note 1, at 45-46. Wolfe, for his part, regretted the settlement because of his conviction that such libel suits were "a part of a great organized national industry of shaking down [authors] . . . and the only way to stop it is to fight it, because it lives by threat and flourishes on submission." E. NOWELL, *supra* note 1, at 344. What now is called the chilling effect had begun to give authors and their publishers pause. Scribner's, in fact, had held up publication of *The October Fair* because of the threat of another lawsuit. *Id.* at 343. Wolfe correctly realized that the chill on artistic expression came not only from the prospect of paying damages, but also from the expense incurred from merely defending such suits. He wrote to Charles Scribner, III:

> I think that in that particular matter we were wrong in not fighting it, and furthermore I think we were licked before we started, because our lawyers cost so much we were practically forced to settle to protect ourselves against our own lawyer's bills if we went on. Frankly, so far as I can see, we would have done as well if we had had— and paid him fifty bucks. In the end, the three floors of office space, . . . the magnificent private offices, regiments of slick-looking assistants, etchings of Abraham Lincoln, etc., did not mean a damn thing except trouble and money: it was a sorry job.

Id. at 344.

Penthouse International, Ltd.,[4] *Bindrim v. Mitchell*,[5] and *Springer v. Viking Press*.[6] *Pring* was brought by an ex-Miss Wyoming who claimed that a humor article in Penthouse Magazine about *a* Miss Wyoming referred to and defamed her.[7] *Bindrim* was filed by a psychiatrist who conducted nude therapy sessions and undisputedly served as the inspiration for a character in a novel.[8] Springer sued for libel and invasion of privacy alleging that a "whore" depicted in the novel *State of Grace* was of and concerning her.[9]

To be sure, the interests of both plaintiffs and defendants are telling. Robbed of his source of ideas, the writer is rendered impotent. If reasonably believed to share the unsavory attributes of a fictional character, a real life model's reputation may be affected no matter how much the author protests that the work is not meant to be taken as the truth.[10] Even so, the accepted legal test is unduly protective of plaintiffs, although it is often expansively applied to the defendant's benefit.[11]

It is accepted that to establish liability under the first amend-

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4. 7 MEDIA L. REP. (BNA) 1101 (D. Wyo. 1981), *rev'd*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 3112 (1983). *But cf.* Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280 (D.N.J. 1981) (no showing of malice in defamation action brought by beauty pageant arising out of same article).

5. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *reh'g denied*, 444 U.S. 1040 (1980).

6. 90 A.D.2d 315, 457 N.Y.S.2d 246 (1982), *aff'd*, 60 N.Y.2d 916, 470 N.Y.S.2d 579 (1983).

7. The article was entitled *Miss Wyoming Saves the World . . . But She Blew the Contest with Her Talent.* It attributed a proclivity toward sexual activity to the fictitious contestant. *See Miss America Pageant, Inc.*, 524 F. Supp. at 1286-87.

8. The defendant, known to be a writer, was told that she could not enroll in the plaintiff's nude therapy classes if she planned to use the experience in a novel. The defendant assured the plaintiff she had no such intention and signed a contract to that effect. Later, the defendant told her publisher about the sessions and subsequently completed a novel entitled *Touching*, depicting a nude encounter class. *Bindrim*, 92 Cal. App. 3d at 69-70, 155 Cal. Rptr. at 33-34.

9. *Springer*, 90 A.D.2d at 316, 457 N.Y.S.2d at 247.

10. "The question," as phrased by one court, "is not so much who was aimed at as who was hit." Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 64, 126 N.E. 260, 262 (1920), *quoted in* Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966). Thomas Wolfe framed the nature of the problem after the furor caused by his first novel when he asked, "[W]here does the material of an artist come from? What are the proper uses of that material, and how far must his freedom in the use of that material be controlled by his responsibility as a member of society?" *See* T. WOLFE, *supra* note 1, at 19-20. We believe Wolfe also touched upon the solution contemplated by the first amendment, that is, no liability should result when a work of fiction is written "without rancour or bitter intention." *Id.*

11. *See* RESTATEMENT (SECOND) OF TORTS § 564 (1977): "A defamatory communication is made concerning the person to whom its recipient correctly or mistakenly but reasonably, understands that it was intended to refer." Comment d addresses the problem of fictitious characters. *See infra* notes 127-33 and accompanying text.

ment a libel plaintiff must prove that the defendant was at "fault" in publishing the defamatory material.[12] The Constitution has been interpreted to require public figures and officials to prove "fault" by demonstrating through clear and convincing evidence that the author knowingly published a false statement of fact or in fact entertained serious doubt as to its truth—the "actual malice" requirement.[13] In some states even private individuals must prove "actual malice" to recover, although in most the constitutionally compelled "fault" standard is satisfied if negligent publication of false facts is proved.[14] The United States Supreme Court has never decided what "fault" standard is appropriate in a fiction/libel case.[15]

The few fiction cases to be decided after the 1974 case of *Gertz v. Robert Welch, Inc.*,[16] in which the Court defined the constitutionally compelled "fault" standards for non-fiction, have focused almost exclusively on whether the publication was "of and concerning" the plaintiff, a traditional element of the common law tort of libel.[17] No court has recognized that "fault," as defined in non-fiction cases, is inappropriate and unworkable in the fiction context. The novelist admits "knowing" his material is false, as fabrication is the essence of fiction. The author is not merely negligent in publishing the fictitious material, he does it intentionally. Thus, the "fault" requirement, which is the primary source of con-

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12. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

13. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court held that in order to recover, a public official must show that the defendant knew the statement was false or acted with reckless disregard as to whether it was false. This notion of fault was extended to cases involving the defamation of public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and to private individuals in *Gertz*.

14. *See* Annot., 33 A.L.R.4th 212, 221-31 (1984).

15. Commentators on *New York Times Co. v. Sullivan* felt that the issue of "art" and libel would inevitably be addressed and perhaps altered. *See, e.g.*, Silver, *Libel, The "Higher Truths" of Art and The First Amendment*, 126 U. PA. L. REV. 1065 (1978).

16. 418 U.S. 323 (1974). For a statistical analysis of those cases, see Franklin & Trager, *Literature and Libel*, 4 COMM/ENT L.J. 205, 207 n.9 (1981).

17. Other common law components of a libel action are the inducement, the innuendo, and the communication of defamatory words. If extrinsic evidence is necessary to establish defamatory meaning, the pleading and proving of those facts constitutes the inducement. The innuendo is the defamatory meaning of the words. *See* W. PROSSER, CASES AND MATERIALS ON TORTS 968 (6th ed. 1976). Prosser provides an example:

> [A] statement that the plaintiff has burned his own barn is not defamatory on its face, since he was free to do so; but when it is pleaded as inducement that he had insured his barn, and as innuendo that the words were understood to mean that he was defrauding the insurance company, a charge of the crime of arson is made out, which is defamatory.

W. PROSSER, *supra* note 2, at 748-49.

stitutional protection in a non-fiction case, provides no shield to the novelist or his publisher.

Proof of "fault," as it is traditionally defined, is a simple task for the plaintiff, and the focus turns to whether the characterization is "of and concerning" the plaintiff. Typically, that disputed question of fact is left to the jury. We do not argue that the jury's determination of this factual question is inappropriate. We submit, however, that leaving the "of and concerning" element as the sole obstacle to liability is insufficiently sensitive to first amendment principles.[18] The "fault" requirement must be made meaningful in the fiction context so that fiction writers have as much first amendment "breathing space" as non-fiction writers.

In Section II of this article, we analyze the "origin of character" to demonstrate that a novelist properly and necessarily draws upon his acquaintances for character development, thus raising the threat of libel. In Section III, we focus on three recent libel cases to show how the traditional analysis of fiction/libel cases threatens the artistic process and why a continuation of this trend will result in uneven and uncertain results for authors and publishers, and inevitable self-censorship. In Sections IV and V, we examine the various categories. Finally, in Section VI we conclude that if the first amendment interests at stake are to be properly balanced, the "fault" standard must be redefined to require the plaintiff to prove by clear and convincing evidence that: (1) the defendant intentionally used the fiction device as a subterfuge to defame the plaintiff *and* (2) did so with malice, that is, hatred, ill-will, or spite.

II
The Origin of Character

"I am a part of all that I have met," said Tennyson's Ulysses.[19]

18. The first amendment embraces more than political discourse. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970) (assuring self-fulfillment is a first amendment function); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593-94 (1982) (first amendment protects individual self-realization). Even Justice Brandeis acknowledged that the first amendment is designed to allow an individual to develop his facilities and to derive happiness from so doing. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *Cf.* Schad v. Mount Ephraim, 452 U.S. 61 (1981) (nude dancing is not without first amendment protection). *See also* Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 COMM/ENT L.J. 259 (1984).

19. The complete thought is:

Much have I seen and known, cities of men And manners, climates, councils, governments, Myself not least, but honor'd of them all; And drunk delight of battle

And so it is that the work of a writer reflects the parts that he has collected throughout his life. Events and characters may be refined and modified so that even the author would not recognize them as resulting from real life. Nevertheless, real life experiences are the source of all artistic inspiration. Understanding the writing process is critical to appreciating the legal predicament of the fiction writer; hence, this discussion of the realities of authorship precedes the analysis of the law.

A writer, states William Faulkner, requires three things: experience, observation, and imagination.[20] Thus, one of his tools in creating believable characters in credible situations is the environment he knows.[21] Even imagination, seemingly independent of experience and observation, is a function of sensory experience. The writer may conjure up a tale of a woman's suicide, but at least he must know something about women and suicide to allow his creativity to act. He may, in fact, have known a woman who committed suicide. Henry James, for example, was one of only a few people who knew of the suicide of Henry Adams' wife, Clover. The next year he wrote *The Modern Warning*,[22] in which a woman kills herself. Undoubtedly, Clover Adams' suicide served as the impetus for the story, but the story is not about Mrs. Adams. Rather, it is an example of James taking events from life and transforming them into a story expressing his own emotions.[23]

James would describe Clover Adams' suicide as the "precious particle" of a work of fiction.[24] It is the germ of the story—something seen, heard, heard about, or remembered.[25] For the British

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with my peers, Far on the ringing plains of windy Troy. I am a part of all that I have met; Yet all experience is an arch wherethro' Gleams that untravell'd world . . . .

A. TENNYSON, ULYSSES 13 (1842). *See also* comment of Lord Byron (George Noel Gordon) ("I live not in myself, but I become/Portion of that around me . . . ."). G. GORDON, CHILDE HAROLD'S PILGRIMAGE, canto III, st. 72 (1812).

20. "[A]ny two of which, at times any one of which," Faulkner says, "can supply the lack of the others." WRITERS AT WORK 133 (M. Cowley ed. 1958).

21. *Id.* For example, the birthplace of Henry James in New York, 21 Washington Place, reappears in his novel *Washington Square* as the home of Dr. Sloper: " 'a handsome, modern, wide-fronted house, with a big balcony before the drawing room windows, and a flight of white marble steps ascending to a portal which was also faced with white marble.' " H. MOORE, HENRY JAMES AND HIS WORLD 7 (1974).

22. The book was written in 1886 but was not published until 1888. H. MOORE, *supra* note 21, at 56.

23. *Id.* at 57. This was not the only example of a person from James' life becoming reincarnated in one of his books. His horseback riding companion Lizzie Boott was the model for his character Pansy in the 1881 novel *The Portrait of a Lady.*

24. WRITERS AT WORK, *supra* note 20, at 7.

25. *Id.* Family members often are the "precious particles." The young Unitarian min-

writer Joyce Cary, the germ was the wrinkled forehead of a young woman he saw on a boat, "a girl of about thirty, wearing a shabby shirt. She was enjoying herself. A nice expression, with a wrinkled forehead, a good many wrinkles."[26] Cary said to a friend on board, "I could write about that girl,"[27] but instead he forgot about her soon after the boat completed its trip around Manhattan.

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ister, the Rev. Mr. Babcock, with whom the hero of Henry James' novel *The American* travels about Europe, was based on James' brother. James and his brother had themselves traveled together in 1874. Upon reading the book, William James wrote to Henry about " 'the morbid little clergyman' ": " 'I was not a little amused to find some of my own attributes in him—I think you found my "moral reaction" excessive when I was abroad.' " C. ANDERSON, PERSON, PLACE AND THING IN HENRY JAMES'S NOVELS 51, 52 (1977).

