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Libel Law, Fiction, and the Charter

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LIBEL LAW, FICTION, AND THE CHARTER*

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> Be not too tame neither, but let your own discretion be your tutor. Suit the action to the word, the word to the action, with this special observance, that you o'erstep not the modesty of nature. For anything so o'erdone is from the purpose of playing, whose end, both at the first and now, was and is, to hold, as 'twere, the mirror up to nature; to show virtue her own feature, scorn her own image, and the very age and body of the time his form and pressure.
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> *Hamlet*, III, ii, ll. 17-25.
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> All the characters in this book are fictitious, and any resemblance to actual persons living or dead is purely coincidental.

I. INTRODUCTION

On June 26, 1980, Master Sandler of the Ontario Supreme Court rendered a decision on what might have seemed two rather innocuous procedural matters.[1] The first was an application by the defendants in a libel action to amend their pleadings to buttress a defence that the plaintiff had no reputation to injure. The second was an application by the plaintiff in the same action to compel the defendant writer to reattend at discovery; the plaintiff wanted answers to his questions. The matters in dispute had to do with sources the defendant had consulted in preparing his manuscript. What makes this second aspect of the motion so special, what lifts it out of the realm of procedural nicety, is that this particular defendant happened to be a novelist — and, after Master Sandler's decision, would be the first Canadian novelist ever ordered by a court to reveal his sources.[2] "While there is protection against revelation of sources for newspapers and reporters . . . [t]here is no such protection for novelists."[3]

No precedent was cited for this blanket assertion regarding novelists. Master Sandler reasoned that questions as to sources *became* relevant to one of the defendant's pleadings, namely, that the novelist Ian Adams had not *intended* his fictional character "S" to refer to the plaintiff, Leslie James Bennett.[4] Malice and intention are only relevant when the defences of privilege and fair comment are pleaded; neither had been pleaded in this case.[5] The lack-of-

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[1] *Bennett* v. *Gage Educational Publishing Ltd. et al* (1980), 16 C.P.C. 241.

[2] Overbury, *Sue and be Dandy*, Books in Canada, Nov. 1980, 3.

[3] *Supra* note 1, at 244. In support of his statement regarding newspapers and reporters, Master Sandler cited *Reid* v. *Telegram Publishing Co. Ltd.*, [1961] O.R. 418, 28 D.L.R. (2d) 6 (H.C.), and *Drabinsky* v. *Maclean-Hunter Ltd.* (1980), 28 O.R. (2d) 23, 108 D.L.R. (3d) 391 (H.C.). No authority was stated for the proposition regarding novelists.

[4] *Id.* at 244.

[5] *Id.* at 243.

intention pleading, then, was legal window dressing, although the defendants might plead it with a view to mitigating damages if they wished. The "only real liability issue," according to Master Sandler, was "the identity issue" — that is, whether the character "S" was "capable of being understood to refer to the plaintiff."[6] Because the defendants had made the source question of relevance by pleading lack of intention to refer to the plaintiff, the plaintiff was entitled to pursue answers so as to negative this plea. Hence, Ian Adams must be compelled to answer questions about the source for his character "S" in the novel *S, Portrait of a Spy.*

In an unsettling way, the decision makes technical sense of the law of libel as it stands in Canada. If a defendant makes a false and defamatory statement of fact, and does not plead privilege or fair comment, his lack of intention to defame, just as his lack of intention to refer to the plaintiff, is irrelevant.[7] *Bona fides* is no defence. The regime is one of strict liability. "The question is not so much who was aimed at as who was hit."[8]

At a deeper level, however, the decision posits a singular absurdity, which has to do with the *idea* of compelling a writer of fiction to reveal his sources. Fiction does not have sources in the journalistic sense. Fictional characters are composites, made in varying measure from the rag-and-bone shop of the writer's own imagination, insight and experience. Fictional characters are not *meant* to identify real people. But to allow a plaintiff to test this lack of intention through compulsion of sources is to say: "You did not mean to write fiction at all, you meant to write fact. You identified me in your book because, like your character, I too have asthma and worked as an intelligence officer for the R.C.M.P. But, unlike your character, I was never a counter-agent for the K.G.B. and the C.I.A. I was not a traitor to my country.[9] Because you got your facts wrong, because in this particular and that I am not at all like the character in your book, you have falsified and defamed me. You, Mr. Writer, are liable precisely because there both was and was not enough truth to your fiction. You are liable for writing fiction."

That is the inevitable absurdity of which Professor Kalven[10] wrote in his seminal assessment of *New York Times Co.* v. *Sullivan*,[11] when he spoke of the "gossamer thread" on which the defendant's liability depends, a thread which is made thinner by the way identifying truths and defamatory untruths are pleaded: "There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances,

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[6] *Id.*

[7] Gatley, *Libel and Slander* (8th ed. London: Sweet and Maxwell Limited, 1981), at para. 8; Klar, *Developments in Tort Law: The 1978-79 Term* (1980), 1 S.C.L.R. 312 at 324; Weiler, *Defamation, Enterprise Liability, and Freedom of Speech* (1967), 17 U.T.L. J. 278 at 280; *Hulton & Co.* v. *Jones*, [1910] A.C. 20.

[8] *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 at 262 (N.Y. Ct. App. 1920).

[9] This is a paraphrase of the actual pleadings of the plaintiff in *Leslie James Bennett* v. *Ian Adams and Gage Educational Publishing Limited*, In the Supreme Court of Ontario, Dec. 19, 1977, Action No. 20362/77, amended statement of claim paras. 4, 5 and 6.

[10] Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* [1964] Sup. Ct. Rev. 191 at 199.

[11] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

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 plaintiff in the first place."[12]

Master Sandler was correct when he said that the only real liability issue was identity.[13] Although, in a libel action, the plaintiff is required to prove every element of the claim,[14] a suit involving fiction turns on the issue of identification.[15] Had Leslie James Bennett succeeded in proving sufficient identification at trial, Ian Adams and his publisher Gage would have been virtually without defence.

Justification, or the truth defence, is tactically foreclosed. It is unlikely that any writer of fiction will admit that his creation was thinly disguised fact.[16] The law of libel has never recognized a justification defence for the "higher truths" of art[17] — the mirror-up-to-nature truths which may distort surface details in pursuit of essential truths.

Nor is fair comment a viable defence. Although an argument can be made for the extension of this defence when dealing with works of "faction"[18] (a novel derived from an admixture of fact and fantasy) as an "opinion" about human motivation, literary novels which do not have a political thrust do not really qualify as comment.[19] This defence is made even more unlikely by virtue of the requirement that the comment be based substantially on true facts.[20] Re-

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[12] *Supra* note 10, at 199.

[13] *Supra* note 1, at 243.

[14] Duncan and Neill, *Defamation* (London: Butterworths, 1978) at para. 5.01:
(a) that the words complained of were published of him;
(b) that the words were defamatory of him; and
(c) that the words were published by the defendant or in circumstances in which the defendant is responsible for the publication.

[15] Wilson, *The Law of Libel and the Art of Fiction* (1981), 44 Law and Contemporary 27 at 33; Stam, *Defamation in Fiction: The Case for Absolute First Amendment Protection* (1981), 20 PEAL 70 at 86; Yayashi and Littlefield, *Fiction Based on Fact: Writers' Liability for Libel or Invasion of Privacy* (1981), 14 U.C.D.L. Rev. 1029 at 1039; McCloskey, *Suing the Artist for Libel — The Pendulum Swings Back* (1982), 71 111. B.J., 124 at 128.

[16] Franklin and Trager, *Literature and Libel* (1982), 4 Comm/Ent. L.J. 205 at 214.

[17] Silver, *Libel, the "Higher Truths" of Art, and the First Amendment* (1978), 126 U. Pa. L. Rev. 1065.

[18] *Id.* at 1067-69. Professor Silver cites Robert Coover's *The Public Burning* as an example of the genre.

[19] *Supra* note 14, at para. 12.02:
The main principles relating to the defence of fair comment are as follows:
(a) the comment must be on a matter of public interest;
(b) the comment must be based on fact;
(c) the comment, though it can include inferences of fact, must be recognizable as comment;
(d) the comment must satisfy the following objective test: could any man honestly express that opinion on proved facts?;
(e) even though the comment satisfied the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

[20] *Vander Zalm* v. *Times Publishers* (1980), 12 C.C.L.T. 81 (B.C.C.A.), *per* Nemetz C.J.B.C. at 213: ". . . the matter must be recognizable to the ordinary man as a comment upon true facts. . . ."

cent cases where the defence has been tested in more likely contexts are further reason for scepticism.[21]

I will be discussing the defence of qualified privilege at greater length as one area which might prove pliant in response to the *Canadian Charter of Rights and Freedoms*.[22] While the general principles may appear broad, their application in Canada thus far has proved rather inflexible.[23]

The unavailability of traditional defences for the writer of fiction is attested to by the fact that Ian Adams in the *Bennett* suit did not rely on them.[24] He argued primarily that *the characters were fictional* — written against a background of public offices and institutions not belonging to anyone; and secondarily, that *the plaintiff did not have a reputation to injure* by reason of the circumstances surrounding his retirement from the R.C.M.P. after interrogation relating to security activities.[25] We will never know how successful those pleas might have been. The case settled out of court three years after the writ was served, and before the appeal from Master Sandler's decision could be heard.[26]

If the motion before Master Sandler is any indication, it suggests a willingness to treat fiction as non-fiction for the purpose of libel law — to treat it as if it has a compellable source. This leaves the writer virtually without defence. For once it is established that a character in a novel has a real-life counterpart, it is a virtual certainty that the negative aspects of the portrayal will "tend to lower the plaintiff in the estimation of right-thinking members of society generally."[27] That there must be negative aspects of the characteriza-

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[21] See e.g. *Chernesky* v. *Armadale Publishers Ltd.*, [1978] 6 W.W.R. 618, 90 D.L.R. (3d) 321 (S.C.C.).

[22] Part I (ss. 1-34) of the *Constitution Act, 1982*, Sched. B of the *Canada Act 1982*, 1982, c. 11 (U.K.).

[23] *Boland* v. *Globe and Mail Ltd.* (1960), 22 D.L.R. (2d) 277 (S.C.C.).

[24] *Bennett, supra* note 9, Statement of Defence of Ian Adams.

[25] *Id.* at paras. 4, 7, 11.

[26] Gage settled with Leslie James Bennett for $30,000 on December 18, 1980 (Memorandum of Agreement, litigation file of Paul Copeland, counsel for Ian Adams). A little known fact is that Gage held libel insurance with a $50,000 deductible. Because the lawyer representing Gage was also the lawyer for the insurer, there was a real incentive to settle, for fear that a judgment might involve the publisher in sums far in excess of the deductible. In an agreement between Gage and Ian Adams, collateral to this settlement, Adams became responsible for $10,000, which sum was to include Adams's buy-back of the paperback rights. That collateral agreement has spawned further litigation between Adams and Gage. (*Gage* v. *Adams*, in the County Court of the Judicial District of York, Nov. 10, 1981, Action No. 158362/81.) Thus, the consequences of the *Bennett* suit are far from over. (Conversation with Paul Copeland, March 3, 1983). See also Callwood, "Publish and Be Damned", *Toronto Life*, June 1982 at 30, in which June Callwood describes the devastating impact that being sued has upon the writer. One American commentator has suggested that, quite apart from a defendant's chances regarding liability, the mere prospect of litigation acts as a procedural chill on the constitutional freedom. (Anderson, *Libel and Press Self-Censorship* (1975), 53 Tex. L. Rev. 422.) Thus, a constitutional guarantee that operates to buttress a defence may be operating at the wrong end of the spectrum.

[27] *Sim* v. *Stretch* (1936), 52 T.L.R. 669, [1936] 2 All E.R. 1237 at 1240 *per* Lord Atkin.

tion, we know from the fact the plaintiff has filed suit. Fiction becomes libelous by its very nature. It is both truth, and non-truth. Well might the writer here be tempted to say to the State as did the fool to King Lear: "Pr'ythee, nuncle, keep a schoolmaster that can teach thy fool to lie: I would fain learn to lie."[28] Surely that is the message to writers of fiction: learn to lie so completely that your art bears no traceable resemblance to reality, or do not write at all. Do not make life one of your sources.

What can one say of a law which deprives a segment of its citizenry of its defences? A new weight has been added to the balance — the constitutional argument:[29]

> The law of defamation must strike a fair balance between the protection of reputation and the protection of free speech, for it asserts that a statement is not actionable, in spite of the fact that it is defamatory, if it constitutes the truth, or is privileged, or is fair comment on a matter of public interest, expressed without malice by the publisher. These defences are of crucial importance in the law of defamation because of the low level of the threshhold which a statement must pass in order to be defamatory. . . . This is the reason why most defamation actions centre on the defences of justification, fair comment, or privilege. *It is these defences which give substance to the principle of freedom of speech.*
> [Emphasis added.]

What Mr. Justice Dickson called a "principle" in his well-reasoned dissent in *Cherneskey* is now a constitutionally entrenched freedom. Ironically, this freedom may be the fiction writer's only defence.

It is precisely because traditional defences in the law of defamation are unworkable for fiction that the constitutional balance presents itself in starkest relief: society's pervasive interest in preserving reputation and in seeing that a person's name is not traduced with impunity, contrasted with society's equally pervasive interest in seeing that freedom of expression — the "breath of life"[30] of a constitutional democracy — is not infringed or denied without demonstrable justification.

This paper addresses the special problems fiction creates for the law of libel. Because the constitution argument is the law of libel's newest accretion, some time will be spent discussing the Charter at a general level: the substantive arguments which are likely to arise; theoretical bases underlaying freedom of expression; the thorny issue of Charter application; and the way in which American defamation law has responded to constitutional challenges. The return journey will focus on the significant elements of the libel action as regards fiction — notably, the issue of identification. I will then conclude with the special claim of fiction to Charter protection, and a suggested test for balancing the countervailing expressive and reputational interests through an expanded defence of qualified privilege.

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[28] Shakespeare, *King Lear* I, iv.

[29] *Cherneskey, supra* note 21, at 342-43, *per* Mr. Justice Dickson, dissenting.

[30] *Re Alberta Statutes*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81 at 133 (S.C.R.), 107 (D.L.R.) *per* Duff C.J. In the passage in which these words appear, it is political speech to which Chief Justice Duff refers: "it is axiomatic that the practice of this right of free discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions."

II. BROAD OUTLINES OF THE SUBSTANTIVE ARGUMENT

One should begin by delineating, in broad brushstrokes, the outline of the substantive arguments one is likely to hear.

The defendant will have raised all of his traditional tort defences — qualified privilege, justification, fair comment, and so on. He will argue that these defences are constitutionally deficient for failure to provide the safeguards for freedom of expression that are required by section 2(b) of the Charter. He may also argue that the burden of having to prove each ingredient of his defence[31] is inconsistent with section 1 of the Charter, which appears to place the burden squarely on the party who would claim that a limit upon a fundamental freedom is "demonstrably justified in a free and democratic society".[32] He may further argue that the presumption of malice as presently framed is constitutionally deficient, again as a denial of his freedom of expression.[33] A similar argument might be made as regards the present rule of

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[31] *Cherneskey, supra* note 21, at 330 *per* Ritchie J.

