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Comment: Defamation by Fiction

COMMENT

DEFAMATION BY FICTION

Fiction is under increased attack as authors test the creative, and unwittingly the legal, limits of their craft, and persons who believe that their reputations have been tarnished retaliate with defamation suits.[1] Consequently, fictionists feel constrained, and publishing houses are hesitant to publish fiction, particularly historical novels and works by unknown writers.[2] The cost of libel insurance, once a rare feature in the literary world, has skyrocketed, and some publishers now procure this insurance for their authors.[3]

Although all writers bewail their exposure to liability, fictionists have a particular concern: Recent constitutional developments in defamation are difficult to apply to fiction, and protections inherent in the common law occasionally go unnoticed. This constitutional infusion, which provides defendants with more, not less, protection than at common law, curiously has led to increased vulnerability for fictionists. A few courts apply Supreme Court mandates in a manner appropriate for factual writings, not fiction, and, in concentrating upon first amendment principles, they seem oblivious to the protections for fiction present in the elements and defenses of defamation. These courts have skewed the delicate balance between two important interests: free speech and an individual's reputation.

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1. *See, e.g.*, Goodale, *Stranger Than Fiction: The Novel That Gave Rise to Libel Damages*, Nat'l L.J., May 5, 1980, at 26; Pilpel & Chasen, *The Trouble With "Faction,"* Publishers Weekly, July 18, 1980, at 20; *see also* Friendly, *In Libel Suits, Juries Exact Damaging Dues For Damaged Reputations*, N.Y. Times, April 5, 1981, § 4, at 8, col. 3; Lauter, *Libel Suits: New Wave Is Predicted*, Nat'l L.J., June 21, 1982, at 1 (potential plaintiffs less hesitant to sue).

The concern for fictionists is not of recent origin. A nineteenth century advertisement warned: "And indeed there is not in the world a greater error than which fools are apt to fall into, and knaves with good reason to encourage than the mistaking a satirist for a libeller." J. TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL, AND ON THE REMEDY BY CIVIL ACTION FOR THOSE WRONGS 20 n.5 (1868). *See also Fiction and Libel*, 161 LAW TIMES 161, 172 (1926) (proposed legislation to protect fictionists).

2. "[A]ll first novels should be considered suspect. They tend to be autobiographical, and twentieth century fiction is replete with examples of writers whose first novel, at least, leaned heavily on the author's (usually unflattering) portrayal of and judgment on his family." H. PILPEL & T. ZAVIN, RIGHTS AND WRITERS 23 (1960). *See, e.g.*, Fetler v. Houghton Mifflin Co., 364 F.2d 650, 650 (2d Cir. 1966) (author's first novel portraying his brother).

The term "fictionist" includes all novelists, playwrights, short story writers, and others who present a fictional, not factual, reality for their readers.

3. O'Connor, *Authors Given Libel Coverage*, Sunday Sun (Baltimore), April 4, 1982, at K7, col. 1.

Under *New York Times Co. v. Sullivan*,[4] which created a constitutional privilege to err honestly in statements of fact about public officials,[5] and subsequent cases which extended first amendment protection to criticism of public[6] and private[7] figures, a plaintiff must prove both the falsity in the writing and the defendant's fault (or "actual malice" if the plaintiff is a public figure) in making the false statement of fact. This focus on truth and falsehood and the margin of error appropriate to protect society's interest in free speech — essential to constitutional privilege analysis — initially appears misplaced in cases involving fiction. The distinction between truth and falsehood is reduced to an absurdity if applied mechanically to fiction, "the conscious antithesis of truth."[8] An author who eschews any pretense of presenting a "true" account of actual events must struggle to apply a standard that protects defendants who do not knowingly, recklessly, or, in some cases, negligently make false statements of fact about another.[9] Similarly, the heated debate over the distinction between public and private figures — and now "limited interest" public figures[10] — is bewildering

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4. 376 U.S. 254, *motion denied*, 376 U.S. 967 (1964). *See infra* text accompanying notes 78-87.

5. The Supreme Court held:

> The constitutional guarantees require, we think, 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.