The families of Eugene O'Neill and D.H. Lawrence appeared in *Long Day's Journey Into Night* and *Sons and Lovers*, respectively. O'Neill, however, directed that his play not be published until 25 years after his death. His widow broke his wish by publishing it in 1956, just three years after he died. John Cheever refrained from publishing his first novel, *The Wapshot Chronicle*, until his father died in 1957. The book describes the material and spiritual decline of a New England family similar to his own. *See* Kakutani, *Authors and Parents—'Be More like Graham Greene, Dear,'* N.Y. Times, Aug. 16, 1981, § 7 (Book Review), at 3, 20, col. 1.

Autobiography, seemingly, is irresistable to authors. *See, e.g.*, J. JOYCE, A PORTRAIT OF THE ARTIST AS A YOUNG MAN (1964); Nisly, *A Portrait of the Artist as a Young Southerner: Flannery O'Conner's "The Enduring Chill,"* 24 CLA J. 43 (1980). The temptation is especially seductive to authors embarking on their first novels. *See, e.g.*, Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966). The court catalogues the similarities between the character Maxim, who cooperates with a Nazi organization, and the author's brother, the plaintiff:

> The novel depicts events in the life of the Solovyov family, composed of a father, mother, and thirteen children of whom ten are boys and the third, fourth and eighth are girls. This is the exact composition of the Fetler family. In the novel, Maxim is the eldest child and is twenty-three years old in 1938; in life, the same is true of plaintiff. In the novel, Maxim is a Latvian by birth; in fact, plaintiff, although born in Leningrad, was a Latvian citizen at the time the events in the novel occurred. In the novel, the father is an itinerant Russian Protestant minister whose wife and children perform as a band and choir where the father preaches. Maxim is generally responsible for their temporal needs and to that end dominates them. The family travels around Europe in an old bus. In fact, plaintiff's father was a Russian Protestant (Baptist) minister; the rest of his family gave concerts as a family band and choir. Plaintiff looked after them, and they journeyed through Europe during the 1930's in an old bus. Both families bought homes in Stockholm.

Id. at 651. Nonetheless, the court overturned the granting of summary judgment on this issue of identification. *Id.* at 654.

Because of this first novel syndrome, two experts have counseled publishers to scrutinize writers' initial efforts carefully. *Id.* at 651-52 n.3 (quoting H. PILPEL & T. ZAVIN, RIGHTS AND WRITERS: A HANDBOOK OF LITERARY AND ENTERTAINMENT LAW 23, 25 (1960)). Few writers receive the warm response Bernard Malamud got after portraying a couple like his parents in one of his first stories. Malamud mailed a copy to his father and his father responded with a note signed "Sam," the name of the fictional grocer. *See* Kakutani, *supra*, at 20.

26. WRITERS AT WORK, *supra* note 20, at 7-8.

27. *Id.*

Three weeks later, at four in the morning on the other side of the country, Cary awoke with a story in his head that had as its heroine an English woman. As he revised the piece, he kept asking himself, "Why all these wrinkles? That's the third time they come in."[28] Then, he realized that his English woman was the girl on the boat. "Somehow she had gone down into my subconscious and came up again with a full-sized story."[29] The wrinkles came from real life, but the rest of the character came from Cary's imagination.[30]

Far from denying the influence of reality on their work, most writers readily admit it. French novelist Francois Mauriac,[31] for example, affirms the importance of sense perception. "Before beginning a novel," he says, "I recreate inside myself its places, its *milieu*, its colors and smells. I revive within myself the atmosphere of my childhood and my youth—I *am* my characters and their world."[32]

What sets the artist apart from the rest of us is his critical eye, his acute perception of the world around him,[33] and his ability to resuscitate the technicolor closeups long left in the recesses of his mind. British writer Angus Wilson observed that the connections are not always apparent, not even to the artist. According to Wilson, every character is a mixture of people the writer has known:

> Characters come to me . . . when people are talking to me. I feel I have heard this, this tone of voice, in other circumstances. And, at the risk of seeming rude, I have to hold on to this and chase it back until it clicks with someone I've met before. The second secretary at the embassy in Bangcock may remind me of the chemistry assistant at Oxford. And I ask myself, what have they in common? Out of such mixtures I can create characters.[34]

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28. *Id.*

29. *Id.*

30. Yet even the imaginary aspects of the character may have been based on still another person. Norman Mailer has observed that "there's no clear boundary between experience and imagination. Who knows what glimpses of reality we pick up unconsciously, telepathically." WRITERS AT WORK 268 (G. Plimpton ed. 1967).

31. Mauriac received the 1952 Nobel Prize for literature. His works include *Le Baiser au Lépreux (A Kiss for the Leper)* (1922); *Genetrix* (1923); *Thérése Desquevroux* (1927); and *Le Noeud de Viperes (Vipers' Tangle)* (1932).

32. WRITERS AT WORK, *supra* note 20, at 42 (emphasis in original).

33. E.B. White, author of *Charlotte's Web*, alluded to this hypersensitivity in a 1952 letter to a fifth grade class in Larchmont, New York: "I didn't like spiders at first, but then I began watching one of them, and soon saw what a wonderful creature she was and what a skillful weaver. I named her Charlotte, and now I like spiders along with everything else in nature." LETTERS OF E.B. WHITE 367 (D. Guth ed. 1976).

34. WRITERS AT WORK, *supra* note 20, at 260. In Hemingway v. Random House, Inc., 23

Once transported into a work of fiction, the real person undergoes a metamorphosis and a character emerges. The difficulty arises when the character retains enough of the characteristics of the real person to be recognizable. True, the character exists in a fictional story, but the factual resemblances may lead readers to believe that more came from the model. Norman Mailer, for example, has admitted that the character Hollingsworth, in his novel *Barbary Shore,*[35] came from "a vapid young American" he met in Paris shortly after the publication of *The Naked and the Dead*[36] "who inveigled me to have a cup of coffee with him in a café and asked a lot of dull questions."[37] Still, Mailer says, "there was something sinister about him."[38]

In the book Hollingsworth is a clerk for a stock brokerage firm and is described in detail:

> He had straight corn-colored hair with a part to the side, and a cowlick over one temple. His eyes were small and intensely blue and were remarked immediately, for his nose and mouth were without distinction. He was still freckled, which made me wonder at his age. I was to learn later that like myself he was at least in his middle twenties, but there must have been many people who thought him eighteen.[39]

Realistic? Perhaps. But reality ends when another character in the book begins his description of Hollingsworth: " 'A pretty sick individual . . . He's got a mind like a garbage pail. My private opinion of him can be summed up in one word. He's a mad-

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N.Y.2d 341, 244 N.E.2d 250 (1968), the widow of Ernest Hemingway contended that the author's social interaction was susceptible to copyright. What was oral for Hemingway one day, she argued, could become part of a written manuscript the next. Conversation for him was said to be part of the literary process. The suit was against the author of a biography of Hemingway that included excerpts from his conversational speech. The court found for the defendant without having to reach the difficult question of copyrightability of conversations, holding that Hemingway had assented to their publication.

35. The book was published in 1951 and was Mailer's second novel.

36. *The Naked and the Dead* was Mailer's first book, published in 1948.

37. WRITERS AT WORK, *supra* note 30, at 268.

38. *Id.* at 269.

39. N. MAILER, BARBARY SHORE 38 (1951). The description continues on a subsequent page:

> I discovered again how unusual were his eyes. The pupils were almost submerged in the iris, and reflected very little light. Two circles of blue, identical daubs of pigment, stared back at me, opaque and lifeless.
>
> The sockets were set close together, folded into the flanks of his thin nose. Front-face, he looked like a bird, for his small nose was delicately beaked and his white teeth were slightly bucked. There was a black line between his gums and the center incisors in his upper jaw, and it gave the impression of something artificial to his mouth.

Id. at 40.

man.' "[40] The potential for defamation is patent.[41] The physical description, most likely, is one of the actual American in Paris; but surely Mailer did not mean that the real person was a madman or even that someone thought he was. Something has intervened between reality and fiction. That something is the art of the author.

Art is the difference between the journalist and the novelist. The former reports what is so. The latter takes what is so and remakes it to suit his mold. The real life model, according to James Jones, is merely the springboard.[42] Thomas Wolfe described it as the clay of the writer.[43] In Wolfe's view, an observer might well say, "I know the farm from which you got that clay," but it would be unfair, he says, for that person to go further and say, "I know the figure, too."[44] Yet that is precisely why the plaintiffs in *Pring, Bindrim*, and *Springer* sought redress. The origin of the clay—nude encounter groups in *Bindrim*, the Miss America pageant in *Pring*, the academic setting in *Springer*—was undis-

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40. *Id.* at 36.

41. An allegation of insanity likely would be considered defamatory. W. PROSSER, *supra* note 2, at 739.

42. WRITERS AT WORK, *supra* note 30, at 241. Jones is the author of *From Here to Eternity*.

43. T. WOLFE, *supra* note 1, at 22.

44. *Id.* at 23. Speaking of the reception given his book *Look Homeward Angel*, Wolfe wrote, "Now I think what happened in my native town is that having seen the clay, they became immediately convinced that they recognized the figure, too . . . ." *Id.* This transformation from real life to imagination is the essence of fiction writing. In that respect, it resembles the concept of "necessary distortion" in the visual arts, the process by which the artist observes the world around him and then employs it to express his own point of view. American artist Leonard Baskin describes this theory, first postulated by Jacob Landau:

> Works of art in their myriad manners probe at reality. Reality is the totality of human experience, nature, all personal-emotional relationships, the visible and invisible links and synapses, to wit, the structures of being. No artist can deal with this whole; he does in fact apportion to himself a segment of reality. An example: Two artists observe a sunset. One declares the sun is moving around the earth; the other says, no, the earth is circling the sun. From an observable phenomenon the wise artist employs distortion to achieve reality. Artists have universally and necessarily distorted in achieving their vision. Not to distort is not to invent; not to distort is not to magnify or diminish, or simplify or make complex.

L. BASKIN, SCULPTURE, DRAWINGS & PRINTS 14 (1970).

As Baskin indicates, the goal of the artist, be he visual or verbal, is to portray some part of the ultimate reality, not merely to reproduce a person or object. Depictions of people from real life are altered and distorted and combined with others to achieve this objective. *See* Hospers, *Truth and Fictional Characters*, 14 J. AESTHETIC EDUC. 5 (July 1980). To the extent that an author succeeds in this endeavor, a character in a novel may seem so lifelike that real people seem to be imitations of him rather than the reverse. *Id.* at 9-10. Nevertheless, while each characteristic of the character may be recognizable from real life, the combination may be different from that found in any actual human being. *Id.* at 9.

puted. The cases revolved around the plaintiffs' claims that they knew the figures, as well.

Because a writer's descriptive powers may be so strong or his insight into human nature so penetrating, the reader may believe he recognizes an individual in a character when, in fact, the character is an amalgam of human types.[45] Yet, Joyce Cary believed that the structure of a work of fiction prevented any character from ever becoming a complete portrait of a real person. Real people are too complex for books, he thought.

> Look at all the great heroes and heroines, Tom Jones, Madame Bovary, Anna Karenina, Baron Charlus, Catherine Linton: they are essentially characters from fable, and so they must be to take their place in a formal construction which is to have a meaning. A musician does not write music by trying to fit chords into his whole. The chords arise from the development of his motives.[46]

Cary's comment underscores the most important aspect of fiction for legal purposes—it is not true and it does not purport to be true. It has a separate existence even though the impetus for creating that existence may have come from reality. Indeed, a legal system that requires a writer to create characters divorced from reality in effect requires him not to create at all, for that is the ultimate source of imagination.[47] As E.B. White wrote to a child fan: "Thanks for the letter. I don't believe I can write a book about a horse because I don't know any horse."[48]

Related to the source of character types is the source of character names. Real names may be applied to characters consciously or inadvertently. The more closely the fictional character resembles the real person with that name, the greater the identifica-

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45. Many writers speak almost metaphysically about the transformation from actual person to fictional character. British novelist E.M. Forster, for example, described his "trick" of looking at a person with half-closed eyes, fully describing certain features. "I am left with about two-thirds of a human being," he said, "and can get to work . . . . When all goes well, the original material soon disappears, and a character who belongs to the book and nowhere else emerges." WRITERS AT WORK, *supra* note 20, at 32-33. Similarly, Francois Mauriac says that a character almost always begins with a real person but changes so much that sometimes he no longer bears the slightest resemblance to the model. The process, he says, is one of crystallization around the person. *Id.* at 43.