[32] This argument based on section 1 is slightly different from the one discussed *infra.* The argument could be framed by analogy to recent reverse-onus cases under the criminal law, notably the important Ontario Court of Appeal decision in *R.* v. *Oakes* (1983), 2 C.C.C. (3d) 339, 145 D.L.R. (3d) 123. In *R.* v. *Oakes*, the legal issue was whether section 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1 offended the right of an accused to be presumed innocent, as guaranteed by sub-section 11(d) of the Charter. Martin J.A., speaking for a unanimous court of five judges, reasoned that a reverse onus provision does not, *per se*, contravene the right to be presumed innocent, provided that the particular reverse onus provision is a reasonable limitation of that right. *Id.* at 362 (C.C.C.), 146 (D.L.R.). In determining whether a reverse onus provision is a reasonable limit, the court should consider three factors: 1. the magnitude of the evil sought to be suppressed; 2. the difficulty of the prosecution making proof of the presumed fact; and 3. the relative ease with which the accused may prove or disprove the presumed fact. *Id.* at 362 (C.C.C.), 146 (D.L.R.). But even if section 8 of the *Narcotic Control Act* were otherwise justifiable according to the above three criteria, it could not be justified as a reasonable limit under section 1 of the Charter, since it "casts upon the accused the burden of disproving not some formal element of the offence but the burden of disproving the very essence of the offence." *Id.* at 363 (C.C.C.), 147 (D.L.R.). By analogy, one could argue that a civil rule of liability which casts the burden on the defendant to prove that his opinion is not counterfeit or that his motives are not malicious casts upon the defendant an impossible burden — the burden of disproving the very essence of the libel. It reduces freedom of expression to a "mere shadow," makes the guarantee "wholly illusory and fanciful." *Id.* at 353 (C.C.C.), 137 (D.L.R.).

Regarding burden of proof under the *Charter*, see generally Marx, "Entrenchment, Limitations and Non-Obstante," in Tarnopolsky and Beaudoin, eds., *Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982), 61 at 68, Conklin, *Interpreting and Applying The Limitations Clause: An Analysis of Section 1* (1982), 4 Supreme Court L.R. 75.

[33] "Malice" and "maliciously" are used in a number of different contexts in the law of defamation. When used in a statement of claim, a plea of maliciousness is, strictly speaking, unnecessary. The falsity of defamatory words is presumed and the burden of proving them true is placed on the defendant. Similarly, the publication of defamatory words is presumed to be malicious. In this context, the word malicious does not imply a state of mind or intention to defame. Intention is irrelevant. Duncan and Neill, *supra* note 14, at paras. 17.01-02.

The second context in which malice is used is to defeat a defence of fair comment or qualified privilege, and its meaning can be a source of confusion in Canada, as epitomized by the majority and minority opinions in the *Cherneskey* decision, *supra* note 21. In a sense, the majority never came to consider malice. It held that the defendant newspaper had failed to prove affirmatively an element of its defence of fair com-

damages.[34] The question for the court at this stage of the argument will be whether the particular rule of liability, by its burdens, definitions of malice, and so on, abridges freedom of expression as guaranteed by the Charter. This question revolves around the meaning of section 2(b). Does the particular tort rule of liability infringe or deny freedom of expression as guaranteed by that section.

The plaintiff would counter the above by arguing, first, that there has been no infringement or denial of a Charter right. Defamatory utterances are not within the definitional ambit of what is meant by freedom of expression. That is, defamatory statements of fact are not constitutionally protected expressions. Second, the *Canadian Charter of Rights and Freedoms* applies only to governmental infringement of individual rights; it has no application in a private dispute between private parties. Finally, even if the court overcomes the application hurdle and further finds that freedom of expression has been infringed or denied, that freedom is subject to such reasonable limits as can be "demonstrably justified in a free and democratic society". Laws against defamation exist in all democratic societies. The *Criminal Code* provisions against libel[35] are evidence of a social consensus that such laws are desirable, and that comparable civil laws aimed at the protection of reputation are reasonable limits, demonstrably justified in a free and democratic society."[36]

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ment — namely, its "honest belief" in the opinions expressed in the letter complained of. *Id.* at 330 (D.L.R.), *per* Ritchie J. Dickson J. framed the issue differently. Once the comment has been shown to be objectively fair, Dickson J. would shift the burden to the plaintiff to prove that the defendant was actuated by express malice: "Malice is not limited to spite or ill will, although these are its most obvious instances. Malice includes any indirect motive or ulterior purpose, and will be established if the plaintiff can prove that the defendant was not acting honestly when he published the comment. This will depend on all the circumstances of the case. Where the defendant is the writer or commentator himself, proof that the comment is not the honest expression of his real opinion would be evidence of malice. If the defendant is not the writer or commentator himself, but a subsequent publisher, obviously this test of malice is inappropriate. Other criteria will be relevant to determine whether he published the comment from spite or ill will, or from any other indirect and dishonest motive." *Id.* at 346 (D.L.R.). My point is that, depending on how they are framed, tests of "honesty of belief" and "malice" may have a decided impact on the success of defences, hence on freedom of expression. As one commentator has opined: "To require a defendant to prove that his opinion was not counterfeit, or that the motives of the writer were not malicious, requires the disproving of malice. The law should not assume malice on the part of a defendant who expresses or publishes an objectively fair comment on a matter of public interest. Quite to the contrary, he who alleges improper motives should have the full burden of proving them." Klar, *The Defence of "Fair Comment,"* 8 C.C.L.T. 149 at 154. These tests will undoubtedly involve some re-alignment under pressure from the constitutional argument.

[34] "[Libel] is actionable without proof of damage, as general damages are presumed." Linden, *Canadian Tort Law* (3d ed. Toronto: Butterworths, 1982), 687.

[35] R.S.C. 1970, c. C-38, sections 261-64.

[36] It is to be hoped that the circularity of this argument will be recognized and repudiated. The import of section 52 of the Charter is that any law must be justified anew against the standard of the Supreme law of Canada. The mere existence of a law is not its justification. However, in a recent decision on the constitutional validity of the censorship provisions of *The Theatres Act*, R.S.O. 1980, c. 498, an Ontario Divisional Court came close to adopting this sort of analysis in relation to the requirement of demonstrable justification: "Eight other provinces and many other free and democratic countries have similar legislation. . . . Moreover, the federal criminal prohibition against obscenity is evidence that there is and has been sufficient concern in this country

Leaving aside for a moment the issue of the Charter's application, the constitutional argument will revolve around an examination of section 1. Both at the first stage (is there a breach?) and at the second stage (is the tort rule of liability a reasonable limit?), the court will be confronted with a choice between two conflicting interests: tort law's interest in seeing that a person's reputation is not traduced with impunity; and the constitutional commitment to freedom of speech.

There will be no absolute choice. To ask whether defamation law is *per se* unconstitutional as an abridgement of freedom of speech, is to ask the question at far too general a level; just as to ask whether defamation law is a "reasonable limit" is to pose a somewhat meaningless generality. Rather, it will be a question of determining at what point along a continuum libel law impinges on the constitutional guarantee — a question, in other words, of adjusting presumptions, burdens and elements of the traditional tort action so that it accords with the constitutional guarantee. The substance and procedures of libel law must now be evaluated against the background of a constitutional commitment. The question is, how will the balance be struck? What principles will the court draw upon in prescribing limits to this freedom?

Professor Weiler has identified four criteria that can be adopted in relation to liability for defamation, depending on the relative importance our society wishes to confer on the respective values of free speech and freedom from defamation.[37]

At one end of the scale, society can choose to impose strict liability for erroneous statements of fact which result in loss of reputation, *regardless of fault.* This is our system as presently constituted.[38] A regime of strict liability accords overriding weight to the interest in compensating persons for loss of their reputation; in removing the deterrent from people who might wish to

about this problem to enact legislation to combat it. We are satisfied, therefore, that some prior censorship of film is demonstrably justified in a free and democratic society." *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors* not yet reported, Mar. 25, 1983 (Ont. Div. Ct.) at 11. Prior legislative activity, such as a *Criminal Code* provision for libel, may be some evidence of social consensus, but it can hardly be determinative of demonstrable justification — especially when one appreciates that this legislation is itself open to challenge. See e.g. *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), where the United States Supreme Court voided a state criminal libel statute.

Compare the deference to legislative choice suggested by the Ontario censorship decision, with the powerful judgment of Martin J.A. in *R.* v. *Oakes, supra* note 32, at 362-63 (C.C.C), 146-47 (D.L.R): "Great weight must be given to Parliament's determination with respect to the necessity for a reverse onus clause in relation to some element of a particular offence. Certainly, reverse onus clauses exist in other free and democratic societies. . . . However, a reverse onus provision, even if otherwise justifiable by the above criteria, cannot be justified as a reasonable limitation of the right to be presumed innocent under section 1 of the Charter in the absence of a *rational connection* between the proved fact and the presumed fact. In the absence of such a connection the presumption created is purely arbitrary." The analysis in *R.* v. *Oakes* rejects a "frozen" approach to demonstrable justification, and instead seeks out an objective test for determining rational connection which is at once wedded to the context and constitutionally principled. Mere longevity or prior judicial endorsement of a law is not conclusive of its demonstrable justification.

[37] Weiler, *supra* note 7, at 330-32.

[38] *Id.*

enter public life; and in distributing losses using the enterprises most likely to offend — those forums of public discussion, such as newspapers and the electronic media. The unfairness of this regime is that it requires one segment of society to pay the cost of preserving a social value in which we are all vitally interested. It limits constitutional protection to only those statements which can be proven true. This intolerance for even marginal error tends to produce self-censorship, by which we all ultimately lose.[39]

A second criterion is to require proof of "fault" before attaching liability — fault being the failure to exercise *reasonable care* in checking and publishing statements which cause reputational loss. Although preferable to the first model, the requirement of reasonableness still means that enterprises of public discussion will bear the weight of miscalculation, or the juror's assessment as to what constitutes reasonableness. The standard of reasonableness does not mean that only false speech will be deterred. It is an uncertain standard and, again, likely to result in prior-censorship.[40]

Professor Weiler's third possible basis for liability is "actual malice." This test excepts from constitutional protection the intentional telling of lies. Hence, in *New York Times*,[41] the United States Supreme Court created a qualified privilege for any defamatory statement made of a public official or of his official conduct, defeasible only upon proof of actual malice. A statement is malicious when it is made with knowledge of its falsity or with reckless disregard for whether it is true or false. The purpose of the *New York Times* criterion was to found a rule of liability against the "background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[42]

The fourth criterion in establishing liability for defamation is to accord an absolute immunity for all political discussion — that is, to view freedom of expression as an absolute. To the extent that *intentional* communication of falsehood can only be inferred circumstantially, there is always a danger that a jury will impose liability for political opinion. This view of the constitutional imperative places public interest in free and open debate above all other interests the state might have in reputation. This is the minority position of Mr. Justices Douglas and Black of the United States Supreme Court and can be paraphrased in one sentence: "I take no law abridging to mean no law abridg-

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[39] *New York Times, supra* note 11 at 278, citing *Smith* v . *California*, 361 U.S. 147 at 153-54: "For if the bookseller is criminally liable without knowledge of the contents . . . he will tend to restrict the books he sells to those he has inspected: and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden. . . ."

[40] *Time, Inc.* v. *Hill*, 385 U.S. 374 at 389 (1967), *per* Mr. Justice Brennan: "Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait."

[41] *Supra* note 11.

[42] *Id.* at 270.

ing."[43] The absolute test is intended to bring a broader range of expressions within constitutional protection. It does so by viewing a wider sector of activities as inherently governmental, and by including "a more extensive area of expression" within the *definition* of "freedom of speech."[44]

It is unknown whether Canadian courts will ever grant absolute immunity to political discussion. But even if the forms of expression that can qualify for constitutional protection are liberally defined, it is highly unlikely that *all* such forms will be granted absolute immunity. The way in which section 1 of the *Canadian Charter of Rights and Freedoms* is framed makes it clear that the rights and freedoms are not absolute.

The court is now the guardian not only of private character, but also of freedom of expression. The choice of a civil rule of liability — the position the court adopts along the continuum — will give both substance and parameter to the constitutional freedom. It is to be hoped that, in choosing its criteria, the court will remember: "Whatever is added to the field of libel is taken from the field of free debate."[45] In society, there exist many interests, and the free exercise of one right can involve impingement on another. The court must be the arbiter between these countervailing interests, for neither the writer nor the defamed individual "can be trusted to define the freedom of the other."[46] The court's power is to define both freedoms through interpreting the Constitution. The question is, where will it look for guidance in its attempt to formulate legal doctrine? The next part of this paper will explore American and Canadian theoretical bases for freedom of speech.

III. AMERICAN THEORETICAL BASES FOR THE FIRST AMENDMENT[47]

Traditional theory of freedom of expression begins with this purposive approach of Mr. Justive Holmes in his celebrated dissent in *Abrams* v. *United States:*[48]

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas —

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[43] See e.g., Black, *The Bill of Rights* (1960), 35 N.Y.U.L. Rev. 865 at 867. (This paraphrase was coined by Meiklejohn, *The First Amendment is an Absolute*, [1961] Sup. Ct. Rev. 245 at 246.

[44] Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966) at 56-58.

[45] *New York Times, supra* note 11, at 272, citing Judge Edgerton in *Sweeney* v. *Patterson*, 128 F. 2d 457 at 458 (D.C.Cir.), *cert. denied*, 317 U.S. 678 (1942).

[46] Bork, *Neutral Principles and Some First Amendment Problems* (1971), 47 Ind. L.J. 1 at 3.

[47] The First Amendment to the United States Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[48] 250 U.S. 616 at 630 (1919).

> that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Thus expressed, freedom of speech is valuable, first of all, as a means to an end — the better attainment of truth. The "marketplace of ideas" argument, described in the language of the American capitalist enterprise, expresses a kind of Darwinian faith in the power of truth to win acceptance in the market, given the chance to compete. The danger of this theory is that it may lead to its opposite — that perceived falsehood immediately puts a different cast on the constitutional question: "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity."[49]

Hence is borne the category approach to the First Amendment — the 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."[50] Included in the category approach as unprotected speech we find "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[51] Once defined, these classes of speech prove remarkably resilient.[52]

Apart from its tendency to spawn categories of speech which do not fall within protection, the problem with the "marketplace of ideas" theory is that the right to differ about what *is* "the truth" may be subtly endangered.[53] Notions of falsity pose particular dangers for the artist. Just as an immoral man can tell a moral tale (Chaucer, "The Pardonner's Prologue", *The Canterbury Tales*), the poetic "lie" can be the vehicle of truth. The interplay of truth and illusion is one of the classic themes of literature. In Thomas Mann's *Felix Krull*, the narrator contemplates the actor in his dressing room, now stripped of his paint. The "truth" is a pimpled individual, a "repulsive worm" who a moment ago on stage was "the glorious butterfly". The contrast is so marked that Felix Krull is moved to inquire: "which is the 'real' shape of the glow-worm; the insignificant little creature crawling about on the flat of your hand, or the poetic spark that swims through the summer night? Who would presume to say?"
poetic spark that swims through the summer night? Who would presume to say?"

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[49] *Garrison, supra* note 36 at 75 (1964).

[50] *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 at 572 (1941).

[51] *Id.*

[52] After years of role repetition of the categorical approach, its sudden scrutiny in *New York Times, supra* note 11, must have seemed unexpected indeed. The tenor of the *New York Times* rejection is that a mere label of state law cannot end the constitutional debate: ". . . libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *Id.* at 269.

[53] Tribe, *American Constitutional Law* (New York: The Foundation Press, 1978) at 577.

The danger for the artist is that, in puritan times, the law might presume to pass judgment on what is truth. A theory of freedom of expression which leaves "lies" unprotected as having minimal social utility could easily be extended to comprehend poetic lies.

A second theory of freedom of speech sees the First Amendment within the narrower perspective of its political function. Free speech is protected as essential to informed self-government: The First Amendment "protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility."[54] According to Alexander Meiklejohn, the most frequently cited proponent of this theory, literature and the arts are protected because they have a social importance, which he calls a "governing" importance.[55] "People need novels and drama and paintings and poems because they will be called upon to vote."[56] They "must be self-educated in the ways of freedom."[57] Literature feeds into this theory as a function of the informed vote. It is a form of thought and expression from which the "voter derives the knowledge, intelligence, sensitivity to human values; the capacity for sane and objective judgment which, . . . a ballot should express."[58] Professor Tribe's criticism of this theory is that it is a partial view; it tells us disappointingly little.[59] It does not tell us, for instance, *why* self-government is to be valued. It is too rational, too political to accommodate the cry of impulse, the expression of self which has no ostensible purpose beyond expression.[60]

An answer to Professor Tribe's question — *why* self-government, *why* democracy, at all? — is suggested by Mr. Justice Brandeis' philosophical attempt to lay down a comprehensive theory of the First Amendment:[61]

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them,

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[54] Meiklejohn, *supra* note 43, at 255.