376 U.S. at 279-80.

In Rosenblatt v. Baer, 383 U.S. 75, 84-85 (1966), the Court expanded the "public official" concept to include persons at the lowest levels of government.

6. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

7. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974). For a general discussion of the present state of Maryland defamation law see Comment, *The Maryland Court of Appeals: State Defamation Law in the Wake of* Gertz v. Robert Welch, Inc., 36 MD. L. REV. 622 (1977). *See infra* notes 58-59.

8. Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 131, 233 N.E.2d 840, 845, 286 N.Y.S.2d 832, 838 (1967) (Bergan, J., dissenting). Judge Bergan argued that: "All fiction is false in the literal sense that it is imagined rather than actual. It is, of course, 'calculated' because the author knows he is writing fiction and not fact; and it is more than a 'reckless' disregard for truth." *Id.*

9. *See* Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280, 1283-84 (D.N.J. 1981); Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 860, 870-71, 603 P.2d 454, 461, 160 Cal. Rptr. 352, 359 (1979) (Bird, C.J., concurring); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 89, 155 Cal. Rptr. 19, 45 (Files, P.J., dissenting), *cert. denied*, 444 U.S. 984 (1979), *reh'g denied*, 444 U.S. 1040 (1980); Silver, *Libel, the "Higher Truths" of Art, and the First Amendment*, 126 U. PA. L. REV. 1065, 1094 (1978); *see* Comment, *Privacy, Defamation, and the First Amendment Implications of* Time, Inc. v. Hill, 67 COLUM. L. REV. 926, 943-44 (1967).

10. *See, e.g.*, Street v. National Broadcasting Co., 645 F.2d 1227, 1236 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981).

to the fictionist, who finds it difficult to distinguish between a parody of a "public figure" and a satire of society which focuses on an unknown "private figure." Although many fictionists nevertheless have prevailed,[11] many recent cases have chilled fictionists who base their work on real people or contemporary events. The harm from these cases, two of which will be discussed at length, extends beyond any judgment for damages: By ignoring or misunderstanding precedent, some courts have blurred the borders of permissible writing.

This Comment describes how a reader's perception that a work and its characters are fictitious arises and what effect this understanding has upon the reader's reasonable belief whether a writing defames the plaintiff. A novel that embarrasses or otherwise harms a plaintiff nevertheless may be nondefamatory. As courts for centuries have recognized, some "fiction" deserves protection, but other writings published under the guise of fiction do not. The results of this experience are built into the elements and defenses of common-law libel, slander, and the related privacy causes of action.[12] In particular, a writing must be "of and concerning," or sufficiently identify, the plaintiff as the subject of the writing. If, however, the plaintiff satisfies this threshold hurdle, the writing may fail to make a false representation of fact. After *New York Times*, some courts have melded the latter requirement into a constitutional protection for opinion.

This study of defamation[13] by fiction is divided into three sections: The first analyzes the "of and concerning" element, and focuses upon

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11. *See, e.g.*, Lyons v. New American Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (1980) (fictionist prevails, but rationale unclear); Shapiro v. Newsday, Inc., 5 Media L. Rep. (BNA) 2607 (N.Y. Sup. Ct. 1980) (same); Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 439-40 (10th Cir. 1982) (judgment for defendant, but scant analysis of the "of and concerning" requirement), *petition for cert. filed*, 51 U.S.L.W. 3738 (U.S. Apr. 12, 1983) (No. 82-1621); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 19 (defendants liable in poorly reasoned opinion), *cert. denied*, 444 U.S. 984 (1979), *reh'g denied*, 444 U.S. 1040 (1980).

12. This Comment focuses on libel, but the analysis also applies to slander and related torts such as "false light" invasion of privacy and intentional infliction of emotional distress, which are subject to the same first amendment restrictions. *See, e.g.*, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 442 (10th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3738 (U.S. Apr. 12, 1983) (No. 82-1621); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 766 (D.N.J. 1981); RESTATEMENT (SECOND) OF TORTS § 566 comment f (1977); *see* Time, Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489, 491 (1975); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1207 (1976).