46. *Id.* at 57. Cary's comments about the inability of a writer to portray a real person fully resemble Leonard Baskin's remarks about the inability of a visual artist to capture all of a scene. *See supra* note 44.

47. Norman Mailer, for example, says he may start with a real person but puts him in situations that have very little to do with his real life. As a result, the model disappears. His function is finished. What is left, according to Mailer, is only what is exportable in his character. WRITERS AT WORK, *supra* note 30, at 269.

48. LETTERS OF E.B. WHITE, *supra* note 33, at 429.

tion.[49] The more radically the fictional character differs from his real life counterpart, the greater the chance for libel.[50]

Names, like personality traits, come from real people. Dorothy Parker named her characters by consulting the phone book and the obituary columns.[51] The latter is relatively safe, as it is generally not possible to libel the dead.[52] The former, however, is more dangerous. Even so, the number of names is limited and an author must get them from somewhere. E.B. White, for example, met an Indian named Sam Beaver at a place called Camp Otter. He liked the name, and years later gave it to a boy in his book *The Trumpet of the Swan*.[53] Francois Mauriac obtained his names from those that were well-known in his part of France, around Bordeaux.[54]

Perhaps more than any author, Thomas Wolfe discovered the perils of allowing names of actual people and characters they resemble to converge. Wolfe's Bordeaux was Asheville, North Carolina. He almost invariably used surnames prevalent there.[55] In some instances the names were changed, but not enough to obscure their origin. Jeannerett became Jannadeau; Sternberg became Greenberg; Bus Woody was transformed into Gus Moody; and the Perkinson family was changed into the Tarkington clan.[56] Wolfe's method of naming characters may have been devised to

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49. *See infra* notes 169-84 and accompanying text.

50. Falsity is an essential element of a libel action today, and must be proved by the plaintiff. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See* RESTATEMENT (SECOND) OF TORTS § 581A (1977). *See generally* W. PROSSER, *supra* note 17, at 973. In colonial times, however, the converse was true: the greater the truth, the greater the libel. Counsel for the defendant urged a contrary rule in the trial of John Peter Zenger, who was accused of seditious libel for criticizing the Governor General of New York. *See* J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (n.p. 1735), *reprinted in* S. Katz ed. 1963. The Chief Justice, however, found the state of the law to be as described in 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 194 (n.p. 1716): "It is far from being a justification of a libel, that the contents thereof are true, or that the person upon whom it is made had a bad reputation, since the greater appearance there is of truth in any malicious invective, so much more provoking it is." Nevertheless, the jury found Zenger not guilty, "upon which there were three huzzas in the hall." J. ALEXANDER, *supra*, at 101.

51. *See* WRITERS AT WORK, *supra* note 20, at 79.

52. *See* 1 A. HANSON, LIBEL AND RELATED TORTS § 199 (1969); *cf. infra* note 145.

53. *See* LETTERS OF E.B. WHITE, *supra* note 33, at 87-88.

54. *See* WRITERS AT WORK, *supra* note 20, at 43.

55. *See* F. WATKINS, *supra* note 1, at 150-55. Wolfe later admitted that "the young writer is often led through inexperience to a use of the materials of life which are, perhaps, somewhat too naked and direct for the purpose of a work of art." T. WOLFE, *supra* note 1, at 21. Nevertheless, one commentator has observed that his consistency in naming characters after real people "indicates that surely he must have enjoyed skirting the abyss and making fiction as close to life as possible." F. WATKINS, *supra* note 1, at 9.

56. T. WOLFE, *supra* note 1, at 21.

help him keep all the names straight in his head, but his reward was the virulent reaction of his former neighbors.[57]

The nature of the writing process virtually guarantees similarities between real people and fictional characters. Writers consciously draw upon the people and experiences from their lives in creating the people and places that populate their novels.[58] Additionally, the unconscious mind, with its storehouse of impressions, generates fiction based on fact.[59] By chance, authors conjure out of their imaginations characters that closely resemble actual people they have never met, seen, or even heard about. The current libel standard, however, affords this sort of fortuitous occurrence no additional protection. Thus, an author may be held responsible for both the intentional and unintentional consequences of his actions.

III
Pring, Bindrim, and *Springer*

The recent case of *Pring v. Penthouse International, Ltd.*[60] reveals just how easily the fiction writer can be held liable. Kimberli Jayne Pring was a perennial beauty contest participant. She represented the state of Wyoming on numerous occasions,[61] including the Miss America pageant in 1978. She also was a baton

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57. F. WATKINS, *supra* note 1, at 9.

58. *See supra* notes 1-57 and accompanying text.

59. Joseph Heller, in his novel *Good as Gold*, describes the dilemma through the central character, an author, whose sister fears that she will become a character in an upcoming book. The protagonist says:

> I've got five sisters, one brother, three children, a wife, father, stepmother, and more inlaws and nieces and nephews than I can keep track of. It's hard for me to deal with any subject without coming close to some of them. If I do they're embarrassed, if I don't they feel snubbed.

J. HELLER, GOOD AS GOLD 87 (1979), *quoted in* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 121 (1980). Sack notes that Heller's novel is dedicated to:

> The several gallant families
> and
> Numerous unwitting friends
> whose
> Help, conversations and experiences
> play
> so large a part.

R. SACK, *supra*, at 121 n.336.

60. 7 MEDIA L. REP. (BNA) 1101 (D. Wyo. 1981), *rev'd*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 3112 (1983).

61. Pring appeared as a contestant in the Miss U.S.A. Beauty Pageant, the Miss Black Velvet competition, the Wyoming Miss Universe contest and represented the state at the 33d National Sweet Corn Festival. *Pring*, 7 MEDIA L. REP. (BNA) at 1103.

twirler of no small renown.[62] In 1979, Penthouse Magazine published an article by Philip Cioffari, a free-lance writer and a professor of English and creative writing.[63] The article attributed various sexual exploits to *a* Miss Wyoming who was a baton twirler in a Miss America contest. Even though the writer testified that the work was fiction,[64] and the editor[65] and the publisher thought it was fiction,[66] the United States District Court for the District of Wyoming was not convinced, and denied the defendant's motion for summary judgment. Citing comment d section 564 of the Restatement (Second) of Torts,[67] the court concluded that "the question of whether or not a reader of the article in question would understand that the character therein was in actual fact the Plaintiff, is a question for the jury."[68]

The Wyoming jury found that the story was "of and concerning" Ms. Pring and awarded damages of $26.5 million, subsequently reduced by voluntary agreement to $14 million. Unlike the decision of the trial court, which framed the threshold issue as whether the plaintiff was a public figure,[69] the defendant's brief on appeal stated that the threshold issue was "whether Kim Pring, who was Miss Wyoming, twirled a baton, and wore blue, may come forward and claim that she is the 'Charlene' in the story and recover for a defamatory imputation of indecent conduct."[70]

On appeal, lawyers for Penthouse argued that the verdict was

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62. Pring won the title of Miss Majorette of Wyoming four times, received more than 50 baton twirling trophies, and appeared in several magazines. *Id.* Her public activities were important because the defendants claimed that she was a public figure and that, accordingly, she should have been held to an "actual malice" standard of proof rather than simple negligence. The district court, however, held her to be a private figure. *Id.* at 1104.

63. The facts recited in the *Pring* opinion are sparse; however, the decision in another case arising from the same facts, Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280 (D.N.J. 1981), provides additional background material. *Id.* at 1281.

64. *Id.* Such a disclaimer, however, is not dispositive under the Restatement test. *See infra* note 113 and accompanying text.

65. 524 F. Supp. at 1285.

66. Robert Guccione, the publisher, admitted though that he did not read the article until after its publication. *Id.*

67. *Pring*, 7 MEDIA L. REP. (BNA) at 1104; *see infra* note 127.

68. *Pring*, 7 MEDIA L. REP. (BNA) at 1104. The article was not labeled "fiction," but rather "humor." *Id.*; *Miss America Pageant, Inc.*, 524 F. Supp. at 1285-86. Even humor that is meant to be fictional, though, is not insulated from liability. In Salomone v. MacMillan Publishing Co., 97 Misc. 2d 346, 351, 411 N.Y.S.2d 105, 109 (1978), the court quoted the language of an 1831 Irish case, *Donoghue v. Hayes*: " 'The principle is clear that a person shall not be allowed to murder another's reputation in jest . . . . If a man in jest conveys a serious imputation, he jests at his peril.' " *See also* R. SACK, *supra* note 59, at 65-66, 244.

69. *Pring*, 7 MEDIA L. REP. (BNA) at 1102.

70. *See Tenth Circuit Hears Appeal of $14 Million Libel Verdict*, 7 MEDIA L. REP. (BNA) 2208 (looseleaf ed. 1981).

improper not only because the author had not known the defendant, but also because no reasonable person would connect the real person with the fictional character.[71] The article, they argued, was a humor article, and was clearly labeled as such. Further, the judgment condemning the article would threaten other humor that alludes to real things such as the Miss America contest.[72] The events described put the world on notice that this was a work of fiction. District Court Judge Oliver Seth asked the plaintiff's attorney, "What do we do with incidents that are so incredible that nobody will believe them, even if the people are real?" The attorney answered, "It's sometimes the absurd that hurts the worst."[73]

The Court of Appeals for the Tenth Circuit reversed the *Pring* trial court in a two to one decision and directed the trial court to set aside the verdict and dismiss the action.[74] The United States Supreme Court denied certiorari.[75] The circuit court majority broke down the "basic question" of the appeal into two parts. First, it found that the matter of identity, that is, whether the article was of and concerning the plaintiff, was "well developed in the record" and "need not be discussed."[76] The court then based its reversal on the second issue, "that the story must reasonably be understood as describing actual facts about the plaintiff or her actual conduct."[77] The court recognized that an argument could be made that the "reasonably understood" requirement in this case could be thought to be a jury question.[78] The court, however, ruled that the issue could and should have been decided as a matter of law.[79] The court noted that the language complained of by plaintiff depicted acts that were physically impossible, and thus were "obviously a complete fantasy."[80] Under these circumstances, the court held that as a matter of law no reader could reasonably understand them to relate to statements of fact about the plaintiff.[81]

Circuit Court Judge Breitenstein, in his dissent, argued that the article contained both fact and fiction. The judge stated, "I con-

71. *Id.*
72. *Id.* Humor is not necessarily a defense. *See supra* note 68.
73. 7 MEDIA L. REP. (BNA) at 2208.
74. Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 443 (10th Cir. 1983).
75. Pring v. Penthouse Int'l, Ltd., 103 S. Ct. 3112 (1983).
76. *Pring*, 695 F.2d at 439.
77. *Id.* at 440.
78. *Id.* at 442.
79. *Id.* at 442-43.
80. *Id.* at 443.
81. *Id.*

sider levitation, dreams, and public performances as fiction. Fellatio is not. It is a physical act, a fact, not a mental idea."[82] The dissent disagreed with the majority with respect to whether the "reasonably understood" requirement could be dealt with as a matter of law. Apparently, Judge Breitenstein would have reversed and remanded for a jury trial on the question of "reasonably understood."[83]

The *Pring* decision, like any difficult case, raises several questions. Can, for example, the case be limited to situations where the fiction describes physically impossible acts? If *Look Homeward Angel* were litigated, where all of the events were indeed "possible," should the jury get to decide whether the matters depicted therein could be "reasonably understood" to deal with statements of fact about the plaintiff? If *Look Homeward Angel* were permitted to go to a jury in Asheville, North Carolina, would liability result? Is this a matter countenanced by the first amendment?