[55] *Id.* at 262.

[56] *Id.* at 263.

[57] *Id.*

[58] *Id.* at 256.

[59] *Supra* note 53, at 578.

[60] Hannah Arendt, in her reflections on thinking describes the urge toward "self-display" as a developmental movement toward epiphany: "Seen from the viewpoint of the spectators to whom it appears and from whose view it finally disappears, each individual life, its growth and decline, is a developmental process in which an entity unfolds itself in an upward movement until all its properties are fully exposed; this phase is followed by a period of standstill — it's bloom, or epiphany, as it were — which, in turn, is succeeded by the downward movement of disintegration that is terminated by complete disappearance." Arendt, "Reflections: Thinking — 1", *The New Yorker*, Nov. 21 1977, 65 at 82. From this philosophical perspective, self-expression might be seen as one of the goals of life.

[61] *Whitney* v. *California*, 274 U.S. 357 at 375-76 (1927).

> discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Freedom of expression is both an end and a means, as is democracy both an end and a means. Through democracy, we make men free to develop their faculties, and the quality of the democracy that results is necessarily incidental to the quality of their freedom. To silence the individual is not only to diminish his life — that developmental process toward his own epiphany — it is a silence by which we are all, somehow, diminished, cut off from the kind of society we might have been.

Mr. Justice Brandeis's words posit a vision of the First Amendment which sees freedom of expression as a constitutive part of both individual and societal liberty. It may not help us to delineate the boundaried world within which expression is to be protected and outside of which it is not, but it at least points to the dangers of a partial view — an almost existential silence: "The argument of force in its worst form."[62]

IV. CANADIAN THEORETICAL BASES: FREEDOM GOVERNED BY LAW

Even before freedom of expression was entrenched in Canadian constitutional law, our courts found the theoretical bases for it implicit in the preamble to the *Constitution Act, 1867*.[63] According to Duff C.J. and Cannon J. writing in *Re Alberta Statutes*[64] the preamble showed plainly that the Constitution of Canada was to be similar in principle to that of the United Kingdom, which meant a parliament working under the influence of public opinion and public discussion:[65] "it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions."[66] Cannon, J. further rooted

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[62] *Id.*

[63] 30 & 31 Vict., c. 3 (U.K.).

[64] *Supra* note 30. In *Re Alberta Statutes*, the Press Bill was part of a general scheme of Social Credit legislation which dealt, in the main, with taxation of banks and consolidation of credit in Alberta. This omnibus legislation was held *ultra vires* the province on federalism grounds, and the Press Bill fell as ancillary and dependent legislation. Hence, the statements Duff C.J. and Cannon J. regarding liberty of the press and the right of public discussion are *obiter*.

[65] *Id.* at 133 (S.C.R.), 107 (D.L.R.), *per* Duff C.J., at 146 (S.C.R.), 119 (D.L.R.), *per* Cannon J.

[66] *Id.*

freedom of speech in a concept of democracy: "Freedom of discussion is essential to enlighten public opinion in a democratic state. . . . Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the state within the limits set by the criminal code [*sic*] and the common law."[67]

But both Cannon, J. and Duff, C.J. recognized that there were competing societal values. What is meant by freedom of speech is freedom "governed by law."[68] The right is subject to legal restrictions, "those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned."[69]

In view of the Charter, *Re Alberta Statutes* is enlightening in two respects.[70] It is an early attempt to import a notion of freedom of expression into the Canadian context. It suggests two tests for determining when that freedom is abridged or denied.

The first test is what we might term a "traditional forms test." Any attempt to abrogate the right of public debate, or to suppress "the traditional forms" of its exercise, (for example, public meetings and the press) would be *ultra vires* the provinces.[71] Secondly, while some degree of regulation of newspapers "everybody would concede to the Provinces,"[72] there is a limit to that regulation. The limit is reached "when the legislation affects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada. . . ."[73]

The reasoning is "principled." It rests on a foundation.[74] But like Mr. Justice Holmes' "market place of ideas" theory, one might regard this reading as a partial view. From the perspective of *Re Alberta Statutes*, freedom of

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[67] *Id.* at 145-46 (S.C.R.), 119 (D.L.R.).

[68] *Id.* at 133 (S.C.R.), 107 (D.L.R.).

[69] *Id.*

[70] For the relevance of pre-Charter caselaw, see generally Finkelstein, *The Relevance of Pre-Charter Caselaw for Post-Charter Adjudication* (1982), 4 Supreme Court L.R. 267.

[71] *Supra* note 30, at 134 (S.C.R.), 108 (D.L.R.).

[72] *Id.*

[73] *Id.*

[74] The genesis for the theory that a legal basis for freedom of speech could be "implied" from the Preamble to the *Canada Act, 1867* is to be found in the dicta of Duff, C.J. and Cannon J. in *Re Alberta Statutes, supra* note 30. The reasoning was that the Preamble showed plainly that the Canadian constitution was to be similar in principle to that of the United Kingdom, and that this contemplated a parliament working under the influence of public opinion and public discussion. This reasoning is open to criticism, for the very implication of rights suggests that Courts have competence to scrutinize legislation on other-than federalism grounds. British constitutional principles, based on the notion of parliamentary supremacy, would seem not to admit of court-imposed restrictions on legislative action, *except* on federalism grounds. For a brief description of the rise and fall of the implied bill of rights theory, see Skarsgard, *Freedom of the Press: Availability of Defences to a Defamation Action (1981)*, 45 Sask. L. Rev. 287 at 293-94.

speech is to be regarded as a means to an end — successful parliamentary government. It is, in other words, a political instrument.[75]

In 1953, Rand J. in *Saumur* v. *City of Quebec*[76] took the theory a step further. Freedom of speech, religion and the inviolability of the person are "original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order."[77] By "original freedom", Rand J. may merely have meant that one need not point to a legal rule by which to justify the assertion of freedom of speech.[78] That he probably meant more, meant, like Mr. Justice Brandeis, to posit a broader theory of freedom of expression which was tied to man's humanity — his "thinking propensities"[79] — is supported by this eloquent exposition when he again took up the theme in *Switzman* v. *Elbling*:[80]

> Parliamentary government postulates a capacity in men, acting freely and under self-restraint, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. . . . Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence.

Stopping only at perimeters where the foundation of the freedom is itself threatened, Rand, J. would leave "the literacy, discursive and polemic use of language, in the broadest sense, free".[81]

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[75] This understanding of a free press as a political instrumentality was recently echoed by Mr. Justice Dickson, dissenting in *Gay Alliance* v. *Vancouver Sun*, [1979] 4 W.W.R. 118, 97 D.L.R. (3d) 577 at 601: "Newspapers occupy a unique place in western society. The press has been felicitously referred to by de Toqueville as 'the chief democratic instrument of freedom.' Blackstone wrote, 'The liberty of the press is indeed essential to the nature of a free state.' Jefferson went so far as to assert, 'Were it left for me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.' There is a direct and vital relationship between a free press and a free society."

[76] *Saumur* v. *City of Quebec*, [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641. In *Saumur*, by a narrow margin of five to four, the Supreme Court of Canada held that a provincial by-law restricting the distribution of pamphlets in Quebec city streets without prior permission of the Chief of Police was *ultra vires* the province. The five majority judges classified the law as in relation to either speech or religion, but only three of the five, Rand, Kellock and Lock, cited the dicta of Duff and Cannon J.J. in *Re Alberta Statutes* as basis for their holding that the subject-matter of the by-law was beyond the legislative power of the Province. The four dissenting judges classified the by-law as in relation to the use of the streets and within the competence of the provincial legislature.

[77] *Id.* at 329.

[78] This meaning of original freedom is suggested by Bushnell, *Freedom of Expression — The First Step* (1977), 15 Alta. L. Rev. 93 at 121n.

[79] *Switzman* v. *Elbling*, [1957] S.C.R. 275, 7 D.L.R. (2d) 377 at 305 (S.C.R.), 357 (D.L.R.): "The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities."

[80] *Id.* In *Switzman*, the Supreme Court of Canada held by a majority of eight to one that a Quebec law authorizing the padlocking of any house used to propogate communism or bolshevism was *ultra vires* the province. The one dissenting opinion of Taschereau J. classified that law as in relation to property and would have upheld it on that basis. Five of the eight majority judges were of the view that a statute creating penalties for its breach was legislation in respect of criminal law and hence *ultra vires* the province. Only three of the eight majority judges — Rand, Kellock and Abbott JJ. held that the law was in relation to freedom of speech and *ultra vires* on that basis.

[81] *Id.*

This reading of freedom of expression as "original", as an end in itself and as an expression of the sort of society we wish to become, is further substantiated by the law which was found to offend in *Saumur* — a law forbidding distribution of pamphlets on Quebec's city streets without prior permission from the Chief of Police. What is offensive about that law is that it represents a prior or antecedent restraint.[82] Prior restraint is insidious, apart from the breadth of its operation, in that it stunts the developmental process — that "steadily advancing enlightenment, for which the widest range of controversy is the *sine qua non*."[83] If a freedom is original, it is part of our primary condition as human beings. It cannot be stifled without, in some sense, stifling our humanity.

One might ask at this point, is there a difference between a governmental attempt to enact an antecedent restraint, (such as a prior licensing law to permit speech on only certain occasions), and the application by the courts of a civil law which has the ultimate effect of inhibiting debate? If prior censorship is an unreasonable limit which cannot be justified in a free and democratic society, is not a civil rule of liability which compels society's critics to guarantee the truth of their factual assertions or to bear the burden of proving them true not a comparable prior-restraint?[84]

It was under pressure from this kind of thinking, thinking about fundamentals, about the bases of our freedoms, that defamation law underwent its radical reassessment in *New York Times*. It does not take much by way of prediction to anticipate an equally profound reassessment under the Charter. And yet, will the reassessment be all that radical? Are the roots of it not already there?

V. THE THRESHOLD ISSUE: APPLICATION OF THE CHARTER

Section 24(1) provides that:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

At first reading, this provision would appear to contemplate proceedings not only against governments, but by one individual against another. The use of the word "anyone" supports a reading of section 24 as essentially a request for enforcement of a personal right.[85]

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[82] *Supra* note 76, at 330 (S.C.R.), 671 (D.L.R.).

[83] *Id.*

[84] *New York Times, supra* note 11, at 279: "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable 'self-censorship.' Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'."

[85] There are other sections of the Charter which, on their face, refer to individual rights without requiring any state or governmental action. The fundamental rights section (section 2) uses "[e]veryone." Section 6(1) protects the right of "[e]very citizen of

If "everyone" has certain fundamental freedoms, and "anyone" whose freedoms have been infringed or denied can apply to a court, then the Charter would seem to apply in actions between one individual against another. If a plaintiff has a right, he must of necessity have the means to vindicate and maintain it. Indeed, "it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."[86]

Those who espouse the contrary and more orthodox position, that the Charter should be confined to relations between the State and individuals and not intrude into the area of relationships between individuals themselves, root their arguments in Section 32(1):

> This Charter applies
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The view expressed before the Special Joint Committee on the Constitution, for instance, was that the Charter "addresses itself only to laws and relationships between the state and individuals, it does not attempt to deal with private relationships. . . ."[87]

If the exclusion of private activity is not clear enough from section 32, those who espouse this limitation make reference to basic principles of constitutional law: A constitution protects individuals from government in its rule-making and rule-applying capacity.[88] It defines the relationship between the citizen and the State.

This "State-action" requirement rests on important premises.[89] It leaves

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Canada . . . to enter, remain in and leave Canada." Sections 7 and 8 protect "[e]veryone's" right to "life, liberty, and security of the person" and "the right to be secure against unreasonable search and seizure." Section 12 again protects the right of "[e]veryone . . . not to be subjected to any cruel and unusual treatment . . ." Secton 15 provides that "[e]very individual is equal before and under the law without discrimination . . ." Section 11 uses the term "any person." These uses of "anyone," "any person," "every individual" throughout the Charter would seem to support a view that the Charter, as a whole, contemplates proceedings between individual litigants, without the antecedent requirement of state action. See Swinton, "Application of the Canadian Charter of Rights and Freedoms," in Tarnopolsky and Beaudoin, eds., *supra* note 32 at 45. Swinton, after envisioning the possibility of this linguistic argument, goes on to espouse the opposite view. A counter-argument to the one based on the language of these sections, is to say that the words used indicate *who* can assert a claim, not *against whom* a claim can be asserted. Section 32 provides for that latter half of the equation, and obviates the need to have inserted into each of these sections the words "by government or state actors."

[86] *Bhadauria* v. *Board of Governors of Seneca College of Applied Arts and Technology* (1979), 27 O.R. (2d) 142, 105 D.L.R. (3d) 707, at 147 (O.R.), 712 (D.L.R.), *per* Madame Justice Bertha Wilson, citing Holt C.J. in *Ashby* v. *White* (1703), 92 E.R. 126 at 136.

[87] Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, (January 29, 1981), Testimony of Mr. F.J.E. Jordan, Senior Counsel, Public Law, Federal Department of Justice, 48:27.

[88] Tribe, *supra* note 53 at 1147.

[89] As used by Tribe, "state action" means action by *any* level of government from local to national. *Id.* at 1147n.

open a spectrum of private activity in which the individual knows he will be free to make certain choices, such as choices about how and with whom he will contract. The State-action requirement may even reinforce principles of federalism and the separation of powers, by leaving free a zone of action within which provinces may validly legislate — for instance, in relation to property and civil rights in the province — laws conceived for the protection of various *private* interests.[90]

This public/private dichotomy is illustrated by traditional thinking of the tort of defamation. Lies told about a person would be outside the constitutional protection of freedom of expression, as the community has no interest in the spread of falsehood. There is no *public* interest in lies.[91]

I suggest that the Charter is not to be so limited. There are other sections which bear upon the issue.

First, and most importantly, section 32 must be read in the light of section 52, which provides for the primacy of the Constitution of Canada over any law of Canada:[92]

> s. 52 The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

That "any" law would include common law is hardly controversial.[93] Only the narrowest conception of jurisprudence would confine the notion of "law" to what is written in statute books.[94]

One could argue that the Charter is activated whenever a court purports to apply "any law" — be that law a civil rule of liability or a statutory rule — which is inconsistent with the supreme law of Canada.

The second question is whether section 24 is to be read as subject to sec-

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[90] *Id.* at 1149. Professor Tribe's second argument is probably more applicable in the American context, where the state action requirement limits the range of wrongs which the federal judiciary may right in the absence of congressional action.

[91] Bushnell, *supra* note 78, at 104.

[92] Part VII of the *Constitution Act, 1982*, Sched. B of the *Canada Act 1982*, 1982, c. 11, s. 52 (U.K.).

[93] Tribe, *supra* note 53 at 1168; Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 105.