13. "[N]o definition of the term 'libel' [, or defamation, is] sufficiently comprehensive to embrace all cases . . . ." Thompson v. Upton, 218 Md. 433, 437, 146 A.2d 880, 883 (1958). *See generally* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5 (1956); W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS §111 (4th ed. 1971); R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 39-42 (1980). The elements vary dramatically from case to case, depending on at least four factors: the plaintiff, the defendant, the character of the allegedly

group defamation analysis, which is particularly valuable in studying fiction. This identification requirement is crucial in fiction cases because, unlike a writing that purports to be factual, a work of fiction might be unable to portray any real person. The next section discusses how the fictionist creates the impression that the writing is fiction, not fact, and how this perception affects the "of and concerning" element, the false representation of fact requirement, and the reader's understanding of the writing as a vehicle for expression of opinion. This section ends with an analysis of the "archetypal character" concept, which is both a useful literary device and a valuable legal approach to evaluating fiction. The third section reviews two recent cases in which fictionists and their publishers suffered judgments at trial, *Bindrim v. Mitchell*[14] and *Pring v. Penthouse International, Ltd.*,[15] to highlight the difficulties in applying defamation law to fiction.

I. A CASE OF MISTAKEN IDENTITY: THE "OF AND CONCERNING" REQUIREMENT

A. *Accommodating Fiction*

Although the requirement that a writing be of and concerning the plaintiff is assessed easily in cases involving a writing that purports to be factual, such as a newspaper, this element presents a difficult challenge for a plaintiff who feels maligned by an unsavory character in a novel or a story. The dual nature of the "of and concerning" requirement — first, that the writing portray an ascertainable person, and second, that the plaintiff be this person[16] — provides the key to understanding the protection it affords fiction: In factual writing, the reader may be unable to discover *which* person the writing portrays, but, in fiction, the writing might not portray *any* real person. Literary characters, as the standard frontispiece disclaimer admonishes, may be "fictitious, and any resemblance to any actual person, living or dead,

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defamatory writing, and the jurisdiction whose law applies. R. SACK, *supra*, at 39. Section 558 of the *Restatement (Second) of Torts* suggests four requirements:

(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS § 558 (1977).

14. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *reh'g denied*, 444 U.S. 1040 (1980). *See infra* text accompanying notes 172-94.

15. 695 F.2d 438 (10th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3738 (U.S. Apr. 12, 1983) (No. 82-1621). *See infra* text accompanying notes 195-214.

16. *See infra* note 21.

purely coincidental." Thus, satisfying the "of and concerning" requirement in fiction involves more than adding up identifying indicia, such as names and physical characteristics. Despite similarities between the plaintiff and the literary cognate, the reasonable reader may conclude that the work of fiction does not identify the plaintiff.

Notwithstanding this protection, a few courts ignore the demands of the "of and concerning" element and thus force an interpretation that the writing is about an actual person. These courts incorrectly rely upon superficial similarities or fiction's roots in real events.[17] The identification requirement, however, demands a portrayal: The writing must do more than suggest to the reader that an actual person served as the basis for the fiction. Courts should not fail to examine properly whether the writing identifies the plaintiff: If a writing is not of and concerning the plaintiff, it cannot be defamatory.[18] When a court permits a jury to disregard the resonable perception that the fiction fails to portray the plaintiff, liability follows easily: A novel that is not of and concerning a plaintiff certainly will contain false statements of fact about that person.

B. *The "Of and Concerning" Requirement*

The basic components of the "of and concerning" element are straightforward, but are often difficult to apply to fiction. Generally, the plaintiff must prove[19] to the trier of fact[20] that the reasonable reader would perceive the writing as intended to portray an ascertainable person and that the plaintiff is that person.[21] The level of recognition must

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17. *See infra* text accompanying notes 172-214 (analysis of two such cases, *Bindrim v. Mitchell* and *Pring v. Penthouse Int'l Ltd.*).