While the Tenth Circuit in *Pring* appeared to treat the "reasonably understood" requirement as a matter of constitutional dimension, it did not address the question whether the "fault" requirement imposed by *New York Times v. Sullivan* and its progeny had been improperly addressed by the trial court.

In preliminary rulings, the trial court in *Pring* held that the plaintiff was not a "public figure," and thus the plaintiff did not need to satisfy the requirement of *New York Times Co. v. Sullivan* that the article be published with "actual malice."[84] However, the court submitted the question of actual malice to the jury on the issue of punitive damages.[85] As Penthouse properly noted, however, "[i]n a case of fiction, the [*New York Times Co. v. Sullivan*] standard must be cast in different terms. Otherwise, publishers of fiction, who by definition know of [the story's] literal falsity will be strictly liable. . . ."[86] Thus, Penthouse argued, the actual malice standard with respect to a work of fiction is "inappropriate and totally misleading."[87] Penthouse claimed that with respect to a work of fiction, *Sullivan* requires that there be clear and convincing evidence that the defendant "publishes with subjective aware-

82. *Id.* at 443-44.

83. *Id.* at 444.

84. *See supra* note 13.

85. Even a private figure must prove malice to recover punitive damages. *Gertz*, 418 U.S. at 350.

86. Appellant's Brief at 30, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1983).

87. *Id.*

ness that the work will be understood as conveying a statement of fact."[88]

For private plaintiffs such as Ms. Pring, Penthouse argued that the fault standard can only be satisfied if the plaintiff proves that the "defendants failed to exercise due care in avoiding a publication which would be understood as depicting actual language and conduct." The Tenth Circuit, however, never reached the issue of "fault."

Thus, in cases like *Pring,* in which the fiction is also fantasy, and in such works as Robert Coover's *The Public Burning,* in which Richard Nixon makes love to Ethel Rosenberg on death row, the "reasonably understood" standard does afford protection.[89] But what happens when a court confronts a novel that depicts events that are possible and that holds the fictitious/real character up to hatred, ridicule and contempt?

This was the issue in *Springer v. Viking Press,*[90] involving the novel *State of Grace.* Lisa Springer, the plaintiff, claimed that she was the fictitious character Lisa Blake.[91] Blake was described as a " 'whore' who engages in various types of abnormal sexual activity."[92] Aside from physical similarities between Lisa Blake and the plaintiff, the record indicated that the author had informed the plaintiff that the relationship between Lisa Blake and another character in the book was "loosely patterned" after their relationship.[93] The plaintiff discussed the plot with the author during the book's initial creative stage and later reviewed the book for editorial purposes.[94] The record also contained a letter from a former lecturer and teacher at Columbia University, the South African novelist Nadine Gordimer, who had known both the plaintiff and the author/defendant. The letter stated in part:

> I have read Robbie's book and am absolutely amazed that *he has put Lisa into it—under her own name!—as a psychology student who has become a high class prostitute.* What a childish revenge! She is described making torridly clinical 'love' to an Italian tycoon-gangster who connives to have the Pope killed . . . . I wonder if

88. *Id.*

89. For a discussion of the legal implications of Coover's work, see Silver, *supra* note 15.

90. 90 A.D.2d 315, 457 N.Y.S.2d 246 (1982), *aff'd,* 60 N.Y.2d 916, 470 N.Y.S.2d 579 (1983).

91. *Id.* at 316, 457 N.Y.S.2d at 247.

92. *Id.*, 457 N.Y.S.2d at 247.

93. *Id.*, 457 N.Y.S.2d at 247.

94. *Id.*, 457 N.Y.S.2d at 247.

L. [Lisa] has read it?[95]

The trial court refused to dismiss plaintiff's cause of action for libel and an appeal was taken.[96] The Appellate Division reversed, holding as a matter of law that Lisa Blake and Lisa Springer were not sufficiently similar.[97] The court held that "the description of the fictional character must be so closely akin to the real person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two."[98] The New York Court of Appeals reviewed the dismissal and in a two paragraph, per curium opinion, affirmed.[99]

Although Ms. Gordimer apparently had no difficulty linking Lisa Springer with the fictional character Lisa Blake, Ms. Gordimer's letter was cited only by the dissenting appellate division judge[100] and not at all by the Court of Appeals.

The court also did not discuss the appropriate "fault" standard to be applied, nor did it discuss *Pring*. Obviously the *Pring* analysis did not assist the defendants in *Springer*, as the allegedly defamatory activity in *Springer*, unlike that in *Pring*, was indeed possible. The Appellate Division's approach seems to balance the similarities between the plaintiff and the fictional character on one side, and their dissimilarities on the other, and then decide as a matter of law whether a hypothetical "person who knew [the] plaintiff" could confuse the two.[101] If the court deems them similar, presumably the case is submitted to a jury which is permitted to make the same calculation.

The *Springer* court did set some standards. Superficial similarities and a common first name are insufficient. But under the *Springer* analysis, the author is given little guidance as to what a judge or jury will deem sufficiently dissimilar. Should the artist adjust his creative work to meet such a slippery standard?

To illustrate just how hazardous it is predicting what is a superficial similarity and what is not, consider the case of *Bindrim v. Mitchell*.[102] Gwen Mitchell wrote a novel about nude therapy af-

95. *Id.* at 321, 457 N.Y.S.2d at 250 (Kupferman, J., dissenting) (emphasis added by court).

96. *Id.* at 317, 457 N.Y.S.2d at 247.

97. *Id.* at 319-21, 457 N.Y.S.2d at 249.

98. *Id.* at 320, 457 N.Y.S.2d at 249.

99. Springer v. Viking Press, 60 N.Y.2d 916, 470 N.Y.S.2d 579 (1983).

100. *Springer*, 90 A.D.2d at 321, 457 N.Y.S.2d at 250 (Kupferman, J., dissenting).

101. *Id.* at 319, 457 N.Y.S.2d at 248.

102. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *reh'g denied*, 444 U.S. 1040 (1980).

ter enrolling in the "Nude Marathon" session conducted by the plaintiff, Dr. Paul Bindrim.[103] The book, *Touching*, portrayed a seamy session conducted by a Dr. Simon Herford.[104] The crucial question was whether Herford was in fact Bindrim.

Undisputedly, Mitchell relied on what she saw at Bindrim's class to generate ideas for her novel.[105] Nevertheless, differences did exist. The character Herford was described in the book as a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms."[106] Bindrim had short hair and was clean shaven.[107] Herford was a psychiatrist. Bindrim was a psychologist, a Ph.D. rather than an M.D.[108] Indeed, of the three witnesses who testified that they recognized Bindrim as Dr. Herford, the only similarity mentioned was the fact that both

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103. Bindrim knew that Mitchell was a writer and refused to allow her to participate in the program if she planned to write about it in a novel. Mitchell assured Bindrim she had no such intention and signed a contract that included the following language:

> The participant agrees that he will not take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired. If he fails to do so he releases all parties from this contract, but remains legally liable for damages sustained by the leaders and participants.

92 Cal. App. 3d at 69, 155 Cal. Rptr. at 33. The trial court refused to uphold a damage award based on the contract, and the appellate court affirmed on this point, observing that a professional person, by contract or otherwise, cannot prevent a patient from reporting the treatment he received. The law of libel, the court said, fixed the boundaries of the right to report. *Id.* at 81, 155 Cal. Rptr. at 41.

104. *Id.* at 69-70, 155 Cal. Rptr. at 34. The alleged defamation was the use of obscenities by the fictional character. For a comparison of part of the novel with part of the actual sessions, see *infra* note 116. Because Bindrim was a public figure, he was required to prove "actual malice" on the part of the defendant, that is, knowledge of falsity or reckless disregard of the facts. *See supra* note 13. The increased burden, however, had no effect because Mitchell knew what had happened by virtue of having attended the sessions. Any divergence from the reality was patent "actual malice." 92 Cal. App. 3d at 72-73, 155 Cal. Rptr. at 35. The paradox, of course, is that by denying that the novel was of and concerning Bindrim, Mitchell admitted its falsity.

105. *Id.* at 69-70, 155 Cal. Rptr. at 34.

106. *Id.* at 75, 155 Cal. Rptr. at 37.

107. *Id.* at 76, 155 Cal Rptr. at 37, 38. The majority distinguished *Bindrim* from Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969), in which the fictional character's life did not parallel the plaintiff's. The character, however, did have the same unusual first name as the plaintiff, Esco. *Id.* at 142. Author and plaintiff grew up together, but the writer successfully argued that the mere use of a name was not sufficient to constitute portrayal. *Id.* at 143. In reality, though, readers may be more likely to connect a character with his real life namesake than with a real person whose name and physical characteristics are completely different and whose only connection with the character is the same occupation. This name/characteristics dichotomy does not appear to be a meaningful basis upon which to decide liability for libel. For a discussion of the use of real names, see *infra* notes 155-74 and accompanying text.

108. 92 Cal. App. 3d at 75, 155 Cal. Rptr. at 37.

practiced nude therapy.[109]

Three witnesses, however, were two more than necessary to prove identification. The majority approved a jury instruction stating that the plaintiff bore the burden of proving "[t]hat a third person read the statement and reasonably understood the defamatory meaning and that the statement applied to the plaintiff."[110] That instruction, however, contradicted the court's formulation of the test as being "whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described."[111] The distinction is critical. The latter language invokes an objective analysis, the former, a subjective analysis. The dissent suggested that the majority confused the test for publication, which requires communication to only one person, with the tests for defamation and identification, which the dissent believed are "to be tested by the impression made on the average reader."[112] The majority avoided the problem, however, holding that the question was one for the jury to resolve and was not susceptible to judicial review.[113] The dissent compared this paradox to that identified by a commentator on *New York Times Co. v. Sullivan*:[114]

> There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to the plaintiff in the first place.[115]

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109. *Id.* at 86, 155 Cal. Rptr. at 43-44 (Files, P.J., dissenting). The dissent points out that the plaintiff certainly was not the only practitioner of this type of therapy; presumably, others using the technique also could have sued, claiming that they were identified. Physical resemblance, one should recall, was not important to the court's decision. As a result, the *Bindrim* logic leaves open the anomalous possibility that an author might be sued by several persons, all of whom claim that others recognize the character as portrayals of them, and all of whom receive damages.

110. *Id.* at 87, 155 Cal. Rptr. at 44.

111. *Id.* at 78, 155 Cal. Rptr. at 39. *Accord* Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969).

112. *Id.* at 87, 155 Cal. Rptr. at 44 (Files, P.J., dissenting).

113. *Id.* at 78, 155 Cal. Rptr. at 39. The court did acknowledge, however, that in some cases the judge could determine that no reasonable person could make the identification of the real human being with the character. In such instances, the court admitted, the jury would not be allowed to consider the evidence itself. *See, e.g.*, Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978). However, in the court's opinion, this was not such a case. *Bindrim*, 92 Cal. App. 3d at 78, 155 Cal. Rptr. at 39.

114. 376 U.S. 254 (1964).

115. Kalven, *The New York Times Case: A Note on the Central Meaning of the First*

The dilemma is exacerbated in a case like *Bindrim* in which the author readily admits finding inspiration from real life. Not only does the writer assert that the information is fictional, he also acknowledges knowing the truth of the matter. In *Bindrim*, for example, Mitchell knew from attending the seminar that Bindrim was not foul-mouthed. The fact that the fictional Herford did use obscenities constituted the falsity of the matter asserted.[116]

Amendment, 1964 SUP. CT. REV. 191, 199, *quoted in Bindrim*, 92 Cal. App. 3d at 87, 155 Cal. Rptr. at 44 (Files, P.J., dissenting).

116. The *Bindrim* opinion reproduces the objectionable matter and the transcript of part of the actual session upon which it appeared to be based.

Excerpts from "Touching":

The minister was telling us how the experience had gotten him further back to God,

And all the time he was getting closer to God, he was being moved further away from his wife, who didn't understand, she didn't understand at all. She didn't realize what was coming out of the sensitivity training sessions he was conducting in the church.

[H]e felt, he, more than felt, he knew, that if she didn't begin coming to the nude marathons and try to grasp what it was all about, the marriage would be over.

"You better bring her to the next marathon," Simon said.

"I've been trying," said the minister. "I only pray she comes."

"You better do better than pray," said Simon. "You better grab her by the cunt and drag her here."