[94] This argument is further buttressed by the preamble to the Charter: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." According to Dicey, *The Law of the Constitution* (10th ed., reprint 1959 ed., E.C.S. Wade, ed. London: Macmillan, 1965) the rule of law embraces at least three components: First, it means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power." *Id.* at 202. In other words, "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." *Id.* at 188. Second, the rule of law implies that no man is above the law, but that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." *Id.* at 192. The third sense in which rule of law may be described is on general principles of the constitution, which are, according to Dicey, "the result of judicial decisions determining the rights of private persons in particular cases brought before the courts." *Id.* at 195. British constitutionalism is, in other words, "the result of the ordinary law of the land." *Id.* at 203. That Dicey meant "ordinary law" to include the common law is clear from the above three meanings he ascribed to the rule of law.

tion 32 or to section 1. Recall that section 1 provides that the Charter guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Conversely, section 32, the application section, does not use the word "only" — does not provide that the Charter applies *only* to the parliament and government of Canada and to the legislatures and government of each province. Some meaning must be given to the word "only" — its presence in section 1 and significant absence from section 32. The author argues that section 1 sets out the only limit upon the constitutionally guaranteed freedoms.[95]

Thirdly, section 1 has a leading importance, not only because of its lead position in the Charter, but also because of its intention — to make explicit that the Charter *guarantees* the rights and freedoms set out in it. Unless that "guarantee" is to be an empty shell of good intentions, that word, too, must be given some meaning. What does it mean to have guaranteed a freedom if it is circumscribed by the fortuitous circumstances in which the freedom attempts to assert itself? Is this guarantee to have limits other than the one limit set out in section 1? Are we now to accept that freedom of expression has a second limit — the second being a limit of application? If that is the case, then this "guarantee" is a paper currency of little worth.

Fourthly, there is the question of the meaning to be given to a description of these freedoms as "fundamental". The theoretical bases have already been explored above. At a minimum, "fundamental" could mean fundamental to the functioning of democracy — as a political instrument. It could also mean "fundamental" as an expression of man's essential humanity. But is it consistent with the meaning of "fundamental" that a freedom should change its character depending on whether the State or an individual is the principal actor?

Fifthly, while proponents of the narrow reading of the Charter's application[96] cite American "state action" doctrine in support of their contention that governmental activity is a condition precedent to constitutional scrutiny, examination of that doctrine shows that it is a fertile source for proponents of the opposite view.

Exploration of this complex and innovative body of law is beyond the competence of this paper. Suffice it to say here that American "state action" doctrine has been extended to comprehend a broad range of activities. It extends, for instance, to embrace private activities which are seen to have a "public function."[97] That is, the actions of seemingly private actors may be in-

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[95] See Conklin, *Interpreting and Applying the Limitations Clause: An Analysis of Section 1* (1982), 4 Supreme Court L.R. 75 at 77.

[96] Hogg, *supra* note 93, at 77; Swinton, *supra* note 85, at 54.

[97] In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), for instance, the United States Supreme Court reversed a state trespass conviction incurred when a Jehovah's Witness attempted to distribute religious literature in a company town. The question was whether the people who lived in Chickasaw could be denied freedom of the press and religion simply because a single company had legal title to all the town. Justice Black had no trouble in holding that the state's interest in protecting private property rights failed to justify the constitutional infringement: "had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature." *Id.* at 505.

herently governmental and thus subject to constitutional limitation. State action doctrine has forced American courts to confront difficult questions about whether a positive concept of liberty may make governments accountable for failure to act.[98] There may even be state action whenever government acquiescence in private action amounts to ratification of that action.[99]

Thus, recourse to "state action" doctrine to support a narrow reading of the application of the Charter may in fact erode the neat dichotomy between public and private by forcing a creative recasting of the question in a constitutional mode.

If the above arguments are accepted, *why*, might one ask, was section 32 included in the Charter at all?

By analogy to the canon of statutory construction that the Crown is not bound by a statute unless expressly stated,[100] it is argued that section 32 was written into the Charter *in order to make its application to government unequivocal*, not to limit its application solely to government or State actors.

When the question arose in *New York Times* as to whether common law defamation could be state action, the Court showed no hesitation whatsoever in subjecting that law to constitutional scrutiny. After reading that decision and appreciating its impact on American libel law, it becomes difficult to see how the threshold issue regarding the application of our Charter will be anything other than academic in several years. As will be expected of Canadian plaintiffs, the plaintiff in *New York Times* had raised the argument that the Fourteenth Amendment[101] was directed against state action and not private action. Mr. Justice Brennan disposed of that submission at the outset:

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[98] Tribe, *supra* note 53, at 1150.

[99] In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), a private restauranteur had formulated a rule that no blacks would be served in his restaurant. The restaurant was located in a publicly owned and operated car parking building. The Supreme Court found sufficient physical and financial integration of the restaurant into the building to establish a nexus between the restaurant and the public parking authority. It found further that the parking authority was the state in one of its manifestations. Through the parking authority's inactivity, the state became a party to the refusal of service. *Id.* at 725.

See also *Corrigan* v. *Buckley*, 271 U.S. 323 (1926), where it was argued, albeit unsuccessfully, that judicial enforcement of a racially restrictive covenant was an unconstitutional form of state action: if a legislature cannot enforce racially restricted land transfers, then a court, which is a manifestation of the state, cannot either. *Id.* at 324. The argument was rejected by the Supreme Court. *Id.* at 331. But see *Shelly* v. *Kraemer*, 334 U.S. 1 (1948), where it was held that a state court could not enforce a racially restrictive covenant (in this case, a restrictive covenant prohibiting the sale of houses to blacks) without offending the equal protection clause of the Fourteenth Amendment. Judicial enforcement of such a covenant would be state action. The decision has, however, been viewed with suspicion. See Tribe, *supra* note 53, at 1168.

[100] *The Interpretation Act*, R.S.C. 1970, c. I-23, s.16 reads:

> No enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to.

[101] The First Amendment by its terms ("Congress shall make no law . . .") was originally addressed only to action by the Federal Government. But this limitation has long since been eliminated through the intermediary of the Fourteenth Amendment. In giving content to the due process clause of the Fourteenth, American Courts have looked to the Bill of Rights for guidance, so that many of the rights guaranteed by the first eight Amendments have been selectively absorbed into the Fourteenth. It is now beyond question that the First Amendment applies equally to the States. *Gitlow* v. *New York*, 268 U.S. 652 at 666 (1925); *Near* v. *Minnesota*, 283 U.S. 697 at 707 (1931); *New York Times*, *supra* note 11, at 253-54; Tribe, *supra* note 53, at 567.

> That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.[102]

The first step toward *New York Times* has already been taken in Canada — the constitutionalizing of the concept of free speech. It remains to be seen whether Canadian courts will begin the arduous process of reinventing the wheel, starting with grants of "talismanic immunity" from consitutional scrutiny simply because of the form in which the law is expressed, or whether our courts will recognize that the question which should trigger Charter application is whether State power in the form of "any law" has in fact been exercised.

VI. THE PUBLIC/PRIVATE DICHOTOMY THROUGH NEW YORK TIMES AND GERTZ[103]

A. *The Public Plaintiff*

New York Times v. *Sullivan* arose when the police commissioner of Montgomery, Alabama brought a civil libel action against four black Alabama clergymen and the New York Times Company. The police commissioner alleged that statements published in the Times in a full-page advertisement soliciting contributions for Dr. Martin Luther King and the civil rights movement in the South, and impliedly condemning the performance of local law-enforcement officials, had libeled him. Interestingly, none of the statements mentioned the Police Commissioner by name. The Commissioner argued that the allegations contained in the avertisement against the "police" were sufficient reflection upon him in his official capacity to satisfy the "of and concerning" requirement.

Even more interesting was the uncontroverted fact that in several particulars the statements were not absolutely accurate. The advertisement had protested, with exaggerations, the activities of the police in "ringing" the campus; padlocking the dining hall in order to starve students into submission; arresting Dr. King seven times; bombing the King home; assaulting his person; and charging him with perjury. Although the statements were not absolutely accurate, it is clear from the court's juxtaposition of each inaccuracy beside its originating fact, that there was a grain of truth to every exaggeration.[104] For instance, although the police at no time literally "ringed" the campus, police had been deployed near the campus in large numbers; and although Dr. King had not been arrested seven times, he had been arrested four times.

Alabama law provided for a strict liability on the part of a publisher for any defamatory falsehood, and recognized no privilege for good faith mistakes of fact. Once it was established that the words tended to injure a person in his reputation or to bring him into public contempt, and once it was found that the words were "of and concerning the plaintiff," then "libel *per se*" was established. A defence of fair comment would then depend on the

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[102] *Supra* note 11, at 265.

[103] *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

[104] *New York Times, supra* note 11, at 258-59; Kalven, *supra* note 10, at 199.

truth of the facts upon which the comment was based, and truth was rigorously construed. Unless the publisher could discharge the burden of proving truth in all its particulars, general damages were presumed. Good motives or honest belief in truth did not negate the inference of malice, but were relevant, if at all, only in mitigation of punitive damages.[105] Alabama law, in other words, looked very much the way Canadian libel law looks today.[106]

The first question the Court addressed was whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridged the freedom of speech and of the press guaranteed by the First and Fourteenth Amendments. That first question is comparable to the initial substantive issue our courts will have to consider in a Charter analysis of defamation law: does a strict rule of liability offend freedom of expression as guaranteed by section 2(b)?

In reaching an affirmative answer on the first question, the Court rejected the prevailing view that libel was a category of speech beneath constitutional protection. As mentioned above, the Court dismissed the categorical approach by stating that mere labels of state law could not foreclose constitutional scrutiny.[107]

Drawing upon the words of Mr. Justice Brandeis in *Whitney* v. *California*,[108] Mr. Justice Brennan posited the basic proposition that freedom of expression upon public questions is secured by the First Amendment: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[109]

Once the *prima facie* case for constitutional protection was established, Mr. Justice Brennan moved to the second issue, which in argument under our Charter would be equivalent to a shift from section 2(b) to section 1.[110] The question then became whether the advertisement "forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent."[111]

Having surmounted the low threshold test on the first issue, the Court might have been expected to answer the second question with a simple negative. Instead, what one finds is a discursive treatment of the issue, ranging from philosophic consideration of the *Sedition Act* of 1798, through the chilling effects of censorship, to the inhibiting effect of damage awards under the

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[105] For Alabama law, see generally *New York Times, id.* at 267.

[106] *Supra* note 7.

[107] *Supra* note 11, at 269 and at 265.

[108] *Supra* note 61.

[109] *Supra* note 11, at 270.

[110] For an example of this two-tiered analysis under the Charter, see *Rauca* v. *Federal Republic of Germany* (1983), 41 O.R. (2d) 225 at 240 (Ont. C.A.): "First, it has to be determined whether the guaranteed fundamental right or freedom has been infringed, breached or denied. If the answer to that question is in the affirmative, then it must be determined whether the denial or limit is a reasonable one demonstrably justifiable in a free and democratic society."

[111] *New York Times, supra* note 11, at 271.

Alabama rule. What the Supreme Court seemed to be doing was searching for a rule which would permit a margin of good faith error in public discussion but at the same time, leave open an avenue of recourse to the courts for victims of defamatory statements made with actual malice.[112] The Court in *New York Times* was engaged, in other words, in just the sort of balancing one would expect to find under section 1 of the *Canadian Charter of Rights and Freedoms*, a probing of what rule of liability would constitute a reasonable limit upon freedom of speech, a drawing of the line between speech unconditionally guaranteed and speech which may legitimately be regulated — a wedding, in other words, of ends and means.

The rule Mr. Justice Brennan articulated in *New York Times* is as follows:

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[113]

As applied to the facts of the case, the evidence failed to show with the "convincing clarity" demanded by the constitutional standard, that the New York Times Publishing Company had published the advertisement with knowledge of its falsity, or with reckless disregard.[114] (On the facts, a finding of reckless disregard was clearly open to the Court. The New York Times Publishing Company had the resources within its own files to check the accuracy of the copy against its own news stories. Thus, there is even some suggestion that a publisher is immune if the publication clearly identifies the defamatory material as representing, not its own views, but the views of a responsible organization.)

To make its holding doubly secure, the Court further ruled that the evidence was inadequate to identify the plaintiff with the assertions in the advertisement.

The importance of this "constitutional malice" test cannot be stressed enough. It recalls the earlier discussion about whether a concept of freedom of speech extends to protect the right to differ about what *is* the truth, and whether falsehood is not also comprehended. In a deep sense, the *New York Times* decision is about the relevance of truth to constitutional protection.[115]

The Court laid down two rationales in support of its tolerance for good faith error. The first is that some "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[116] The second is that an intolerance for a permissible margin of error tends to generate a kind of prior "self-censorship." The man who is compelled "to guarantee the truth of all his factual assertions, or to bear the burden of defending their truth," is likely to "steer much wider of the unlawful zone" than is necessary, with the result

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[112] Kalven, *supra* note 10, at 203.

[113] *New York Times, supra* note 11, at 279-80.

[114] *Id.* at 285-86.

[115] Kalven, *supra* note 10 at 210-13.

[116] *Supra* note 11, at 271-72.

that not only unlawful speech is deterred.[117] Thus, the special vice of a regime of strict liability is that it leads to an antecedent restraint — a self-censorship which impacts upon even lawful speech. The signal importance of the *New York Times* rule is that it creates a qualified privilege for a margin of error and for the good faith critics of public officials, which is defeasible only upon proof of actual malice.

Thus, the rule in *New York Times* selected a constitutional posture at a point on the spectrum between absolute liability for defamation and absolute privilege for freedom of speech. By shifting the *burden of proof* to the plaintiff to satisfy the court of the defendant's actual malice against a standard of "convincing clarity," the *New York Times* test sought to adjust the balance between two conflicting interests, and came out in favour of freedom of speech. That shift of burden is, endorsed by section 1 of the Charter.

The question of onus under the Charter is not free from difficulty. But the cases that are beginning to reach us would seem to support this view.[118] The high court decision in the *Rauca* litigation suggested that the "limits" to be applied require the court to adopt an objective standard, and that "the demonstrable justification which modifies the reasonable limits be interpreted in a manner that leans slightly in favour of the individual when the competing rights of the individual and of society are being balanced in the courts."[119]

I would argue that the kind of balancing contemplated by section 1 of the Charter invites the two-tiered analysis of Mr. Justice Brennan in *New York Times*, with a low threshold test on the substantive question posed by section 2(b), (whether the particular rule of liability offends freedom of expression); and a balancing test under section 1, which at a minimum, places the burden on the plaintiff to demonstrate the constitutional justification for the current rule of liability.

B. *The Private Plaintiff*

The issue left open by *New York Times* until its resolution in *Gertz* v. *Robert Welch, Inc.*, was the proper test of liability in cases brought by private plaintiffs.[120]

The events that culminated in the *Gertz* libel action began with a much publicized killing of a Chicago youth by a policeman. The boy's family retained Elmer Gertz, a prominent Chicago civil liberties lawyer, to bring a civil action against the policeman who was subsequently convicted of second degree murder. An article then appeared in a magazine alleging that the policeman's

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[117] *Id.* at 279.

[118] *Quebec Association of Protestant School Boards et al.* v. *Quebec (No. 2)* (1982), 140 D.L.R. 33 at 57-59 (Que. S.C.). *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors, supra* note 36, at 9-10; *Rauca* v. *Federal Republic of Germany, supra* note 11, at 241: "[T]he wording of s. 1 makes it clear that he who seeks to support the limit prescribed by law has the burden of establishing on the balance of probabilities that it is reasonable and demonstrably justifiable"; the burden on the proponents of the limiting legislation is described in *Rauca* as "significant." *Id.* at 246.

[119] *Federal Republic of Germany* v. *Rauca* (1982), 38 O.R. (2d) 705 at 715 (H.C.), *aff'd* 41 O.R. (2d) 225.

[120] *Gertz, supra* note 103.

murder trial was a "frame-up," and that Gertz was part of a communist conspiracy to discredit the local police. Elmer Gertz filed a libel action in Federal Court. After the jury returned a verdict in his favour, a district court judge subsequently decided that the standard enunciated in *New York Times* was applicable, and entered a judgment for the defendant magazine. Notwithstanding the falsity of most of the statements in the article, Elmer Gertz had been unable to prove actual malice. The Court of Appeals affirmed on the basis of *Rosenbloom* v. *Metromedia, Inc.*,[121] which had expanded the *New York Times* test to protect "all discussion and communication including matters of public or general concern."[122] But when the case came to the Supreme Court, the Court retrenched, rejecting the application of the *New York Times* test to actions involving private plaintiffs.

The Supreme Court began its analysis with common ground: "Under the First Amendment, there is no such thing as a false idea."[123] Returning to the approach in *Chaplinsky*[124] it reasserted: "But there is no constitutional value in false statements of fact."[125] Although erroneous statements of fact are not worthy of constitutional protection, they are nonetheless inevitable in free debate. The Court affirmed *New York Times* as regards public debate on public figures, citing James Madison for the proposition: "Some degree of abuse is inseparable from the proper use of every thing."[126]

Then the Court qualified the rule enunciated in *New York Times*. A rule which seeks to avoid self-censorship by the news media loses its social value when the private plaintiff is involved. At this point, the state interest in compensating injury to reputation holds sway over the constitutional interest:

> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, . . . the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself is left primarily to the individual States under the Ninth and Tenth Amendments."[127] [Citations ommited.]

The Court gave a number of reasons for drawing this distinction. When it comes to the public figure, a notion almost of voluntary assumption of risk is involved. Public persons, after all, are distinguished "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention."[128] Individuals seeking public office must accept certain necessary consequences of that involvement in public affairs, one of which is the greater degree of public scrutiny.[129]

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[121] 403 U.S. 29 (1971).

[122] *Id.* at 44.

[123] *Gertz, supra* note 103, at 339.

[124] *Supra* note 50.

[125] *Gertz, supra* note 103, at 340.

[126] *Id.*

[127] *Id.* at 341.

[128] *Id.* at 342.

[129] *Id.* at 344.

Secondly, there is the question of remedy: The first remedy of any victim of defamation is self-help. There are more available opportunities for the public person to contradict the lie or to immunize its impact on reputation. Public figures, "enjoy significantly greater access to the channels of effective communication" and hence have a more realistic opportunity to contradict the falsehood.[130] The same cannot be said of the private individual. Because private persons are more vulnerable to injury, they are more deserving of the State's protection. For these reasons, the Court must fashion a different rule. That rule may be summarized thus: The States may define for themselves the appropriate standard of liability for a publisher of defamatory falsehood injurious to a private individual "so long as they do not impose liability without fault."[131]

Finally, damage awards are another way of preserving the constitutional balance. These must extend no further than what is necessary to protect the legitimate interests involved. That means no compensation for anything other than *actual* injury. No punitive or presumed damages may be recovered against a publisher unless there is a showing of knowledge or reckless disregard of the falsity of the defamatory publication.[132]

There are several problems implicit in the *Gertz* holdings. The first is the difficulty of drawing the public/private line, as demonstrated by the facts themselves. Elmer Gertz was not found to be a public figure, even though he had voluntarily become counsel in a case which was bound to involve him in notoriety. The second is that the broad stricture that States may not impose liability without fault, leaves definition of "fault" to each State. That may be objectionable in view of the principle that a constitutional standard should be of widespread and more certain application.[133]

But for the writer of fiction who happens to choose private persons as his models, *Gertz* poses a special threat — it withdraws any possibility of the *New York Times* constitutional protection.

Libel law is a law of accretion. Now added to the common law and to statute[134] is the possibility of constitutional adjudication. It has been necessary to examine *New York Times* and *Gertz* to introduce the Canadian reader to the potential impact of a constitutional argument on the traditional libel case. But whatever the implication of those cases for political expression, their principles have proven singularly inappropriate when applied to literary works of fiction. I turn now to the application of the *New York Times* standard where the publication in question is a "calculated falsehood."[135]

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[130] *Id.*

[131] *Id.* at 347.

[132] *Id.* at 349.

[133] Tribe, *supra* note 53, at 1049.

[134] An action for defamation can involve causes of action and defences under statute and at common law. For example s. 3(6) of the Ontario *Libel and Slander Act*, R.S.O. 1980, c. 237 reads: "Nothing in this section limits or abridges any privilege now by law existing . . ."

[135] *Chaplinsky, supra* note 50.

VII. CALCULATED FALSEHOOD IN FICTION — A NONSENSE ANALYSIS

Bindrim v. *Mitchell*[136] saw the first American effort to apply the constitutional law of libel to fiction.

In 1977, Gwen Davis Mitchell wrote *Touching*, a novel which described the experiences of two women at a nude encounter group in California. The author had actually attended such an encounter group some months before writing her novel. When the novel was published, Dr. Paul Bindrim, the operator of the encounter group, sued Mitchell and her publisher, Doubleday, for libel, claiming the book both identified and defamed him. Bindrim admitted he was a "public figure"[137] which meant that under the *New York Times* standard he must produce "clear and convincing evidence" that the publisher and author had acted with knowledge that the statements were false or with reckless disregard for whether they were false or not.

It took one footnote for the California Court of Appeal to dispose of the book's classification as fiction: "The fact that "Touching" was a novel does not necessarily insulate Mitchell from liability for libel, if all the elements of libel are otherwise present."[138] That a work may be fiction is, in other words, no defence. Assuming that the depiction was defamatory, the question then became one of "actual malice." Since Mitchell was in the best position to know the truth or falisty of her own material, in departing from that truth she wrote the novel with actual malice. Her reckless disregard for the truth was apparent from her knowledge of what had occurred at the actual encounter.[139]

Doubleday might be excused prior to the hardback publication for relying on the author's repeated assurances that the novel bore no resemblance to reality. However, prior to the paperback printing, there was evidence in the form of a letter from Bindrim to suggest there might be some inaccuracy. At that point Doubleday was under a duty to investigate. Actual malice was thus established against the publisher, too.[140]

The Court then turned to the issue of identification. The fictional character in *Touching* was described as a "fat Santa Clause type with long white hair, white sideburns, a cherubic rosy face and rosy forearms"; the real-life plaintiff was clean shaven and had short hair.[141] Notwithstanding these physical dissimilarities, the Court found sufficient identification. It relied on tape recordings of actual marathon sessions which showed a parallel between the novel and the real life events.[142] In an alarmingly narrow statement of the test, the Court concluded that it could not say, "that no one who knew plaintiff Bindrim could reasonably identify him with the fictional character."[143]

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[136] *Bindrim* v. *Mitchell*, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979).

[137] *Id.* at 35 n. 1.

[138] *Id.* at 35 n. 2.

[139] *Id.*

[140] *Id.* at 36.

[141] *Id.* at 37.

[142] *Id.*

[143] *Id.* See also 155 Cal. Rptr. at 39: "The test is whether a reasonable person, reading the book would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described."

That low threshold surmounted, the only question left was whether the statements in *Touching* were libelous. All that was needed was for the publication to "contain a false statement of fact."[144] Predictably, the Court had no trouble in making that finding. The portrayal of the plaintiff had cast him in a disparaging light, depicting his language and conduct as "crude, aggressive and unprofessional."[145]

Perhaps the best comment upon the spurious logic of the majority is made in the dissent. Of course the book is false, reasons Mr. Justice Files. Of course it "applies to the plaintiff," insofar as any book about encounter therapy could be said to apply.[146] To infer malice because the fiction is false is an absurdity:

> From an analytical standpoint, the chief vice of the majority opinion is that it brands a novel as libelous because it is "false," i.e. fiction; and infers "actual malice" from the fact that the author and publisher knew it was not a true representation of plaintiff. From a constitutional standpoint the vice is the chilling effect upon the publisher of any novel critical of any occupational practice, inviting litigation on the theory "when you criticize my occupation, you libel me."[147]

The point is, of course, that fiction is libelous by its very nature. To say that Gwen Mitchell was in a position to know the truth or falsity of her fiction is to speak nonsense. The concurring opinion of Mr. Justice Jefferson gives itself away when it suggests that had the defendant author limited her novel, "to a truthful or fictional description,"[148] the majority would have held differently. What is that "truthful or fictional" really suggesting? It is suggesting that the fiction must be either journalism, or journalism's opposite. To say, "we will permit journalism, and we will permit *pure* fiction, but we will permit nothing in between," is to make a legal prescription about *what fiction is.* Should any court be competent to pass judgment on what constitutes lawful literature?[149]

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[144] *Id.* at 38.

[145] *Id.*

[146] *Id.* at 44.

[147] *Id.* at 45.

[148] *Id.* at 41.

[149] The possible legal ramifications of the *Bindrim* decision are disturbing. Even courts which have recognized the difficulty of evaluating a work not intended to be truthful have looked upon *Bindrim* as "instructive." See, for example, *Miss America Pageant* v. *Penthouse International*, 524 F. Supp. 1280 (D.N.J. 1981) at 1284 and 1286:

> It would seem too simplistic in the case of a fictional or satirical work simply to question whether the author/publisher had the subjective intent to publish a falsity, since such works are not intended to convey truth. . . . Since *Bindrim* is the only decision in which a court applies the clear and convincing proof of actual malice requirement to a work of fiction, it is the only bench mark for this court.

The *Pring* case arose when Penthouse published a satirical story about a Miss Wyoming in the Miss America Pageant who was able to levitate those upon whom she performed fellatio. The organizer's lawsuit against the defendant publisher was ultimately dismissed as the Miss America Pageant was unable to put forward enough evidence upon which a jury could find the magazine had acted with actual malice, as defined by the constitutional *New York Times* standard. But a close reading of the case reveals how faithfully the court followed the reasoning of *Bindrim.* The defendant magazine was not actuated by actual malice, as it was not in a position to know the truth. It had not, for example, attended a pageant nor received a letter from the Pageant prior to publication. (*Id.* at 1284) For a discussion of the *Pring* litigation, see Franklin and Trager, *supra* note 14, at 231-32.

The common ground between *Bindrim* v. *Mitchell* and the motion before Master Sandler in *Bennett* v. *Gage Educational Publishing Ltd.*[150] is the attitude. The statement, "There is no such protection for novelists," is no different from saying: "The position of the majority is simply to refuse to permit a writer and publisher to libel a person and hide under the banner of having written only fictional material."[151]

Ironically, it is at the level of *language* that the lawmakers betray themselves. There are the handful of judgments that speak sensitively of "the acorn of fact" which becomes the "progenitor of the oak."[152] These understand that authors, "of necessity must rely on their own background and experiences in writing fiction."[153] In contrast, there are the judgments that speak of "the varnish of fiction," and the "veiled attacks" that lurk behind this "dastardly mode" of striking at reputations.[154]

To understand the peculiar vulnerability of fiction to judicial handling of legal liability is to understand something, not only of literature's sources, but also of its ends.

The *source* is *mimêsis*, the human instinct of "imitation", which Aristotle tells us is "congenital to human beings from childhood" — fundamental to man's nature.[155] Man "differs from the other animals in that he is the most imitative and learns his first lessons through imitation."[156] The pleasure that all men take in works of imitation is proof of what happens in the experience — "recognition" (anagnôrisis), the "shift from ignorance to awareness."[157]

The *purpose* of playing, Hamlet tells the actors, is to hold the mirror up to nature, to show virtue her own feature and scorn her own image. The reader of fiction looks into the mirror and sees, not the writer, but himself, and perhaps a reflection of the world in which he lives. What if he does not like the reflection? In a litigious age such as ours, it is not difficult to predict the reader's response to recognition. The question is, whether the individual's response should be society's.

To gain some appreciation of just how difficult that question is to answer, the legal issue will be traced through some of its actual manifestations, by focusing on the "of and concerning" requirement.

VIII. SALIENT FEATURES OF A LIBEL ACTION CONCERNING FICTION

A. *Identification*

In order to establish a *prima facie* case the plaintiff must prove that the words complained of were written "of him"; that the language was

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[150] *Supra* note 1.

[151] *Bindrim, supra* note 136, at 42.

[152] *People* v. *Scribner's Sons*, 205 Misc. 818 at 821 (Magis. Ct. Kings Co. 1954).

[153] *Middlebrooks* v. *Curtis Publishing Co.*, 413 F. 2d 141 at 143 (4th Cir. 1969).

[154] *Supra* note 8, at 262, 264 (N.E.).

[155] Aristotle, *Poetics*, reference made to translation by Gerald F. Else (University of Michigan Press, Ann Arbor Paperbacks: 1970) at 20.

[156] *Id.*

[157] *Id.* at 35-6.

defamatory of him; and that there has been a publication — that is, a communication of the words complained of to some person other than the plaintiff.[158]

In an action for libel involving fiction, the point upon which liability turns is the "of and concerning" requirement.[159] The test of identification is whether reasonable people would suppose the fiction to mean an actual person. If those who "know of the existence of the plaintiff would think that it was the plaintiff — then the action is maintainable."[160]

Unless a character is a "mere type" the portrayal will inevitably combine both good and bad characteristics in order to satisfy the artistic ends of verisimilitude. And it is almost inevitable that the bad characteristics will satisfy the low threshold which a statement must pass in order to be defamatory. Hence, the only real hurdle to the plaintiff is to prove the identity requirement. Once that has been achieved, liability follows almost as a matter of course.

Commentators have tended to organize cases which revolve around the "of and concerning" issue into two categories: the "same name" cases; and those in which, although the name is different, the plaintiff claims sufficient external similarities to justify the identification.[161] The dichotomy is more one of convenience than it is suggestive of a rule. Determinations in any one case have tended to depend on the court and which factors it finds decisive amid a range of variables. Nonetheless, in this ad hoc area of the law, some organization is better than none.

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[158] Duncan and Neill, *supra* note 14, paras. 5.01, 6.01, 7.01, 8.01; Linden, *supra* note 34, at 676, 683, 691.

[159] In *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T.L.R. 581 (C.A.), the defendants produced a film called *Rasputin, the Mad Monk,* depicting the influence Rasputin had on the Czar and Czarina of Russia. The plaintiff, Princess Irina Alexandrova of Russia, brought an action alleging that she would be understood to be the Princess Natasha of the movie whom Rasputin had either ravished or seduced. To say that a woman has been ravished is unquestionably defamatory of her, "as tending to cause her to be shunned and avoided although it involves no moral turpitude on her part." *Id.* at 581. There was also no dispute as to publication. Hence, the case turned on the question of identification. In the opinion of Scrutton L.J., while a depiction of an imaginary person, a "mere type," would not be libelous, the defendant here would lose if "there was evidence on which the jury could reasonably find that a considerable number of reasonable people who saw the film would identify the Princess of the film with the Princess Irena of Russia." *Id.* at 584. Although some of the incidents were fictionalized, the damning "fact" which connected the fictional princess with the real was that Prince Youssoupoff had killed Rasputin. Hence, the requirement that there be sufficient evidence for reasonable people to take the libel complained of as relating to the plaintiff was amply satisfied.

[160] *Hulton and Co.* v. *Jones,* [1910] A.C. 20. This much criticized case may be as much an aberration as it is a classic. In it, the House of Lords permitted one Artemus Jones to sue a publisher who had coincidentally used that name in a fictional work. The *Hulton* standard turned not on the author's intent, but on the public's reasonable understanding.

See also *Youssoupoff, supra* note 159, at 583:

> [W]e follow the law that though the person who writes and publishes the libel may not intend to libel a particular person and, indeed, has never heard of that particular person, the plaintiff, yet, if evidence is produced that reasonable people knowing some of the circumstances, not necessarily all, would take the libel complained of to relate to the plaintiff an action for libel will lie.

[161] Franklin and Trager, *supra* note 16, at 210-212; Silver, *supra* note 17, at 1077-1084.