"I can only try."

"You can do more than try, Alex. You can grab her by the cunt,

"A man with that kind of power, whether it comes from God or from his own manly strength he doesn't know he has, can drag his wife here by the fucking cunt."

"I know," Alex said softly, "I know."

Transcript of Actual Session:

"I've come a little way,"

"I'd like to know about your wife. She hasn't been to a marathon?"

"No."

"Isn't interested? Has no need?"

"I don't—she did finally say that she would like to go to a standard sensitivity training session somewhere. She would be—I can't imagine her in a nude marathon. She can't imagine it."

"Why?"

"Neither could I when I first came."

"Yeh. She might. I don't know."

"It certainly would be a good idea for two reasons: one, the minor one is that you are involved here, and if she were in the same thing, and you could come to some of the couple ones, it would be helpful to you. But more than that, almost a definite recipe for breaking up a marriage is for one person to go into growth groups and sense change and grow . . ."

"I know that."

"Boy they sure don't want that, and once they're clear they don't need that mate anymore, and they are not very patient."

"But it is true, the more I get open the more the walls are built between us. And it's becoming a fairly intelligent place, a fairly open place, doing moderate sensitivity eyeballing stuff with the kids. I use some of these techniques teaching out class work."

Bindrim, 92 Cal. App. 3d at 70-71, 155 Cal. Rptr. at 34.

The constitutional "fault" requirement was squarely addressed in *Bindrim*. The court found clear and convincing evidence of "actual malice" because "Mitchell's reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter. Since she attended sessions, there can be no suggestion that she did not know the true facts."[117] The dissent characterized this analysis as "absurd."[118]

Indeed, to expect works of fiction to be free of all vestiges of reality is to propound a legal standard that cannot be met. *Pring, Springer,* and *Bindrim* demonstrate a variety of circumstances and types of fiction whereby the author or publisher is vulnerable to liability and damages—sometimes in large amounts. What the defendant knew may be the crucial inquiry in a case of non-fiction libel. But as to a work of fiction, which by definition purports to be untrue, the more revealing question is what did the author intend? The time has come for states to recognize fictional libel as different in kind from non-fiction libel and enact laws that address it directly.

IV
The Persistence of the Misplaced Question

The problem of libel in fiction represented by these three cases arises in circumstances that can be roughly classified as follows: (1) unintended similarity of a fictional character to a real person by creation of characters from real people; and (2) use of names and named people in fictional settings. A separate subspecies of fiction/libel problems concerns fictionalization and the "new journalism."[119] To be sure, the categories overlap and include a spectrum of examples within each. This typology, however, allows an examination of the different interests and degrees of culpability involved in questions of identification and of how the "malice" standard we suggest works in the context of the categories.

A. Common Law Elements

The proper initial inquiry in any allegation of libel is whether the allegedly defamatory statement is "of and concerning" the

117. *Id.* at 72-73, 155 Cal. Rptr. at 35.
118. *Id.* at 88, 155 Cal. Rptr. at 45.
119. *See infra* notes 175-94 and accompanying text.

plaintiff.[120] "The question," though, "is not so much who was aimed at as who was hit."[121] Motivation of the author does not mitigate identification. Rather, it serves only to mitigate damages by barring those of a punitive nature.[122] Once the colloquium,[123] to speak in common law terms, has been established, the plaintiff must go forward and prove defamation, publication, fault,[124] and actual damages.

Section 564 of the Second Restatement of Torts presents a test of liability in which the focus is on neither the publisher nor the person about whom the words were spoken. Rather, the critical inquiry is what a recipient thought about the words. If such a third party reasonably believes that the statement was made about the plaintiff identification is established, even if that belief is mistaken.[125] Comment b to Section 564 underscores this fact. "It is not necessary that everyone recognize the other as the person intended," the comment states, "it is enough that *any* recipient of the communication reasonably so understands it."[126]

Another comment to Section 564, comment d,[127] specifically ad-

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120. *See generally* W. PROSSER, *supra* note 2, at 749; R. SACK, *supra* note 59, at 120.

121. Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966) (quoting Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 64, 126 N.E. 260, 262 (1920)).

122. *Fetler*, 364 F.2d at 651.

123. *See supra* notes 2 and 17.

124. Today, the plaintiff is required to prove falsity as part of his prima facie case. *See* Wilson v. Scripps-Howard Broadcasting Co., 7 MEDIA L. REP. (BNA) 1169 (6th Cir. 1981) (falsity is an element of fault that must be proved and not presumed).

125. RESTATEMENT (SECOND) OF TORTS § 564 (1977) provides: "A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer."

126. *Id.* at comment b (emphasis added). Comment b goes on to state, however, that an important factor in determining the reasonableness of the belief is the number of people who hold it. If only one person thinks that a portrayal of a real human being has occurred, then the jury may well question whether that conclusion is justified. Nonetheless, the jury certainly is able to find that one person's belief is reasonable and sufficient to support a verdict for the plaintiff.

127. Comment d provides:

> A libel may be published of an actual person by a story or essay, novel, play or moving picture that is intended to deal only with fictitious characters if the characters or plot bear such a resemblance to actual persons or events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person. Mere similarity of name alone is not enough; nor is it enough that the readers of a novel or the audience of a play or a moving picture recognize one of the characters as resembling an actual person, unless they also reasonably believe that the character is intended to portray that person. If the work is reasonably understood as portraying an actual person, it is not decisive that the author or playwright did not so intend . . . . The fact that the author or producer states that his work is exclusively one of fiction and in no sense applicable to living persons is not decisive if readers actually and reasonably understand

dresses the question of fictitious characters. The Restatement approach, though, is simply to treat such characters as a subspecies of "identification" problems rather than as a discrete situation requiring different rules. The only comfort offered by comment d is the statement that mere similarity or resemblance is not sufficient.[128] Just as in other identification cases, the recipient—any recipient—must believe that the character is intended to portray the person.[129] All of these matters, however, are for the jury to decide.[130] The fact that six or twelve people are convinced by the evidence that some person in the reading community might reasonably believe that a work of fiction is of and concerning the plaintiff, is too imprecise to withstand first amendment analysis when that is the sole obstacle (as it typically is) to recovery. Most works of fiction are susceptible under this standard to libel judgments. The breathing room required by the first amendment is not there.[131]

While at first glance this "reasonableness" approach may appear to be a proper method of adjudicating fiction libel cases, in fact it raises more questions than it answers. For example, does reasonableness vary depending on the familiarity of the recipient with the

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otherwise. Such a statement, however, is a factor to be considered by the jury in determining whether readers did so understand it, or, if so, whether the understanding was reasonable.

Id. comment d.

128. *Id.*

129. *Id.*

130. Courts are reluctant to preempt a jury decision by means of summary judgment, especially in the light of liberal rules of pleadings such as Rule 8 of the Federal Rules of Civil Procedure. Rule 8 requires only: (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. FED. R. CIV. P. 8. Despite the considerable burden of defending such a suit, no additional pleading is required, at least not in federal court. *See* Geisler v. Petrocelli, 616 F.2d 636, 640 (2d Cir. 1980); Pirre v. Printing Developments, Inc., 432 F. Supp. 840, 843 (S.D.N.Y. 1977). Thus, summary judgment for the defendant, which is granted in federal court only when no genuine issue of material fact exists, is difficult to obtain. So long as any person believes the fictional statement to be of and concerning the plaintiff, courts most likely will consider the colloquium a fact for the jury to decide. *See, e.g.*, Yiamouyiannis v. Consumers Union, 619 F.2d 932 (2d Cir. 1980). *But see* Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280 (D.N.J. 1981). The federal standard for summary judgment is set out in Federal Rule 56. Many state laws adopt the same "genuine issue of material fact" test. *See, e.g.*, TEX. R. CIV. P. 166-A. *Cf.* Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 795 (summary judgment no less common in recent years). *See also* Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 455. *See* FED. R. CIV. P. 12(b)(6).

131. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

purported victim? That is, may a close friend of the plaintiff, who knows him, his life, and his mannerisms well, reasonably conclude that a fictional character represents that person while a stranger could not so conclude? Presumably so under the Restatement test; yet such an approach puts a premium on resemblance, the very factor comment d discounts.[132] The extent to which the author knew anything about the plaintiff is irrelevant.

Not only is the line between resemblance and representation not a bright one, it is no line at all. Proof of the former is a necessary component of a case alleging the latter. The Restatement test allows authors little latitude to take ideas from real life. It subjects them at least to a jury trial, and possibly to an unfavorable verdict, even if the work in question is unmistakably marked as being pure fiction.[133] As a result, the writer is encouraged to make his fiction as unrealistic as possible—a value judgment that may create uniform law but also makes for bad literature.

V
Permutations of the Problem

Defamation, at least in what purports to be non-fiction, is an untrue statement that subjects a person to public ridicule. Unlike non-fiction, however, all fictional characters are admitted to be false. Thus, disputes concern the identity of the person allegedly defamed, not the truthfulness of the statement. Such matters arise naturally from the process of fiction writing and take a variety of forms.

A. Unintended Similarity

The cause of unintended similarity is most troubling to a "reasonable belief" system of libel. The first amendment, as interpreted by the Supreme Court, requires some fault by the defamer to create liability.[134] The problem arises because the "fault" standard for private individuals in non-fiction cases is negligence,[135]

132. *See supra* note 127.

133. The use of a disclaimer stating that any similarity between characters in the book and actual persons, living or dead, is strictly coincidental does not insulate the writer from liability. Comment d to Section 564 of the Restatement specifically addresses this point. Such a statement, it says, is simply a factor for the jury to consider in deciding whether a reader's conclusion of portrayal is reasonable. RESTATEMENT (SECOND) OF TORTS § 564 comment d (1977).

134. *See supra* note 13.

135. *See* RESTATEMENT (SECOND) OF TORTS § 580B (1977).

and this may be proved by inference. "If the recipient reasonably understood the communication to be made concerning the plaintiff," the Restatement states, "it may be inferred that the defamer was negligent in failing to realize that the communication would be so understood."[136]

Thus, the Restatement collapses two distinct questions into one and subordinates the constitutional requirement of fault to the common law element of identification. Proof of indentification is more properly viewed as an antecedent to an inquiry into fault, for if identification is not established the plaintiff has failed to present a prima facie case. Fault, far from being a matter inferred, is a separate requirement of proof designed to prevent liability even if the common law case has been established. As the court stated in *Gertz*, "[t]his approach . . . shields the press and broadcast media from the rigors of strict liability for defamation."[137]

To ask whether an author was at fault for identifying a real person perverts the fault requirement and transports it where it does not belong. In non-fiction, the proper question is whether the defendant knew or should have known that the information was false. In fiction, however, the author admits that the material is false. If he declares, as in *Pring*,[138] that he never knew the real person, then it makes no sense, constitutionally or otherwise, to say that he is negligent for inadvertently writing about her. Even if he acknowledges knowing the real person, he can hardly be blamed for not knowing that certain readers—contrary to his intent—would construe a character to be that person. Literature is necessarily an interactive process, as is all art, in which the reader's contribution may diverge radically from the author's in-

136. *Id.* § 564 comment f. *Sullivan* and its progeny dealt with fault attached to publishing information that was untrue. The question in an "of and concerning" case involving fiction is different. The writer of fiction not only admits the statements are untrue, he also insists that they are untrue. Thus, comment f's approach extends the fault concept to a new domain. The author's knowledge of the falsity of the statement is stipulated. His fault, if there is fault, is in not knowing that a reader would connect the untrue and fictional statement to a real person. In this regard his protection is more limited than his non-fiction counterpart because, according to comment f, negligence may be inferred. Arguably, a standard that allows such an inference is constitutionally infirm to the extent that it diminishes the plaintiff's burden of production. A more provocative possibility, though, is that the transportation of "fault" from the innuendo to the colloquium is improper. The issue is reviewable to the Supreme Court, as it involves constitutional rights. *See* RESTATEMENT (SECOND) OF TORTS § 580A comment g (1977).

137. *Gertz*, 418 U.S. at 348.

138. *See supra* notes 60-88 and accompanying text.

tent.[139] Imposing liability on the author for not anticipating the reaction of a reader denies the independence of the reader and incorrectly assumes a complete congruity of meaning.

If an author is blameworthy at all, it is not because of what the reader thought, but rather because of what the author himself thought. We argue below, however, that even the intent to use a person's persona is not sufficient fault, for that too may be an important literary device. An author should only be culpable when he intends to harm the person portrayed. At the very least, however, an author who is not shown even to intend to portray a person, let alone injure him, should not be subject to liability.

B. Characters Based on Real People

Unlike cases such as *Pring*, in which authors inadvertently create characters that resemble actual people, many cases involve characters consciously culled from reality. They range from the incidental use of one facet of an individual's personality to the *roman a clef*, a novel in which fictitious names are attached to characters meant to be understood as real people. To the extent that the renaming is simply a subterfuge, a persuasive argument for liability can be made. The problem, however, is distinguishing between the thinly veiled reference of the *roman a clef* and the legitimate exercise of artistic license. A system that strives to allow damage compensation in the former runs a significant risk of chilling the latter.

Two motion pictures illustrate the value of the *roman a clef*: *Citizen Kane* and *Inherit the Wind*. *Citizen Kane* is perhaps the most compelling American film of all time. It has been extensively honored, applauded, studied, and extolled.[140] It is also obviously based on the life of an actual human being.

William Randolph Hearst loomed larger-than-life during his lifetime.[141] In 1898, for example, he cabled the artist Frederic Remington in Cuba, saying, "You furnish the pictures, I'll furnish the war."[142] Hearst presided over a publishing empire built upon the *San Francisco Examiner*, a paper he led from shabby quarters

139. *See generally* S. FISH, IS THERE A TEXT IN THIS CLASS? (1980). This is so even in law. *See generally* Symposium, *Law As Literature*, 60 TEX. L. REV. 373-586 (1982).

140. *See generally* FOCUS ON CITIZEN KANE (R. Gottesman ed. 1971); P. KAEL, THE CITIZEN KANE BOOK (1971).

141. *See generally* C. OLDER, WILLIAM RANDOLPH HEARST, AMERICAN (1936).

142. J. BARTLETT, FAMILIAR QUOTATIONS 702 (15th ed., E. Beck ed. 1980).

to economic prominence.[143] With his riches, he built San Simeon, a huge estate on the California Coast.[144]

The principal character of *Citizen Kane*, Charles Foster Kane, also loomed larger-than-life. He, too, told an employee that he would furnish the war. He also built a publishing empire from a floundering newspaper and constructed a mansion with his money. Hearst was a real person, while Kane was his fictional counterpart; no one could fail to recognize that. Yet Charles Foster Kane had some personal shortcomings that were not necessarily inspired by the real life model. Kane's sexual life resulted in public scandal, which in turn cost him an election. Should that attribute be associated with Hearst as well? If so, how could Orson Welles have escaped liability for the contents of an acclaimed masterpiece? The easy answer is by waiting until Hearst died.[145] But that merely avoids the difficult core question: was Welles' film proper? If not, is the loss to the public (i.e., the possibility of the film not being made or of being tampered with by a battery of media lawyers) greater than the damage to the individual? How should those interests be balanced? Surely not on a scale of artistic quality, for that is a determination for which courts are unsuited and ill-equipped.[146]

Similarly, the film *Inherit the Wind* was based on actual events, and it also represents only a thinly veiled attempt to disguise the

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143. C. OLDER, *supra* note 141, at 70-71.

144. *Id.* at 527.

145. Libel, because it is a personal injury, does not survive death in a majority of American jurisdictions. *See* 1 A. HANSON, *supra* note 52, at 164-65. *But see* Canino v. New York News, Inc., 96 N.J. 189, 475 A.2d 528 (1984) (action survives in New Jersey). Rumors of sexual impropriety did in fact circulate during Hearst's lifetime. *See* O. CARLSON, LORD OF SAN SIMEON 147 (1970).

146. In copyright cases, courts have been reluctant to require that works of art satisfy anything more than a minimal test of quality to enjoy copyright protection. In *Bleistein v. Donaldson Lithographing Co.*, a case questioning the originality of lithographed circus posters, the Supreme Court stated:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.

188 U.S. 239, 251-52 (1903).

person portrayed. The historical genesis of *Inherit the Wind* was the case of *State v. Scopes*,[147] more commonly called the Scopes Monkey Trial.[148] The real life characters were colorful enough to have been created by a fiction writer. On one side: William Jennings Bryan, perhaps the best known politician of his day, an old-time stump speaker and advocate of biblical creationism. On the other: Clarence Darrow, an acerbic, cynical courtroom lawyer and defender of the right to teach evolution.[149] The issue: science versus religion. Never did a novelist weave a more compelling scenario than that spun out of this reality.

In the film, William Jennings Bryan became Matthew Harrison Brady. Clarence Darrow was renamed Henry Drummond. The issue, though, was the same, and much of the dialogue came directly from the transcript of the trial.[150] Nevertheless, not all of *Inherit the Wind* was inherited from reality. Nuances were added; personality traits were modified, and some of the changes could have been considered defamatory. In the film, for example, the father of the protagonist's girlfriend is portrayed as a particularly callous and cruel clergyman. He denounces his daughter publicly and vociferously. Gene Kelly, who played a newspaperman meant to be H.L. Mencken, presents a picture of a journalist who could be considered unprofessional: he actively consorts with the defense. The point is not that the material was definitely defamatory or even that it was untrue, but rather, that under the existing test of libel, the issue was at least worthy of litigation. To the extent that such litigation would have convinced others to abandon similar projects, the public would have been deprived of a most worthwhile marriage, the union of fact and fiction, and the author would have been punished for the success of his endeavors.

A test for fictional defamation based on intent to use fact might be proposed, but it would not adequately protect the author who does indeed intend to use reality as the basis for his work. The *Bindrim* case and the two films discussed above illustrate this inadequacy. Undoubtedly, some writers do mean to report actual occurrences using the vehicle of fiction to score their artistic and

147. No. 5231, 5232 (Circuit Ct., Rhea County, Tenn. 1925), *aff'd*, 289 S.W. 363 (Tenn. 1927).

148. *See generally* L. DECAMP, THE GREAT MONKEY TRIAL (1968); S. GREBSTEIN, MONKEY TRIAL (1960).

149. *See generally* BRYAN AND DARROW AT DAYTON (L. Allen ed. 1967).

150. Transcripts of the trial can be found in S. GREBSTEIN, *supra* note 148, at 32, and in J. SCOPES, THE WORLD'S MOST FAMOUS COURT TRIAL, STATE OF TENNESSEE V. JOHN THOMAS SCOPES (1971).

political points.[151] In *Corrigan v. Bobbs-Merrill Co.*,[152] the writer consciously and maliciously manipulated reality to make a real person appear worse than he actually was. As we propose in the final section, the writer who uses the fiction device as a subterfuge to defame real people and does so with "malice," in its common law sense, should be held liable.[153] But the plaintiff must prove two things by clear and convincing evidence: (1) that the defendant intentionally used the fiction device as a subterfuge to defame the plaintiff; and (2) that the defendant did so with malice.

The Restatement of Torts says liability can occur when any person reasonably recognizes a fictional character as representing a real person.[154] The question that arises, however, is whether any such recognition is reasonable. Certainly, people may see a work of fiction and connect it to reality, wondering if the two coincide. "Wondering," however, is not a proper basis for defamation, especially when one considers the first amendment interests at stake. Arguably, once the label "fiction" is attached to any work of literature, a reader connot reasonably believe that any of it is true. The fact that some of it may be true should not imply that anything else about it is also true. A legal system that permits such inferential logic closes off the writer's principal source of inspiration—reality. The effect is felt whether the ultimate congruence of fiction to fact is intentional or accidental.

C. Real Names in Unreal Settings

Unlike Dorothy Parker, who got the names of her characters from phone books and obituary columns,[155] Orlando Petrocelli found his names in the office. Petrocelli wrote a potboiler entitled *Match Set* about a transsexual tennis player competing in the women's professional tennis circuit.[156] The central character was

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151. Truman Capote admits as much in describing his first writing—an article for a children's page contest sponsored by the Mobile, Alabama *Press Register*:

> I had been noticing the activities of some neighbors who were up to no good, so I wrote a kind of *roman a clef* called "Old Mr. Busybody" and entered it in the contest. The first installment appeared one Sunday, under my real name of Truman Steckfus Persons. Only somebody suddenly realized that I was serving up a local scandal as fiction, and the second installment never appeared.

WRITERS AT WORK, *supra* note 20, at 286-87.

152. 228 N.Y. 58, 126 N.E. 260 (1920). *See also infra* notes 206-12 and accompanying text.

153. *See infra* notes 197-212 and accompanying text.

154. RESTATEMENT (SECOND) OF TORTS § 564 comment b (1977). *See supra* text accompanying note 126.

155. *See supra* note 51 and accompanying text.

156. Geisler v. Petrocelli, 616 F.2d 636, 638 (2d Cir. 1980).

named Melanie Geisler, as was a former associate of the author at a small publishing house. The latter, presumably not a transsexual, sued.

In *Geisler v. Petrocelli*,[157] the defendant moved for dismissal and was successful in the trial court.[158] The court ruled that no reasonable reader could mistake the real Ms. Geisler for the fictional one,[159] because the book was clearly labeled "fiction."[160] On appeal, the Second Circuit reversed, ruling that the "of and concerning" issue was a question for the jury and that the plaintiff had pleaded sufficient facts to withstand the motion for dismissal.[161]

Geisler further illustrates the broad impact of conditioning liability on recognition by only one person. Surely, the author was not writing a book about his co-worker. Her name simply was convenient, even if use of it was ill-advised. Yet the Second Circuit held that "[i]t is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that [she] is the person meant."[162]

The word "meant" is the lynchpin of the decision. The court seemingly construes it to signify something less than a portrayal, which is the standard set forth by the Restatement.[163] Mere similarity of name or resemblance is not sufficient.[164] Without a doubt, Petrocelli meant the name of his fictional character to be Melanie Geisler, and he almost certainly meant their physical characteristics to be similar.[165] But he did not mean the tennis player to *be* the real person, only to share some of her attributes. The approach of the Second Circuit, though, makes no such distinction. This confusion unfairly requires the writer to divorce his characters from reality.

The court in *Geisler* alludes to the fact that the plaintiff and the

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157. *Id.*

158. *Id.* at 637.

159. *Id.* at 639.

160. The book also contained a standard disclaimer stating that any resemblances between its characters or episodes and real persons or actual incidents were coincidental. *Id.* at 638.

161. *Id.* at 640

162. *Id.* at 639. *But cf.* Kocza v. Avon, 7 MEDIA L. REP. (BNA) 1919 (N.Y. Sup. Ct. 1981) (fleeting and incidental use of name that is substantially similar to plaintiff's in novel does not violate New York privacy statute; motion to dismiss granted).

163. RESTATEMENT (SECOND) OF TORTS § 564 comment d (1977). *See supra* note 127.

164. *Geisler*, 616 F.2d at 638.

165. *Id.*

defendant worked together.[166] The implication is that this makes the innuendo more likely; but access alone is insufficient to prove the plaintiff's case.[167] Presumably, Melanie Geisler would be no less damaged if Orlando Petrocelli had never met her but used her name nonetheless. Geisler argued that her friends knew that she worked with Petrocelli, so they were more likely to believe that she was in fact the transsexual tennis player.[168] This deduction, however, stacks the deck against the author. Either the fictional character portrays the real person objectively or she does not. Had the character been a Melanie Geisler who worked in a publishing house, the belief that she was a portrayal of the actual Geisler would have been more defensible. The person in the book, however, had a completely different life. Further, the same friends who knew that Geisler worked in a publishing house with Petrocelli obviously knew that she was not a professional tennis player. Thus, her casual association with the author cut against her case as well.

A related problem involving names of actual people arises when an author places a well-known person in a fictional story. One commentator cites the book *The Public Burning*, in which ex-President Richard Nixon becomes involved in an attempt to seduce Ethel Rosenberg.[169] Nixon, so far as we know, did no such thing. The author's defense in such a case is tortuous. He did use Nixon's name, and he did mean to refer to *that* Richard Nixon. He did *not* mean to say, though, that the events actually occurred. Rather, the actual person in such a work of fiction is nothing more than another character. He happens to be real, but his experiences in the book are not.