B. *Same Name Cases*

In *Kelly* v. *Loew's*[162] the plaintiff, Robert Kelly, was clearly identified as the fictional character, Rusty Ryan, in the movie *They Were Expendable.* The movie was based on a book in which Kelly's real name was used. The judgment reads like a public relations exercise for the United States navy. Although the film and the script depicted Ryan as a, "gallant officer, zealous to serve the nation, respectful of his superiors, companionable with his equals, considerate of his men, responsive — but not too responsive — to the charms of women," and imbued him with all the striking virtues of his race, "kindliness, generosity, humour, love of his fellow men, impetuous eagerness for action, exuberance of spirit,"[163] its creators made the mistake of rounding out the characterization. The portrayal contained a few flaws — a certain impetuousness and lack of discipline, which the Massachussetts District Court felt would injure the plaintiff's reputation in the professional class of naval officers. In finding liability, the Court dismissed the "disingenuous legend" that the persons and events shown in the picture were fictitious. The legend, it said, "would not have been treated by the average person or naval officer as any more than a tongue-in-the-cheek disclaimer. . . ."[164]

In contrast, is *People* v. *Scribner's Sons*,[165] dismissing a complaint for violation of the right to privacy lodged by Joseph Maggio, the alleged model for the character of Angelo Maggio in a book entitled *From Here to Eternity.* Joseph Maggio had served with the author in a regiment of the United States Army, stationed in the same place and during the time-frame described in the book. Except for the identity of name, none of the things the character "Angelo Maggio" did in the book in any way resembled the real Maggio or his life. The book also bore the standard disclaimer that it was a work of fiction, that its characters were imaginary, and any resemblance to actual persons was purely coincidental.

In ruling in the defendant's favour, the court took judicial notice of the complex process of artistic creation — one which, of necessity, draws upon the author's own background:

> It is generally understood that novels are written out of the background and experiences of the novelist. The characters portrayed are fictional, but very often they grow out of real persons that author has met or observed. This is so also with respect to the places which are the setting of the novel. The end result may be so fictional as to seem wholly imaginary, but the acorn of fact is usually the progenitor of the oak, which when full grown no longer has any resemblance to the acorn. . . . Thus, the public has come to accept novels as pure fiction and does not attribute their characters to real life.[166]

The Court went on to say that so long as the author does not use the true name of the character, there is no basis for complaint. *Where a name is used,* the name, "like a portrait or picture, must upon meeting the eye or ear, be unequivocally identified as that of the complainant."[167] That test of "unequivocal identification" might be viewed as limited to its context — a civil rights law which was penal in nature — but it is also a recognition of the peculiar

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[162] *Kelly* v. *Loew's*, 76 F. Supp. 473 (D. Mass. 1948).

[163] *Id.* at 481.

[164] *Id.* at 485.

[165] *Supra* note 152.

[166] *Id.* at 821.

[167] *Id.* at 823.

vulnerability of fiction. As long as fiction is written, there will be persons who are quick to associate fictional characters with themselves. Without this stringent test of identification, "the writing of fiction would always be susceptible to the hidden and virtually unavoidable peril of making authors and publishers criminal perpetrators."[168]

In *Geisler* v. *Petrocelli*,[169] we find another example of the use of a name, "having no public recognition." The novel was written several months after the plaintiff, Melanie Geisler, and defendant author had worked together in a small publishing company for about six months. Along with the use of her exact name, the author, Petrocelli, drew upon many of Ms. Geisler's physical characteristics. Petrocelli's "potboiler" concerned the odyssey of a female transsexual athlete through the allegedly corrupt and corrupting world of women's professional tennis circuit. The book proclaimed itself to be a work of fiction, again bearing the traditional disclaimer. A district court judge had found that no reasonable reader could mistake Ms. Geisler for her fictional namesake, but the Court of Appeals reversed. The test of identification it adopted was whether the "libel designates the plaintiff in such a way as to let those who knew her understand that she was the person meant. It 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."[170] The defendants tried to argue that the book was self-proclaimed fiction, that any coincidence of name and commonality of physical traits were superficial, that the facts were insufficient to establish *behavioral* identity.[171] But the Court of Appeals thought these arguments pointed up a "disturbing irony": "The more deserving the plaintiff of recompense for the tarnishing of a spotless reputation, the less likely will be any actual recovery."[172]

Perhaps in *Geisler* the damning factor was the identical name. For at least one other court has held that any reasonable reader would more likely conclude that an author deliberately created a character in an ugly way "so that none would identify her."[173] Courts can obviously differ about the results of the identification requirement. On the facts in *Geisler* it would seem that office workers who knew Ms. Geisler were just as likely to realize she was not the transsexual tournament tennis player described in the book.

C. *Similar Name Cases*

There is a middle range of cases which might be termed the "similar name" cases.

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[168] *Id.*

[169] 616 F. 2d 636 (2d Cir. 1980).

[170] *Id.* at 639.

[171] *Id.*

[172] *Id.*

[173] *Wheeler* v. *Dell Publishing Co., Inc.*, 300 F. 2d 372 at 376 (7th Cir. 1962). *Anatomy of a Murder* was a study through fiction of an actual murder trial. The fictional locale was fairly identifiable with the actual. The writer had been defence attorney at the actual trial, and those how knew him would identify him with his fictional counterpart, just as those who knew the real Hazel Wheeler could reasonably identify her with the fictional Janice Quill by certain physical and contextual similarities. But the court rationalized that the negative aspects of the behavioural depiction negatived the "of and concerning requirement." Another factor was the minor importance of the role in the overall work.

In *Middlebrooks* v. *Curtis Publishing Company*[174] an action was brought by one boyhood friend against another for a short-story published in the *Saturday Evening Post*, listed in the magazine's index under fiction. The story featured two teenagers, Esco Brooks and Earl Edge, whose desperate concern was the upkeep of their car. In realizing this objective, the boys committed a number of thefts. The author of the story, William Price Fox, and the plaintiff, Larry Esco Middlebrooks, had grown up together in Columbia. They were close friends as boys and continued to correspond and to see each other after both left Columbia. After the story was published, Middlebrooks brought a suit against the author, alleging damage to his reputation. The test, again, was whether the fictional character could reasonably be understood as a portrayal of the plaintiff.[175]

The court clearly could have gone either way. It started with the premise that "Moonshine Light, Moonshine Bright" was an obvious work of fiction.[176] It was labeled as such and was illustrated. Among the marked dissimilarities between the fictional character and the plaintiff were the differences in ages, the absence of the real plaintiff from Columbia at the time of the fictional episode, and the differences in employment.[177] The use of actual place names and geographical settings did not militate against the common understanding of fiction as fiction only: "Authors of necessity must rely on their own background and experiences in writing fiction."[178] The Court held that under these circumstances "Esco Brooks" was not reasonably to be understood as a portrayal of the plaintiff, Larry Esco Middlebrooks.

Another case which falls into the similar name category is *Corrigan* v. *Bobbs-Merrill Co.*[179] The novel depicted, somewhat realistically, the adventures of one Arnold L'Hommedieu in New York's underworld. A chapter headed "Justice — a la Cornigan" brought the hero into a court over which the plaintiff Corrigan frequently presided as magistrate, and dealt in a scathing way with the way the fictional Cornigan dispensed with justice. To make matters worse, the writer had once appeared before the real-life magistrate as a defendant on a criminal charge. The Court found the inference unmistakable that the author intended "deliberately and with personal malice to vilify plaintiff, under the barely fictitious name of Cornigan."[180] It further held that this intent to injure was chargeable to the publisher, the actual defendant in the case.[181] The publisher's lack of intent to injure was irrelevant, as intent is presumed from the publication itself. These, then, were the facts that gave raise to the oft-cited words: "The question is not so much who was aimed at as who was hit,"[182] and the words cited by the Court in *Bindrim*[183] to justify its holding: "Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction, or in jest."[184]

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[174] *Supra* note 153.
[175] *Id.* at 142.
[176] *Id.* at 143.
[177] *Id.*
[178] *Id.*
[179] *Supra* note 8.
[180] *Id.* at 262 (N.E.).
[181] *Id.* at 263 (N.E.).
[182] *Id.* at 262 (N.E.).
[183] *Bindrim, supra* note 136, at 42.
[184] *Corrigan, supra* note 8, at 262 (N.E.).

D. *Different Names*

We have already seen that in *Bindrim*, the court adopted an extremely liberal test for the identification requirement — whether anyone who knew Bindrim could reasonably identify him with the fictional character. The test was met despite the fact that the names, professions and physical descriptions were dissimilar, and despite the fact that the book was clearly labeled as a work of fiction.[185]

A disturbing case for its emotional overtones is *Fetler* v. *Houghton Mifflin Co.*,[186] where one brother claimed to have been libeled by another. Whatever the biblical proportions of the litigation, (all the members of a large family became involved),[187] it was dealt with solely on the narrow issue of identification.

The novel was the author's first, and both he and his publisher regarded it as a serious work of creative fiction.[188] The plaintiff offered the following similarities between the novel and fact:[189] The novel depicted events in the life of the Solovyov family, a large family composed of a father, mother and thirteen children — the exact composition of the Fetler family. In the novel, Maxim is the eldest child and is the age the true plaintiff would have been at the time of the book's events. In the novel, the father is an itinerant Russian Protestant minister whose wife and children perform as a band and choir wherever the father preaches. Maxim, the fictional son, is generally responsible for their temporal needs. The fictional family travels about Europe in an old bus, just as had the actual family. When the plaintiff asked his brother what he was writing about, the brother said he was writing "about our father, the family concerts and me."[190]

According to the plaintiff, the novel was libelous because it showed Maxim as co-operating with a Nazi organization for easy money and, in frantic pursuit of money, abandoning his father on his death bed.[191] The defendant vigorously disputed the libel, asserting that Maxim was a "sympathetic character."[192]

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[185] See text accompanying notes 138-47, *supra.*

[186] Fetler v. *Houghton Mifflin Co.*, 364 F. 2d 650 (2d Cir. 1966).

[187] *Id.* at 654.

[188] *Id.* at 650.

[189] *Id.* at 651.

[190] *Id.*

[191] *Id.* at 650.

[192] *Id.* at 650. One can only imagine the eldest brother's reaction to being told his fictional counterpart was a "sympathetic character." In a short-story about Emile Zola's comparable "betrayal" of his friend Paul Cezanne through the writing of a book, author Rolaine Hochstein uses fiction to imagine Cezanne's response. The passage is of interest in that it dramatizes the compelling interests involved:

> "*He* knew who it was about, all right. After he read the book, glowering at page after page with his closely set, farseeing eyes, hurt and anger wringing down into his belly until he couldn't sit straight; after he thought it was bad enough doing what he had to do and always wondering if it was really junk as so many people said it was but doing it anyway because that was what he saw; after thinking on high days he had a masterpiece going and thinking on low days he ought to do something constructive like take up house painting, knowing it's only one life and he's spending it as a failure; after forgetting rejection, forgetting Paris, the expositions, Zola with his ease and his acclaim and his women (it was hard to forget the

The sole question before the Court of Appeals was "whether those who knew him [understood] that he was the person meant."[193] There can be little dispute with the Court's holding on these facts. Notwithstanding the usual disclaimer, the Court held that the summary judgment on the issue of identification was improper on this record, and that there was sufficient evidence to go to the trier of fact.[194]

While the narrow holding as to identification is persuasive, it is nonetheless problematic that such a finding of identification could automatically lead to liability on Fetler-type facts. Does a Fetler eldest brother bring an action because he is concerned to make the writer *tell more truth*, or to keep him from *revealing* the truth? That the artistic portrait of the brother may indeed have been "sympathetic" is at least indicative of the writer's intent. The brother's hurt is no indication that the writer had *intended* to vilify. There is something deeply worrisome about a law which, in taking no account of the writer's motivation, in forcing writers to stick to the purely "truthful or fictional," could take away from the writer one of his most passionate and compelling sources: the family experience. While one can sympathize with the eldest brother's position, something more important may be at stake: the writer's compelling need to give voice to his family's untold story, and perhaps to transcend the experience in the process; to make art of the personal for the benefit of us all.

As the above cases reveal, sufficiency of identification is determined on a case-by-case basis. Although in *Fetler*, the Court declared itself "not unaware of the emotional overtones"[195] in a case where a man claims his brother has libeled him, by and large the identification issue is not determined with a view to its ramifications.

Moreover, application of the *New York Times* constitutional criteria once the issue of identification has been overcome means that any novel traceable to reality automatically fails the test of "knowing falsity." As one commentator has suggested, the American state-of-the-art regarding fiction means that First Amendment protection for fiction is substantially weaker than protection for news or non fiction.[196] Some commentators have even gone so far as to suggest that "the prudent author must balance artistic license against potential liability for libel or invasion of privacy."[197] One can only speculate about the resultant work-product of a nation of "prudent authors."

The malice rule of *New York Times*, fashioned to allow good faith error for allegedly defamatory criticism of public officials by the media, does not work when applied to fiction. To phrase the inquiry in terms of "did the

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women) now to find himself *used*, reduced to words — facts of his life, small and secret experiences, his doubts, his torment, all used. Paul Cezanne was not a man to howl. The shape of his friend's treachery filled his mind. He never spoke to Zola again."

Hochstein, "Emile Zola and His Friend Paul Cezanne," *Atlantic Monthly*, (Dec. 1975), 84 at 85.

[193] *Supra* note 186, at 651.

[194] *Id.* at 652.

[195] *Id.*

[196] Kulzick and Hogue, *Chilled Bird: Freedom of Expression in the Eighties* (1980), 14 Loy. L.A.L. Rev. 57 at 70.

[197] Yayashi and Littlefield, *supra* note 15 at 1047.

author know he was falsifying?" ignores the essential differences between fiction and reportage. Similarly, the plaintiff who is a private figure will likewise prevail if the test that is adopted is the proof-of-fault test proposed by *Gertz*,[198] which leaves definition of fault to each state. If negligence will satisfy, then all that a plaintiff need prove is that the defendant wrote his novel in negligent disregard for whether it defamed an actual person — quite apart from whether injury was intended. Such an inquiry requires the writer to second-guess his readers, and the point at which the source of his inspiration has been sufficiently disguised. It can only inhibit creativity. Moreover, if the *New York Times* test has proved insufficient to protect writers of fiction, any test less stringent will likewise fail.

Furthermore, the public/private dichotomy grew out of cases all involving the news media. The resultant tests were based on considerations peculiar to the news media, such as the extent to which the public figure could immunize any harm by exercising his own ability to reply. It is not logical to suggest that anyone — whether public or private — can answer an allegedly defamatory fiction by writing a fiction of his own. This is not to say, however, that fiction is thereby less deserving of constitutional protection. It is rather to suggest that fiction requires its own test — one which need not necessarily depend on the author's choice of a protagonist.

IX. TOWARD A RESTATEMENT OF THE RULE

At one extreme, it does not seem right that a mere labelling of a work as fiction should grant absolute immunity for the most vindictive attacks — just as we would not want a mere label as libel law to grant "talismanic immunity" from constitutional scrutiny. At the other extreme, a rule which does not recognize the special nature of the form and the social cost in prescribing areas of permissible subject-matter is untenable.

The *New York Times* standard reflected the United States Supreme Court's recognition that some error is inevitable in free debate and must be protected if freedom of expression is to have the breathing space it needs to survive. It also reflected a recognition that in many areas "truth" is not a readily identifiable concept, and that putting "truth" to the pre-existing prejudices of a jury might effectively institute a system of self-censorship.[199] The *New York Times* standard left open an avenue of recourse to the courts for the aggrieved plaintiff where the publication was made with knowing falsity or reckless disregard.

In defamation cases, the concern is with defamatory lies masquerading as truth. With fiction, the concern is entirely different: "All fiction, by definition, eschews an obligation to be faithful to historical truth. Every fiction writer knows his creation is in some sense 'false'. That is the nature of the art. Therefore . . . it is meaningless to charge that the author 'knew' his work was false."[200] Recognizing this absurdity, the court in *Leopold* v. *Levin* explicitly

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[198] *Gertz, supra* note 103.

[199] *Supra* note 40, at 406 *per* Mr. Justice Harlan, concurring in part and dissenting in part (1967).

[200] *Guglielmi* v. *Spelling-Goldberg Productions*, 160 Cal. Rptr. 352 at 359, 603 P. 2d 454 at 461 (Cal. 1979).

held that, "substantially creative works of fiction" would not be subject to the "knowing or reckless falsity" or actual malice standards.[201]

The difficulty is to fashion a rule which will not import the role of literary critic into the function of judges.[202] In *University of Notre Dame Du Lac* v. *Twentieth Century Fox*,[203] the Court expressly declined to state its views on the artistic merit, good taste, or essential treatment accorded to the school by the film and the book: "It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases."[204]

The reason for such an approach is that there is something inherently dangerous about a rule which says that creative imagination is only creative when it transcends the personal; which, in effect, penalizes bad novelists for the failure of their art. Fostering a creative ground in which great works of art can take root means extending freedom of expression to minor novelists, popular novelists and bad novelists along with the good.