This type of literary device shifts the focus from "of and concerning" to a subspecies of that element, namely, whether the publication contains false statements of fact about the plaintiff. No author reasonably can argue that the colloquium has not been met in such a case. He has been shorn of all of his defenses: the similarity of personalities and names is not coincidental, and the name and characteristics are not used simply as springboards. Indeed, a reasonable person could only conclude that the character and the real life person are one and the same.[170] Thus, a writer is

166. *Id.*

167. *See supra* note 17.

168. 616 F.2d at 634.

169. *See* Silver, *supra* note 15, at 1068. *See generally* R. SACK, *supra* note 59, at 242.

170. *See supra* notes 66-70 and accompanying text.

reduced to a sleight-of-hand denial of defamation by pointing out that even though the character and the person have the same name, the material is not defamatory because it is clearly marked "fiction." No one, an author would argue, should believe that these fictional events actually occurred in the life of the real person.[171]

A short story by Truman Capote displays another facet of the "real person in unreal situations" dilemma. In *La Cote Basque 1965*,[172] two persons are having a gossipy conversation at a restaurant in New York when in walk Jacqueline Kennedy and Lee Radziwell. The potential defamation results not from what the Bouvier sisters do, but rather from what the two diners say about them:

> "Isn't that," Mrs. Matthau, offering a diversion, "Jackie Kennedy? and her sister?"
>
> . . .
>
> Lady Ina observed, "You can see those girls have swung a few big deals in their time. I know many people who can't abide either of them, usually women, and I can understand that, because they don't like women and almost never have anything good to say about *any* woman. But they're perfect with men, a pair of Western geisha girls; they know how to keep a man's secrets and how to make him feel important. If I were a man, I'd fall for Lee myself. She's marvelously made, like a Tanagra figurine; she's feminine without being effeminate; and she's one of the few people I've known who can be both candid and cozy—ordinarily one cancels the other. Jackie—no, not on the same planet. Very photogenic, of course; but the effect is a little . . . unrefined, exaggerated."[173]

Who is speaking? Is it Capote or his fictitious diners? Even if it is the diners, should an author have the right to publish arguably defamatory statements about real people simply by putting the words in the mouths of made-up characters? One might argue that the Capote excerpt is not truly defamatory—that it is within the realm of fair comment or opinion.[174] That, however, only

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171. If the real person happens to be a public official or a public figure, the plaintiff will be required to prove *New York Times* malice. *See supra* note 13 and accompanying text.

172. ESQUIRE, Nov. 1975, at 110.

173. *Id.* at 112.

174. Opinions, that is, evaluative statements, as opposed to assertions of fact, are protected by the first amendment. Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970). The Bouvier sisters certainly qualify as public figures, although perhaps unwillingly nowadays. *See* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (court enjoins photographer who persists in taking pictures of Jacqueline Kennedy from coming within 25 feet of her). Consequently their lives

avoids the central problem. Capote's characters could have been more base in their remarks. Let us suppose that one of them accused the sisters of being unfaithful to their husbands. The words may then be considered defamatory. The colloquium is clear. Is there any defense? Perhaps. The writer might contend that because fictional characters are speaking, their comments are not to be regarded as actually depicting the truth. In a case like *Pring*, where the fictional Miss Wyoming performs fellatio on her coach causing him to levitate before a national television audience, the court may have no trouble saying, as a matter of law, that no person could reasonably believe that this fact actually occurred. But when a more realistic set of events is described, such as those described in *La Cote Basque 1965* or *Look Homeward Angel*, the jury decides.

Therefore, the writer must convince the finder of fact that statements by fictional characters exist in a third dimension—they are neither true nor untrue, but rather unreal. It is an esoteric argument, but not a nonsensical one. The nature of libel is that an individual's reputation has been impugned, and the author may assert that no damage has occurred because no actual person made the statement. Thus, a reader could not reasonably believe that it was intended to say anything about the real person purportedly being discussed. So, when a character says Ms. A is a whore, the reasonable reader must confine this statement to the context of the fictional story. As to whether Ms. A really is a whore or not, the author expresses no opinion.

D. Fictionalization

While closely related, fictionalization and the "new journalism" are not identical. The distinction is easier to state than to apply, but it appears to be based on the ultimate intent of the author. A fictionalized work is one that uses fact as a springboard for a good made-up story.[175] The new journalism, on the other hand, uses the techniques of fiction writing in an attempt to make the facts

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are subject to a greater amount of scrutiny in the press. *But see* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (the Court decided that a wealthy society woman, whose divorce decree was held to have been misreported by *Time Magazine*, was not a public figure). While Jacqueline Kennedy may have been a true public figure as First Lady, at some point her status may have changed. *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (person involved in Soviet espionage investigation 26 years before no longer a public figure).

175. One example of fictionalization might be the work of Oscar Lewis. Lewis portrayed the lives of the poor of Mexico in THE CHILDREN OF SACHEZ (1961), and the poor of Puerto Rico in LA VIDA (1966). He tape-recorded monologues of his subjects telling the

more comprehensible.[176] The difference, while subtle, is crucial to determining liability for libel. The former should be considered a work of fiction; the latter will be more likely taken as factual. Accordingly, we include fictionalization, but not the new journalism, in our proposal for a new test of fault in fiction.

The case of *Sliwa v. Highgate Pictures*[177] provides an interesting example of the nature of fictionalization in an unusual context. The case arose as an action on a contract. Curtis Sliwa, founder of the group that grew into the Guardian Angels,[178] signed a contract with Highgate Pictures to produce a made-for-television film based on his life and his organization. The contract allowed the defendant to depict Sliwa's story either in a fictionalized account or in a factual manner. The company chose the former and Sliwa sued over its deviation from the truth.

Judge Greenfield, of the New York Supreme Court, held that the film did not depart markedly from reality, and thus did not violate the contract. In his opinion, Judge Greenfield also discussed the difference between fiction and fictionalization and the limits of the latter.

> Fiction, is a work of the imagination, which is the event, incidents, characters and descriptions [coming] from the author's brain. . . . When we talk about fictionalizing, we start with an essential body of facts taken from the reality and we then proceed along the road so that what we wind up with is an end product somewhere between fact and fiction. The origin and inspiration of the work is clear, but not all the characters, dialogue or events may wholly correspond to reality.[179]

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stories of their lives and then fictionalized them, heightening the dramatic impact. *See* J. HOLLOWELL, FACT AND FICTION 11 (1977).

176. Tom Wolfe, one of the leading exponents of the new journalism, wrote that the new journalism made it possible "in non-fiction, in journalism, to use any literary device, from the traditional dialogisms of the essay to stream-of-consciousness, and to use many different kinds simultaneously, or within a relatively short space . . . to excite the reader both intellectually and emotionally." T. WOLFE, THE NEW JOURNALISM 15 (1973).

177. 7 MEDIA L. REP. (BNA) 1386 (N.Y. Sup. Ct. 1981).

178. The group originally called itself "The Magnificent Thirteen," and became organized on February 13, 1979, for the purpose of patrolling the New York subways in an attempt to reduce the number of muggings. *Id.* at 1386-87.

179. *Id.* at 1387-88. *Sliwa* and other cases of fictionalization are distinguishable from cases such as Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), in which the author fictionalized the life story of a baseball player but published it as a biography. When a false story is presented as true, libel is much more likely. In contrast, cases like *Sliwa* involve works that do not purport to be true. Both, however, are subjected to the same legal analysis for the question of whether they are "of and concerning" the plaintiff. The impropriety of that symmetry would be remedied by the approach suggested in Part VI of this article.

The question in *Sliwa* was not whether the plaintiff had been defamed, but whether he had been cheated out of a reasonably accurate representation of his life. The court held that he had not. The actual events, the court concluded, were simply means to an end—a model that the dramatists were free to cut, clothe, and decorate as they saw fit.[180] Yet this artistic license was subject to certain limits; the defendants were not free to "take the skeleton of a dinosaur and portray it as a mouse."[181] This restriction, however, was based on the contract. The corollary contention in a libel case might be that the writers would not be free to alter reality so greatly as to defame the real life characters who, as in *Sliwa*, may be named.

The remedy in such a libel action, however, could be the same as the solution in the *Sliwa* case: proper labeling. The judge suggested the following disclaimer:

> This story was inspired by the life and deeds of Curtis Sliwa, of the Bronx, New York, and of the group he organized, the Magnificent Thirteen, which later evolved into the Guardian Angels.
>
> For the purposes of dramatization, names have been changed, characters created, and incidents devised or altered, and this production does not purport to be a factual record of real events or real people.[182]

The idea of labeling is not at all foreign to American jurisprudence as a remedy to prevent confusion. In fact, it is the most common solution to cases of unfair competition.[183] In unfair competition, the problem is the possibility that the public will not distinguish between two similar products, pole lamps for example.[184] In fictionalization, the problem is that the public will not distinguish between a fictional story that resembles fact and the actual facts. Just as the proper remedy in the former instance is not to take the pole lamp off the market, the proper approach in the lat-

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180. 7 MEDIA L. REP. (BNA) at 1389.

181. *Id.*

182. *Id.* at 1392-93. The film already included a disclaimer at its head, stating that everything in it was fictitious, but the court was concerned about the fact that that was not so. Some facts as stated in the work were true. Indeed, that was necessary to fulfill the contract. The revised disclaimer puts the public on notice that while some of the events are accurate representations of reality, others are not.

183. *See* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 232 (1964) (state can require proper labeling of unpatentable pole lamps); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 238-39 (1964) (state can require proper labeling of unpatentable lighting fixture). *See also* Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 120-21 (1938) (label was sufficiently prominent to minimize possibility of confusion).

184. Competing pole lamps were the objects in question in *Stiffel*. *See supra* note 183.

ter is not to ban such stories. Rather, the second lamp manufacturer and the fictionalization writer should both be required to clearly label their products as suggested in *Sliwa*. That way, the public receives the benefit of both products and also knows the difference between them and the originals.

For purposes of this discussion, fictionalization is restricted to works that preserve the actual names of the real life characters. It is this feature that distinguishes fictionalization from the *roman a clef*.[185] Unlike the author of a *roman a clef*, the writer of a fictionalized story generally cannot defend himself on the basis of no colloquium. He is usually limited to his no-defamation contention. Thus, the associate justice of the Michigan Supreme Court who wrote the novel *Anatomy of a Murder* could plead that a character in his book did not refer to her real life counterpart, even though the story was quite similar to the actual events.[186]

The plaintiff in *Wheeler v. Dell Publishing Co.*[187] was only a minor player in the actual events and in the novel. The court believed that no average reader would remember the minor subplot in which her "character" had a place.[188] On the other hand, the court believed that anyone familiar with the actual trial would easily identify the fictional characters with their real-life counterparts.[189] The question the opinion raises is whether the prominence of the character should influence the decision regarding "of and concerning."

The *Wheeler* court used the words "reasonable" and "average" interchangeably in describing the hypothetical reader whose response determines the result. In fact, though, the court relied on the average reader. The resulting test is more protective of the defendant writer. Under a "reasonable reader" test, the test adopted by the Restatement,[190] a reasonable identification of plaintiff and character by any reader will suffice. The "average reader" test imposes a greater burden on the plaintiff. Not only must he prove that the identification is reasonable, he also must prove that many people would make the connection. That distinction was quite significant in *Wheeler*, for the court concluded that

185. *See supra* notes 140-54 and accompanying text.

186. *See* Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962).

187. *Id.* The book was a study of an actual murder trial through fiction, and the names had been changed. *Id.* at 375.

188. *Id.* at 376. *Accord* Levey v. Warner Bros. Pictures, 57 F. Supp. 40 (S.D.N.Y. 1944).

189. *Wheeler*, 300 F.2d at 375.