> That this liberty is often carried to excess; that it has sometimes degenerated into licentiousness, is seen and lamented, but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn.[205]

At the same time, does it satisfy to say that because the rule is hard to formulate, the freedom must be absolute? Does it suffice to let the writer's own discretion be his tutor? On the facts of a case like *Geisler* v. *Petrocelli*, where the writer took not only the physical characteristics of his model but also her name, it is clear that this discretion cannot always be trusted. Even if the writer needed the name to stimulate his imagination through the private stages of creation, the substitution of almost any name in the final manuscript would have been, if nothing else, an act of courtesy. A rule which delegates discretion to the writer, trusts the writer, in effect, to define the freedom of another — the right of that other individual to shape the "self" he shows to the world. It ignores that there may be irresponsible writers, just as there are irresponsible journalists, doctors and lawyers. It believes that no writer could ever break faith in circumstances where the private individual is powerless to respond.

There comes a point when freedom of expression as a defence is wholly parasitic upon the deeper concerns of personhood. I would suggest *the limit is reached for fiction when words are used as the instruments of assault.*

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[201] *Leopold* v. *Levin*, 259 N.E. 2d 250 at 256 (1970). The Levin case involved privacy rather than libel, but Professor Silver has suggested that "the thin line between the two torts need not justify a radically different result." *Supra* note 17, at 1090.

[202] As part of the test Professor Wilson has suggested she would have the court inquire "Is the work fiction?" — that is, is it fiction or "reportage thinly disguised?" *Supra* note 15, at 44. It is submitted that this test is untenable since it involves the court in an aesthetic judgement on a matter on which their opinion is of one more value than anyone else's.

[203] 22 A.D. 2d 452, 256 N.Y.S. 2d 301 (1965), *aff'd* 15 NY 2d 940, 207 N.E. 2d 508 (1965).

[204] *Id.* at 307 (N.Y.S.).

[205] Excerpt from Madison's Address, January 23, 1799, appendix to opinion of Douglas J., concurring in *Garrison, supra* note 36, at 87.

X. PROPOSED RULE

The test one might fashion would begin with the creation of a qualified privilege for writers of fiction which places the burden on the plaintiff to prove *every* element of his case. Identification would have to be unequivocal: It must be unequivocal that the author intended to make a particular person the target of attack. That is, the assault would have been ineffectual without the identification.

Furthermore, injury must result from the identification. Under this rule, damages would not be presumed from the mere fact of publication. They would have to be proven.[206]

This privilege would furthermore be defeasible only on proof of "express malice" in its popular sense of spite and ill will — the "desire to injure the person who is defamed."[207] This test of malice will require the court to inquire into the intent of the writer. Whereas now intent is irrelevant except where defences of fair comment or privilege are claimed, in this suggested test intent becomes pivotal to establishing liability. Intent to injure must have been the *primary purpose* of the portrait.[208] In no case involving a writer of fiction

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[206] When so fundamental a freedom is at stake, the issue of injury should not be allowed to turn on hypothetical damage done to a man's name in the minds of the "average reader." See, *e.g., Murphy* v. *La Marsh*, [1971] 2 W.W.R. 196 at 202, *aff'g* (1970), 73 W.W.R. 114 (B.C.C.A.). For an important recent case on the assessment of damages in libel actions, see also *Munro* v. *The Toronto Sun* (1982), 21 C.C.LT. 261 at 294 *per* Holland J.: "Damages in libel actions are 'at large' and rest upon a consideration of the injury to the plaintiff, the conduct of the defendant and the plaintiff and, in some cases, the deterrent effect sought to be accomplished. . . . Injury to reputation is assumed when libel is proved."

[207] *Horrocks* v. *Lowe*, [1975] A.C. 135 at 149, [1974] 1 All E.R. 662 at 669 *per* Lord Diplock.

[208] Penetration of a writer's primary motive will, of course, be a complex task. An analogy for my "primary purpose" test was suggested by s. 159(8) of the *Criminal Code*, which deems obscene any publication "a dominant characteristic of which is the undue exploitation of sex. . . ."

One can identify a number of factors which would guide the Court in determining whether the "primary purpose" of the fiction was to injure a real plaintiff. The most obvious is evidence as to *the actual relationship between the writer and the plaintiff.*

A second factor is artistic, social, or cultural merit. That there were purposes beyond the alleged harm would tend to negative an intent to do damage as the primary purpose. Jurisprudence, again, on the question of obscenity in relation to art takes into account artistic merit as *one factor* in the determination: *R.* v. *Cameron*, [1966] 2 O.R. 777 (Ont. C.A.); *R.* v. *Coles*, [1965] 1 O.R., 557, 49 D.L.R. (2d) 34 (Ont. C.A.); *Brodie, Dansky and Rubin* v. *The Queen*, [1962] S.C.R. 681.

The author's commitment to the genre is a third factor which might have some bearing. Professional commitment would tend to negative intent to injure as a "primary purpose." This factor must not be used to stifle first novels, whose authors will not be able to point to prior accomplishment in support of their own credibility. Rather, it is suggested in aid of writers who have made a significant contribution to the nation's literature, and who should be able to call upon this contribution when faced with a challenge. In the case of first novels, evidence as to the author's past relationship with the real-life counterpart; expert evidence as to the book's merit, whether social or artistic; and the promise of the author, should be considered in an attempt to pierce through to his motivation.

None of the above three factors should be conclusive in itself. Taken together, they are meant as objective guides to assist a court in determining whether an author intended to produce a work of art or entertainment, or whether he has simply manipulated words as the instruments of assault.

would intent be presumed from the publication itself. This aspect of the rule actually seeks to revive traditional notions of commutative justice — loss distribution based on fault. If one of the deeper purposes of tort law is to perform commutative or corrective justice, then a rule of law which imposes liability for expression independent of any notion of fault is inconsistent, not only with the Charter, but also with a philosophical theory of tort itself.

Rather than "calculated falsehood" the above rule posits a test of intention, of "calculated harm."

As for the publisher, one could adopt the suggestion of Professor Wilson, that "a variation of the *New York Times* test be applied to this situation: Did the publisher publish the work with knowledge that the author intended to defame the plaintiff or with reckless disregard of the defamatory intent?"[209] Such a rule rejects the *Corrigan* v. *Bobbs-Merrill Co.* notion that intent to injure is chargeable to the publisher.[210] Some support for distinguishing the malice of the writer from the malice of the publisher already exists in the dissent of Mr. Justice Dickson in *Cherneskey*.[211] Criteria relevant to determining whether a publisher published the comment with knowledge of the writer's intent to injure will vary. If, for example, the publisher receives a letter informing him that a potential plaintiff believes he was the target of a scathing portrayal, the publisher is put on notice and may have some duty to conduct further investigations before releasing a reprint or paperback edition.[212]

The rationale for not imputing the writer's motive to the publisher is similar to the rationale for moving away from a regime of strict liability: faced with a high potential for liability and the estimated costs of defending a law suit compared with projected profits, publishers would be reluctant to puslish certain books, such as first novels, which normally rank low in mass appeal and are generally considered suspect as tending to be autobiographical. Such a policy would stifle creativity at its inception.[213] The result is that an important avenue of expression is blocked and society's ability to apprehend itself thereby diminished.

XI. APPLYING THE TEST

What might be the likely outcome of the *Bennett* suit when analyzed in terms of the above test?

A. *Unequivocal identification*

As pleaded in the Plaintiff's Statement of Claim[214] and suggested by a 1980 *Books in Canada* article on the suit,[215] evidence of a commonality of traits and incidents which might lead persons acquainted with Leslie James Bennett to believe he was the fictional character "S" referred to in *S, Portrait*

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[209] Wilson, *supra* note 15, at 49.

[210] See text accompanying notes 166-68, *supra*.

[211] *Cherneskey, supra* note 21.

[212] *Bindrim, supra* note 136, at 36.

[213] Stam, *supra* note 15, at 90n. 67, 96n. 99.

[214] *Supra* note 9, Amended Statement of Claim of Leslie James Bennett, para. 4.

[215] Neill, *Suit and Dagger*, Books in Canada, Jan. 1980, at 3.

of a Spy, was likely to have been extensive. A sample list might look as follows:

(1) among the book's dedications are the initials L.J.B. — coincidentally the same initials of the Plaintiff;

(2) in the novel, "S" is an intelligence officer, and deputy director of counter-espionage of the Security Services of the R.C.M.P.. Leslie James Bennett also headed the S.S. counter-espionage of the R.C.M.P.;[216]

(3) there are parallels between the circumstances of Bennett's departure from the service and that of the fictional "S". In the book "S" is interrogated by his R.C.M.P. superiors and allowed to resign from his job and to take an early retirement. He settles in Australia. Bennett's R.C.M.P. career ended abruptly in 1972 when the director-general of the S.S. informed him that his loyalty was in question. He was interrogated for four days. Soon after the interrogation, he had assembled the papers needed for a "medical discharge." Bennett's search for a climate more suiting to his asthma took him briefly to South Africa, then eventually to Australia.[217] The fictional "S" also suffers from asthma;

(4) in the book, the character "S" is asked about a mysterious character named Philby. The connection between Philby and "S" is a brief acquaintance in Istanbul, just after the war. Like the fictional "S", Bennett met a Philby in the late 1940s when they served together in Istanbul.[218]

Based on the above sample of similarities, one would have trouble quarrelling with a Court's finding that the evidence is sufficient to establish identification. But identification under the above test does not end the inquiry.

B. *Injury*

Ian Adams pleaded that Bennett had no reputation to injure, by reason of his residence in Australia where the book was not published, and by reason of the circumstances surrounding his retirement from the R.C.M.P. — circumstances which were a matter of public record.[219]

I submit that this pleading should have been relevant to both liability and to damages. Bennett left the force in 1972 apparently without prospects.[220] His early retirement provided for a pension of $7,000 a year.[221] Bennett apparently sent letters to friends in various countries, but no offers of employment resulted. Gage published the Adams novel in 1977. By the time Bennett brought suit, his ill health had left him unable to work. His pension had grown to $10,000, from which he not only supported an aged father and a woman ill with leukemia, but also made child support payments to his wife.[222] The book did not precipitate Bennett's early retirement. Nor did it precipitate the R.C.M.P. investigations. Furthermore, whatever reputational damage it

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[216] *Id.*

[217] *Id.* at 5.

[218] *Id.* at 4.

[219] *Supra* note 9, at para. 11.

[220] Neill, *supra* note 215, at 5.

[221] *Id.*

[222] *Id.*

might have caused would have been virtually indistinguishable from the damage already caused by the circumstances surrounding Bennett's retirement from the R.C.M.P. On these facts, one cannot help but think that any damage award would have been a windfall for Bennett.

C. *Was Intent to Injure Leslie James Bennett the Primary Purpose of "S"?*

Under the above test, the qualified privilege which is granted to writers of fiction is defeasible only upon proof of actual malice — the desire to injure the person defamed. Bennett would be required to prove that an intent to cause him reputation damage was the primary purpose of the characterization.

It will be recalled that Ian Adams pleaded that "S" described a fictional character against a background of public offices and institutions not the property of any one person.[223]

Had Adams been asked at trial about his intent, he might have said that his purpose was no more than to write a spy novel: He wanted to explore, in as convincing and textured a manner as possible, the psychological motivation of a spy. To do so, he chose to set his story against the background of the Canadian Secret Service, which, of necessity, would have its office in Ottawa, its director of counter-espionage, and even, possibly, its double-agents. He might have said that this fictional world was no more than an educated guess about how secret services might operate. In creating it, he was drawing upon his own reading in the genre, an accumulated knowledge culled from news stories, and what he knew or surmised of political life and secret governmental machinery. He had no intent to single out and defame the actual Leslie James Bennett.

These possible responses of Ian Adams to the question posed by the intent test are, of course, pure speculation. But what are the factors a court might take into account in assessing the credibility of that hypothetical reply?

As one discoverable factor, I have suggested evidence of the actual relationship between writer and plaintiff.[224] Although Adams knew about the plaintiff, he had never actually met or spoken to Leslie James Bennett.[225] This would tend to indicate a lack of intent to injure.

Commitment to the genre may be another factor to weigh in assessing whether Ian Adams intended to write a spy novel, or whether he intended to injure the plaintiff while hiding behind the banner of fiction. Adams's writing career included a distinguished period as a journalist at *Maclean's* magazine.[226] After *S, Portrait of a Spy*, he went on to publish a second spy novel, *End Game In Paris*. This would tend to indicate that his purpose was, indeed, to write a spy novel.

Another factor might be the book's social, cultural or artistic importance. The purpose of inquiring into social or artistic merit is to discover whether other purposes predominate over the alleged injury. Other purposes tend to negative that the author's intent was to harm. Ian Adams may have meant the book as social criticism of the corruption that breeds whenever government

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[223] *Supra* note 9.

[224] *Supra* note 208.

[225] Neill, *supra* note 215, at 4.

[226] *Id.* at 3.

agencies are "secret." Social value of the resultant work, as well as social cost in proscribing it, may properly be considered in assessing the author's motivation. Just as the dissent in *Bindrim* envisoned one consequence of that decision as inviting litigation on the theory that "when you criticize my occupation, you libel me,"[227] would a finding of intent to cause reputational damage make it impossible for future writers of spy novels ever to publish fiction about the Security Service?

Adams might also want to lead expert evidence as to artistic merit. As intimated earlier, conclusions about artistic merit should not be determinative for purposes of the law, nor should it be determinative whether a work pains or pleases a particular plaintiff. Rather, artistic merit may be one factor in assessing whether one man's perceived offence should become society's.

The above are all factors the court might consider in its attempt to pierce through the veil of fiction to determine the author's motivation. Using the above test, I suggest that a court would not find that Ian Adams's purpose was to use his art as the instrument of assault.

It is suggested that the constitutional guarantee requires a rule, such as the one posited above, that would recognize that writers do and must of necessity draw upon their own lives and the world which they inhabit. *Mimêsis* is the very essence of art, as fundamental to the creative process as it is to man's nature. At the same time, the constitutional guarantee for fiction would stop short of an absolute immunity, in order to protect those who happen to inhabit the writer's experience from wholesale attacks upon their reputations — assaults which have no ostensible purpose beyond the harm.

XII. EXISTING BASIS FOR THE RULE: THE DEFENCE OF QUALIFIED PRIVILEGE

Within the law of defamation as currently framed, "[t]here are occasions upon which the courts have considered the publication of untrue defamatory statements to be a necessary risk incidental to the pursuit of other social policies . . . ."[228] On these occasions, the law makes a conscious choice between expressive and reputational interests by deciding that it is better for the common good that one individual should suffer than that freedom of expression should be abridged.[229]

The principle of protection, as stated in *Toogood* v. *Spyring*[230] may be summarized thus: While the law presumes a publication to be malicious from the fact that it is defamatory, there may be occasions where the communication is protected. If it is "fairly made by a person *in the discharge of some public or private duty, whether legal or moral*, or in the conduct of his own affairs, in matters where his interest is concerned," then, depending on the absence of actual malice, the law protects such communications "for the com-

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[227] *Supra* note 136, at 45.

[228] Weiler, *supra* note 7, at 282. See also Doody, *Freedom of the Press, The Charter of Rights, and a New Category of Qualified Privilege* (1983), 61 Can. Bar Rev. 124. Mr. Doody's thesis is that application of the *Charter* may lead to an alteration of the law of qualified privilege as a defence for the media in libel actions.

[229] *Bowen* v. *Hall* (1881), 6 Q.B.D. at 343 *per* Lord Coleridge C.J.