190. RESTATEMENT (SECOND) OF TORTS § 564 comment b (1977). *See supra* text accompanying note 126.

the character at issue was too inconsequential for the *average* reader to remember.[191]

The court also addressed the reasonableness issue in a manner unlike that of other courts whose decisions are discussed in this article. The *Wheeler* court concluded that an identification of the character Janice Quill with the plaintiff would be unreasonable, even by those who knew her. The reason: the plaintiff denied having any of the "unsavory characteristics" of the character.[192] So, by alleging that the "representation" was untrue and defamatory, the plaintiff proved the defendant's case—that the character was not "of and concerning" her. This is what writers of fiction have argued all along, but very few courts have accepted the reasoning.

The *Wheeler* approach, then, works well for the writer of the *roman a clef* and perhaps offers some solace to authors of fictionalizations. True, the colloquium is clear, but would the average reader reasonably believe that a book labeled "fiction" contained any information meant to be taken as true? By analogy to *Wheeler*, the more the plaintiff contends it is not true, the less likely it could be taken seriously. If that is so, the plaintiff's reputation has not been besmirched. This may be considered a negation of defamation[193] or of damage,[194] but in any event it leads to a verdict for the defendant. Whether trial judges will find such a subtle argument sufficient to grant a summary judgment for the defendant, however, is questionable.

Whether fictionalization or fiction, the core question remains the same: should such writing be considered fact or fiction for legal purposes? If fiction, should writers be required to label it as such[195] and what standard of liability should be used? If fact, how

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191. *Wheeler*, 300 F.2d at 376.

192. The character was described in the book as "that dame with the dyed red hair and livid scar on her right cheek who had sworn at him in everything but Arabian . . . a noisy foul-mouthed harridan." *Id. Cf.* Lyons v. New Am. Library, 6 MEDIA L. REP. (BNA) 2081 (N.Y. Sup. Ct. 1980) (novel based on "Son of Sam" murder investigation that referred to "this quiff in Malone" not considered to be "of and concerning" county sheriff in Malone, New York who admitted that he did not participate in the investigation).

193. Prosser suggests that if the words were given some other meaning than the obvious one by the recipient, defamation may be said to be absent; however, he also says that absence of belief may not be controlling. The fact that such words concerning the plaintiff are circulating in any form, he says, must have injured the plaintiff's reputation to some extent. W. PROSSER, *supra* note 2, at 746.

194. Absence of belief in the veracity of the words, Prosser says, at least will affect damages. *Id.*

195. *See supra* notes 182-84 and accompanying text. Proper labeling might change the reader's expectations; on the other hand, it could be considered to be nothing more than a subterfuge. The latter view was expressed by the attorney for the plaintiff in Pring v.

much, if any, artistic license should be allowed? When does something cross the fine line between fact and fiction?[196]

The author of a work of fiction under the currently accepted test is placed in an untenable position. He must choose one of two paths. He can admit that the fictitious character is the plaintiff and argue that he did not know or have serious doubt about the false characterization. Or, he can deny that the character is the plaintiff, in which case the author, in effect, admits "actual malice" as defined by the majority in *Bindrim*. In the next section, we propose an alternative—a return to the normal meaning of malice as the measure of fault.

VI
The Solution: Clear and Convincing Evidence of "Subterfuge" and "Malice"

The most simple, precise, and predictable approach to the problem of libel in works of fiction is also probably the most unacceptable: refuse to consider anything in fiction as libelous.[197] Despite the inevitable objections, this solution can fit conveniently within the existing framework of the Restatement of Torts. Relying on a work of fiction as the source for any statement of fact simply would be considered "unreasonable."[198]

Penthouse Int'l, Ltd., 7 MEDIA L. REP. (BNA) 1101 (D. Wyo. 1981), in oral argument on appeal. "Someone writes fiction," he said, "and then hides behind the statement so they can write whatever they want against anybody." *See Tenth Circuit Hears Appeal of $14 Million Libel Verdict*, 7 MEDIA L. REP. (BNA) 2208 (1981). See also *supra* notes 60-88 for a discussion of *Pring*. Proper labeling, however, is made problematic by the belief of some people, such as writer E.L. Doctorow, that "there is no longer any such thing as fiction or nonfiction; there's only narrative." *See* Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 127 n.87 (1980).

196. The recent film *Missing* involves the factual story of the death of a young American in Chile. The film suggests that an American official might have encouraged the protagonist's death. As a result, the United States Ambassador to Chile at the time and another State Department official sued for defamation. *See* Davis v. Costa-Gavras, 10 MEDIA L. REP. (BNA) 2484 (S.D.N.Y. 1984). *See also Missing: Fact or Fabrication?*, TIME, Mar. 8, 1982, at 96. The film makers concede that at least some of the facts in the film were altered for dramatic effect. The responsibility for the young American's death, however, remains a matter of speculation. *Id.* The district court dismissed charges against the publisher of the book on which the film is based, but refused to dismiss the case against the film director. 10 MEDIA L. REP. at 2489.

197. This solution has been advanced by one student author. *See* Comment, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U.L. REV. 571, 592-93 (1980). *Cf.* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. REV. 1, 22-28 (1983)(discussion of absolute first amendment protection for non-fiction).

198. *See supra* note 127.

Chief Justice Rose Bird of the California Supreme Court alluded to this idea in *Guglielmi v. Spelling-Goldberg Productions*,[199] a case primarily concerned with the right of publicity. Justice Bird stated:

> [I]n defamation cases, the concern is with defamatory lies masquerading as truth. In contrast, the author who denotes his work as fiction proclaims his literary license and indifference to "the facts." There is no pretense. All fiction, by definition, eschews an obligation to be faithful to historical truth. Every fiction writer knows his creation is in some sense "false."[200]

Justice Bird's concurrence in *Guglielmi* was cited in *Miss America Pageant, Inc. v. Penthouse International, Ltd.*,[201] a companion case to *Pring*, not to disapprove of the case but rather to distinguish it. *Guglielmi* involved a television program clearly denoted as fiction. The Penthouse article about a Miss Wyoming in *Miss America Pageant, Inc.*, in contrast, was labeled as humor. The inference is that with proper labeling, the Miss Wyoming article would have been insulated from attack.[202]

Such an approach has much to offer. It certainly protects the rights of authors who legitimately draw upon the world around them. Moreover, it has the potential for changing the way in which people look at works of fiction. In the current climate, one may well wonder if the contents of a novel are meant to be taken as true. If the legal system, however, were to refuse to take anything labeled "fiction" as a representation of fact, the public might well respond by looking for less fact in the pages of fiction.

Nevertheless, state legislatures and courts will probably not adopt such a definitive solution. Rather, it seems likely that they will prefer to balance the interests of authors and individuals. This is not undesirable. The central threat to the first amendment still remains the prior restraint.

Viscerally, judges react strongly to aggrieved parties who have no remedies. If the damage remedy—no matter how restricted—is taken away from the libel plaintiff in fiction cases, the temptation to issue an injunction prior to publication will increase. Our constitutional system has always contemplated a virtual prohibition against prior restraint, but at the same time holds a publisher re-

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199. 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

200. *Id.* at 871, 603 P.2d at 459, 160 Cal. Rptr. at 359 (Bird, C.J., concurring).

201. 524 F. Supp. 1280, 1285 (D.N.J. 1981).

202. *Miss America Pageant, Inc.* was decided in the defendant's favor because the plaintiff failed to prove *New York Times* malice. *Id.* at 2183. *Pring*, however, reached a contrary result. *See supra* notes 60-88 and accompanying text.

sponsible for "abusive" publication after the fact. To tamper with this delicate balance in such a way at this late date seems unwise.[203]

Thus, we turn to the solution previously mentioned: redefining the "fault" requirement in a fiction context so as to give breathing room to artistic creativity, while at the same time protecting potential plaintiffs from a potentially libelous publication. There is, of course, little doubt that the full measure of first amendment protections apply to works of fiction.[204] Thus, the novelist and his publisher must be found to be at "fault" in publishing a defamatory matter about a plaintiff. The rationale of *New York Times Co. v. Sullivan* suggests that the "fault" standard for fiction should be defined as follows: the plaintiff must produce clear and convincing evidence (1) that the defendant intentionally used the fiction device as a subterfuge to defame the plaintiff, and (2) that he did so with malice in its ordinary meaning—that is, with hatred, ill-will, or spite.[205]

We have seen that "fault" as defined in non-fiction cases is virtually useless in the fiction context. The first amendment requires protection of the creative process, while at the same time providing a damage remedy to the party who has been aggrievedly abused. The *Corrigan* case,[206] provides an example of a fictitious work where the author was at "fault" under the test set forth above and where the plaintiff should recover.

In *Corrigan*, a New York City magistrate, Joseph E. Corrigan, sued the publisher of a novel that critically described a magistrate named Cornigan.[207] Both character and plaintiff presided over the Jefferson Market Court in New York. Cornigan, however, was portrayed as being "ignorant, brutal, hypocritical, corrupt,

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203. Another proposed solution is raised in Note, *"Clear and Convincing" Libel: Fiction and the Law of Defamation*, 92 YALE L.J. 520 (1983), in which the author suggests a three-part test focusing on the "of and concerning" element of the libel cause of action. As we have argued, the "of and concerning" question is typically left to the jury's discretion, no matter what instructions accompany the submission of the charge. It is improper and unwise to focus the first amendment issue on this traditionally common law concept, especially given the jury's difficulty in grasping the nature of the artistic process involved in the creation of fictitious characters.

204. *See* Franklin & Trager, *supra* note 16, at 217-18.

205. Another commentator has proposed a similar solution for Canada. *See* Madott, *Libel Law, Fiction, and the Character*, 21 OSGOODE HALL L.J. 741, 778 (1983).

206. Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920).

207. The novel was entitled *God's Man* and depicts the adventures of a central character in New York's underworld. *Id.* at 62, 126 N.E. at 262. The lawsuit that was filed against the publisher turned on whether the author's knowledge of the libelous nature of his book could be imputed to the publishing company. *Id.* at 65-71, 126 N.E. at 264-65.

shunned by his fellows, bestial of countenance, unjust, dominated by political influences in making decisions, and grossly unfit for his place."[208]

The similarity of the names and the positions betrays a readily discernable intent on the part of the author to vilify Judge Corrigan.[209] In *Corrigan*, however, the concealment was not even artful. In fact, the author apparently had appeared before the actual judge and had intended to get even with him by means of his book.[210] Consequently, *Corrigan* stands apart from the large body of instances in which writers draw upon real life as a source of inspiration and do not use the fiction device to damage a person and escape liability.[211]

Liability in *Corrigan v. Bobbs-Merrill* is certainly not inconsistent with the first amendment. As the United States Supreme Court said in *Garrison v. Louisiana*:[212]

> [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."[213]

The author who uses the fiction vehicle as a subterfuge in order to "get" the plaintiff does not measure up to first amendment standards and thus may be held liable. He has not used the person to advance his creative efforts, but rather has perverted the fiction label to take cover from the scrutiny applied to non-fiction. This test will catch only a relatively small number of publications, and that is how it should be. Providing breathing space for writers results in broader reading space for all of us.

The first amendment protection in the non-fiction case—at least with respect to public figures and officials—protects the "innocent" mistake. By following the test we have proposed, the "innocent" mistake will be protected while imposing liability for the

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208. *Id.* at 63, 126 N.E. at 262.

209. The table of contents, in fact, lists the relevant chapter as "Justice—a la Corigan," but the heading in the body of the book spells the name "Cornigan." *Id.* at 63, 126 N.E. at 262.

210. *Id.* at 68, 126 N.E. at 264.

211. *See supra* notes 19-59 and accompanying text.

212. 379 U.S. 64 (1964).

213. *Id.* at 75 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

calculated, intentional defamation. Our test likewise solves the thorny problem of "what is fiction?" If the defendant claims that his work is fiction, the jury is permitted to determine whether the author used that device as a subterfuge to defame the plaintiff.

In reality, the test we propose is a compromise born of the fact that absolute immunity for works of fiction is unlikely to be enacted. Short of such absolute immunity, however, we believe that blame should be placed only on those who are blameworthy. In works of non-fiction, the actual malice requirement increases the protection given to authors. As misapplied to fiction, the standard has reduced the degree of protection afforded authors. Thus, rather than transplanting the concept to foreign soil, the courts should fashion a constitutional test that allows fiction to flower. A return to the traditional meaning of malice would accomplish that goal, benefitting those who grow works of fiction as well as those of us who admire the garden.