[230] *Toogood* v. *Spyring* (1834), 1 C.M.&R. 181 at 193, 149 E.R. 1044 at 1050.

mon convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."[231] [emphasis added]

While it is clear in principle that the occasions of qualified privilege, "can never be catalogued and rendered exact,"[232] the actual circumstances in which the defence has succeeded have tended to be kept within a fairly narrow compass[233] — for instance, fair and accurate reports of parliamentary or judicial proceedings;[234] and defamatory statements made for the purpose of defending one's own interest.[235]

The classic definition of a privileged occasion is that of Lord Atkinson in *Adam* v. *Ward*:[236]

> [A] privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

The greatest hurdle has been to find a duty of the sort which will give rise to an occasion of qualified privilege.[237] And then, even if an occasion is found to be privileged, that privilege is easily destroyed if, for instance, the publication is too widespread,[238] or if the privilege has been abused or exceeded.[239] The privilege is further "qualified" in that if made with malice, the privilege will be lost.[240]

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[231] *Id.* at 193 (C.M.&R.), 1055 (E.R.).

[232] *London Association for Protection of Trade* v. *Greenlands*, [1916] 2 A.C. 15 at 22.

[233] The law has authoritatively remained frozen ever since two decisions of the Supreme Court in *Banks* v. *Globe & Mail Ltd.*, [1961] S.C.R. 474, 28 D.L.R. 343 and *Globe & Mail Ltd.* v. *Boland*, [1960] S.C.R. 203, 22 D.L.R. (2d) 277.

[234] Gatley, *supra* note 7, at para. 442.

[235] *SunLife Assurance Co.* v. *Dalrymple*, [1965] S.C.R. 302.

[236] *Adam* v. *Ward*, [1917] A.C. 309 at 334 (H.L.).

[237] *Planned Parenthood Newfoundland/Labrador* v. *Fedorik* (1982), 135 D.L.R. (3d) 714 (Nfld. S.C.T.D.), where the defendant, even though an agent of the Right-to-Life Association, speaking as a guest on an open-line programme, was found not to have a "moral or social duty" to make defamatory statements regarding the Planned Parenthood Association. Hence, her statements that the sex education films used for teenagers by the Planned Parenthood Association were "pornographic" were not protected as having been spoken on an occasion of qualified privilege.

[238] *Lawson* v. *Chabot* (1975), 48 D.L.R. (3d) 556 (B.C.S.C.).

[239] *Whitaker* v. *Huntington* (1981), 15 C.C.L.T. (B.C.S.C.); *Douglas* v. *Tucker*, [1951] S.C.R. 275.

[240] In *Horrocks* v. *Lowe*, *supra* note 207, Lord Diplock gave what has become a classic discussion of the malice required to defeat an occasion of qualified privilege:

> . . . the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit . . . If he uses the occasion for some other reason he loses the protection of the privilege.
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> So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the revelant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. "Express malice" is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive

Nevertheless, the ripeness of this defence as a basis for the proposed rule for writers of fiction, is that it protects some kinds of defamatory expression in the interests of society, and the plaintiff must prove express malice in order to overcome the defence. That shift of burden is one endorsed by section 1 of the Charter, which would place the burden on the one espousing a limit to show that it is "demonstrably justified."

In making a case for the claim of fiction to qualified privilege, it is necessary to find a legal, social or moral duty on the part of the writer to write, and a corresponding duty on the part of the reader to read. This finding of reciprocal duty will be no mean task. In *Globe & Mail Ltd.* v. *Boland*,[241] the

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for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interest.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief. . . ."

Even a positive belief in the truth of what is published on a privileged occasion — which is presumed unless the contrary is proved — may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will towards the person he defames . . . .

Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only when his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found. (*Id.* [1975] A.C. at 149-51, [1974] 1 all E.R. at 669-70.)

It will be noted that Lord Diplock's test of malice — "he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity," — is very close to the *New York Times* standard — knowledge of falsity or reckless disregard of whether the statement is false or not. Although a stringent test, it is somewhat less so than the test of intent I posited for writers of fiction above. The reason for my suggestion of a test of malice in the popular sense of spite or ill will for writers of fiction has to do, again, with the fact that "knowing falsity" has proven unworkable as a test for "deliberate" fictions. See text accompanying notes 136-47, *supra*.

[241] *Supra* note 233. The allegedly defamatory editorial accused the plaintiff candidate in an election campaign of 'McCarthy-style tactics' for having suggested that his opponents were "[s]oft on Communism." This editorial was found to be defamatory and the defence of qualified privilege failed, at 205 (S.C.R.), 278 (D.L.R.).

Supreme Court of Canada was unprepared to find that a newspaper had a public duty to publish the editorial in question. In so holding, the Supreme Court emphasized that "the *right* which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of public interest," should not be confused "with a *duty* of the sort which gives rise to an occasion of qualified privilege."[242]

There were two bases for this holding. The first is the rule of law principle that writers are, like every other citizen, subject to the law: "The freedom of the journalist is an ordinary part of the freedom of the subject. . . . No privilege attaches to his position."[243]

The second, is the greater public interest in attracting persons to public office — a theory which is in direct contradistinction to that espoused in *New York Times* and *Gertz*. To allow criticism of those running for public office, "would mean that every man who offers himself as a candidate must be prepared to risk the loss of his reputation without redress unless he be able to prove affirmatively that those who defamed him were actuated by express malice."[244] That would do the public more harm than good, reasoned the Supreme Court in 1960, as tending to deter sensitive and honourable men from seeking public positions of trust.

There is some indication that this reasoning may have developed a few cracks. In *Stopforth* v. *Goyer*[245] the Ontario Court of Appeal broke with precedent and held that "the electorate, as represented by the media, has a real and *bona fide* interest in the demotion of a senior civil servant for an alleged dereliction of duty . . . "and that the original defendant had "a corresponding public duty and interest in satisfying that interest of the electorate." In *Burnett* v. *Canadian Broadcasting Corp. (No. 2)*[246] a Nova Scotia Supreme Court trial judge recently held that a television reporter was entitled to qualified privilege when he interviewed the mayor of Port Hawkesbury, Nova Scotia, respecting the financing of the construction of malls in Nova Scotia, since the mayor and the interviewer had a common interest in the subject-matter of the interview, and the statements were made without actual malice.

But with the entrenchment of freedom of the press in the Charter, the issue is now even broader. To return to first principles, the issue concerns the quality of democracy itself, the idea that in a true democracy, there is no such thing as defamatory criticism of government: "defamation of the government is an impossible notion for a democracy."[247] In his dissent in *Cherneskey*, Mr. Justice Dickson heralded this approach:[248]

> A free and general discussion of public matters is fundamental to a democratic society. The right of persons to make public their thoughts on the conduct of public officials, in terms usually critical and often caustic, goes back to earliest times in Greece and Rome. The Roman historian, Tacitus, spoke of the happiness

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[242] *Id.* at 207 (S.C.R.), 280-81 (D.L.R.).

[243] *Id.* at 208 (S.C.R.), 281 (D.L.R.) citing Lord Shaw in *Arnold* v. *The King Emperor* (1914), 30 T.L.R. 462 at 468.

[244] *Id.* at 208 (S.C.R.), 281 (D.L.R.).

[245] (1979), 8 C.C.L.T. 172 at 178.

[246] (1981-82), 48 N.S.R. (2d) 183 (N.S.S.C.).

[247] *Supra* note 10, at 205.

[248] *Cherneskey, supra* note 21, at 343-44.

> of the times when one could think as he wished and could speak as he thought . . . Citizens, as decision-makers, cannot be expected to exercise wise and informed judgment unless they are exposed to the widest variety of ideas, from diverse and antagonistic sources. Full disclosure exposes and protects against false doctrine.
>
> *It is not only the right but the duty of the press, in pursuit of its legitimate objectives, to act as a sounding board for the free flow of new and different ideas.* [Emphasis added.]

The time seems ripe for an expanded defence of qualified privilege which would recognize that freedom of expression in certain circumstances is not only a right, but a duty. The reciprocity of interest between press and society is further supported by the words of Dickson J. in another dissent: "There is a direct and vital relationship between a free press and a free society."[249]

The rationales which have hitherto supported a frozen notion of qualified privilege would seem to be losing ground, if, indeed, they were ever convincing in the first place.

XIII. THE CLAIM OF LITERATURE TO A CONSTITUTIONAL QUALIFIED PRIVILEGE

What is the reciprocity of social or moral interest that exists between the writer of fiction and his reader?

To return to Hamlet's metaphor of the mirror, it is the interest the writer has in holding up the mirror to society, and society's interest in seeing itself. It is the secret happiness the writer derives from the process of writing, and the pleasure of recognition which society discovers in learning about itself.

Recognition, of course, can be painful, but even more painful is the floundering and the lack of self-knowledge which results when a nation blinds itself. As Margaret Atwood has written in her thesis on Canadian literature:[250]

> If a country or a culture lacks such mirrors it has no way of knowing what it looks like; it must travel blind. . . . Literature is not only a mirror; it is also a map, a geography of the mind. . . . We need such a map desperately, we need to know about here, because here is where we live. . . . Without that knowledge we will not survive.

The reciprocity of interest, then, is no less and no more than a passionate commitment which the artist shares with his audience in the kind of life that exists in the country where they live.

There are many factors involved in the making of great literature. The pivotal one is the symbiotic relationship which exists between the writer and his reader:

> The artist acts as a vision or tongue, giving shape to patterns in which the audience may then recognize itself, for better or worse; "identify" itself. Take away the artist and the audience can never achieve self-knowledge. . . . But take away the audience, and the artist has part of himself cut off. He is blocked, he is like a man shouting to no one.[251]

The result of the law's failure to recognize this commonality of interest is, in

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[249] *Gay Alliance, supra* note 75, at 601 (D.L.R.)

[250] Atwood, *Survival* (Toronto: Anansi, 1972) at 15-16 and 18-19.

[251] *Id.* at 183.

other words, self-censorship. The writer's silence becomes society's silence — "the argument of force in its worst form."[252]

When a freedom is "original," is "fundamental," there is no prior or antecedent restraint to be placed upon it. Civil rights may arise from positive law, but freedom of speech, as an "original freedom" is at once the "necessary attribute" and "[mode] of self-expression of human beings and the primary condition of their community life within the legal order."[253] Need one point to a legal rule in order to justify its protection in society? Need one even say that art is expressive of society, too, in order to posit some utilitarian function which will satisfy the positivists in society?

Notwithstanding mankind's persistent habit of placing things into categories, of measuring state-produced things by their *utility*, and art-produced things by *aesthetics*, Northrop Frye has pointed out that the arts actually do serve a utilitarian function. They represent:

> an immense imaginative and transforming force in society. . . . There is a much deeper level on which *the arts form part of our heritage of freedom*, and where inner repression by the individual and external repression in society make themselves constantly felt. That is why totalitarian societies, for example, find themselves unable either to tolerate the arts or to generate new forms of them. During the Nazi occupation of France, the French discovered that one of the most effective things they could do was to put on classical plays like *Antigone* or *The Trojan Women*, in original or adapted versions. The Nazis had no excuse for censoring them, but because of the intense repression all around, the plays began to mean something of what they really do mean.[254] [Emphasis added.]

That "heritage of freedom" is now guaranteed by the *Canadian Charter of Rights and Freedoms*. It remains to be seen how deep will be the response of the positive law to the constitutional commitment.

XIV. THE LITIGATION CONTEXT

When the issue of the extent to which constitutional protections for speech and press limit a state's power to award damages in a libel action was first litigated in the United States, it arose in the context of an ongoing action. On the basis of the trial judge's instructions to the jury in *New York Times* v. *Sullivan*, and his rejection of the defendants' contention that his rulings abridged freedom of speech and press as guaranteed by the First and Fourteenth Amendments, the defendants appealed to the Supreme Court of Alabama.[255] The Supreme Court of Alabama sustained the Trial Judge's rulings and instructions, saying that the First Amendment did not protect libellous publications and that the Fourteenth Amendment was directed against state and not private action.[256] The defendants further petitioned the Supreme Court of the United States. Thus, the substantive issues came to be scrutinized anew and ultimately determined by constitutional standards.

A Canadian defence lawyer, when confronted with a statement of claim,

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[252] *Whitney* v. *California, supra* note 61.

[253] *Saumur, supra* note 76, at 329 (S.C.R.) *per* Rand J.

[254] Frye, *Creation & Recreation* (Toronto: Univ. of Tor. Press, 1980) at 18-19.

[255] For litigation history, see *New York Times, supra* note 11, at 262-63.

[256] *Id.* at 263.

should first raise his right to freedom of expression in his statement of defence. He may do so by pleading traditional tort defences and then by adding a defence of constitutional privilege. It may be that the plaintiff will move to strike out this pleading;[257] the substantive issue may be litigated at the motion stage, and appeals may be taken from that motion. The defence lawyer may plead qualified privilege and leave argument as to its application or extension on the facts until trial. He may plead his traditional defences and then affirmatively plead his right to freedom of expression as guaranteed by the Charter.

Having raised the Charter argument in his pleadings, counsel should next raise it at trial — for instance, when the judge invites submissions on his instructions to the jury. Submissions may take the form of an argument for the application of a constitutional qualified privilege, or for a special instruction as to what constitutes "malice." If the legal arguments are rejected by the trial judge and traditional defences fail, the next route will be by way of traditional appeal on the point of constitutional and libel law.

Once a Canadian constitutional precedent like the *New York Times* case has been established, procedures may vary again.

For instance, when the *New York Times* rule was authoritatively established,[258] the procedural tactic used in *Gertz* was quite different. After answering the complaint, the defendant filed a pre-trial motion for summary judgment, claiming a constitutional privilege against liability for defamation based on the privilege enunciated in *New York Times*.[259]

Where tort law has once responded to the Charter and what one is arguing for is the application of the now "constitutionalized" rule of liability to agreed-upon facts, Rule 124 may provide a procedural mechanism for obviating a full trial.[260]

Subsection 52(1) of the Charter invites the scrutiny of the court whenever any law conflicts with the supreme law of Canada. If what one is claiming is the modification of an existing defence to comport with the constitutional freedom, there is no reason this argument cannot be raised within the traditional framework. It is argued that the major impact of the Charter upon libel law will not be procedural but substantive, and machinery is already in place for raising the substantive issues.

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[257] Rule 126 of the Ontario *Rules of Practice*, O. Reg. 540/80, for instance, provides: "A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly."

[258] See text accompanying notes 103-20, *supra*.

[259] For procedural history, see *Gertz*, *supra* note 103, 327-32.

[260] Rule 124 of the Ontario *Rules of Practice*, O. Reg. 540/80, provides: "Either party is entitled to raise by his pleadings any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial."

XV. CONCLUSION

Every element in a case of libel law involves a compelling freedom which deserves protection in a free and democratic society; and every element's protection violates to some degree the freedom of another. At stake are the rights of individuals to be protected against unfounded or malicious damage to their reputations and dignity; the rights of publishers not to be forced out of the marketplace by irresponsible, dishonest or vindictive writers; the rights of writers to speak from the deepest wellsprings of emotion and insight, whatever their source, and not to bear a disproportionate burden of the risk; the right of the public to read, to govern its own choice from a cornucopia of ideas.

Clearly, to regard any one of the above freedoms as absolute would be to run roughshod over the other three. And yet, the current regime of strict liability would seem to have done just that. In its desire to protect a person's reputation, the law does not discriminate between "guilty" and "innocent" offenders. *Bona fides* is irrelevant to liability. Freedom of expression has had to take a back seat.

With the entrenchment of freedom of expression in our constitution, the positive law's position on civil liability for libel is no longer tenable. The question now is not *whether* freedom of expression should be guaranteed in principle, but rather *how* it should be guaranteed — which rule of liability is a reasonable limit, demonstrably justified in a free and democratic society?

This paper has posited a rule of liability for writers of fiction which would make *bona fides* very much an issue. It has suggested that the constitutional limit is reached when, and only when, words become the instruments of assault.