18. *See, e.g.*, LaVey v. Smith, 8 Media L. Rep. (BNA) 1363, 1364 (N.D. Cal. 1982). "If a court concludes that the allegedly libelous material is not of and concerning the plaintiff, it is not necessary to reach other grounds for dismissal." *Id.*

19. *E.g.*, Hansen v. Stoll, 636 P.2d 1236, 1240 (Ariz. Ct. App. 1981) (burden of proof on plaintiff to show identification); Julian v. American Business Consultants, 2 N.Y.2d 1, 17, 155 N.Y.S.2d 1, 16, 137 N.E.2d 1, 11-12 (1956); RESTATEMENT (SECOND) OF TORTS § 564 comment f (1977).

20. The trier of fact decides whether a writing is of and concerning the plaintiff. *E.g.*, Geisler v. Petrocelli, 616 F.2d 636, 640 (2d Cir. 1980); Goldsborough v. Orem & Johnson, 103 Md. 671, 683, 64 A. 36, 40 (1906); RESTATEMENT (SECOND) OF TORTS § 617 (1977).

One court considered summary judgment on this issue inappropriate: "[T]he issue is generally left for resolution by the trier of fact . . . [because] the plaintiff is entitled to develop and present a full evidentiary record." Geisler v. Petrocelli, 616 F.2d at 640. Other courts have not been so reticent about granting summary judgment. *See, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962) (summary judgment for defendant); Lyons v. New American Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (1980) (same).

21. *E.g.*, National Shutter Bar Co. v. G.F.S. Zimmerman & Co., 110 Md. 313, 318, 73 A. 19, 21 (1909); Bonham v. Dotson, 216 Ky. 660, 662, 288 S.W. 297, 298 (1926).

The *Second Restatement* misstates the "of and concerning" requirement. According

rise to a portrayal of the suspect character as the plaintiff—a standard that rarely is met in fiction. The issue is neither whether the writing is based upon or otherwise loosely connected with the plaintiff, nor, under common law, whether the defendant actually intended to represent the plaintiff. The gravaman of the tort of defamation — and an essential point in understanding the "of and concerning" requirement — is that the writing misrepresented the plaintiff's character[22] by yielding to the reader a perceived intent to portray the plaintiff.[23]

The writing is the focus of identification analysis: It alone can injure the plaintiff's legally protected interest in his reputation. Before the infusion of constitutional law into the field of defamation, the writing was a dangerous instrumentality for which there was strict liability.[24] Neither the author's actual intent or level of care,[25] nor the

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to the Restatement, "[a] defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer." RESTATEMENT (SECOND) OF TORTS § 564 (1977). Inasmuch as the passage implies that the reader must *either* (1) reasonably, albeit mistakenly, understand that the defendant intended to refer to the plaintiff *or* (2) have correctly, but not reasonably guessed that the defendant intended to refer to the plaintiff, it is contrary to the case law, *see infra* text accompanying notes 56-66. The first statement was correct before *New York Times* and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); the second has never been correct.

22. "Perhaps the most comprehensive term in which the libel concept can be expressed is that of *misrepresentation* of the victim's personality." L. GREEN, W. MALONE, W. PEDRICK & J. RAHL, INJURIES TO RELATIONS 373 (1959) (emphasis in original). *See also* W. PROSSER, *supra* note 13, at 737; 1 F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 47-48 (1981).

23. *See* Davis v. R.K.O. Radio Pictures, Inc., 191 F.2d 901, 904 (8th Cir. 1951) ("reasonably be understood as a portrayal of the plaintiff"); Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966); Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 142 (4th Cir. 1969); Smith v. Huntington Publishing Co., 410 F. Supp. 1270, 1272 n. 1 (S.D. Ohio 1975), *aff'd*, 535 F.2d 1255 (6th Cir. 1976); Baldwin v. Hildreth, 80 Mass. (14 Gray) 221, 221 (1859) (Shaw, C.J.); RESTATEMENT (SECOND) OF TORTS § 564 comment d (1977); Smith, Jones v. Hulton: *Three Conflicting Judicial Views As to a Question of Defamation* (pt. 2), 60 U. Pa. L. Rev. 461, 480 (1912).

Some commentators have missed this crucial point. *See, e.g.*, Silver, *supra* note 9, at 1084-86 (arguing for this standard because "what makes good literary sense should have some legal relevance," but failing to recognize support in the case law).

24. 1 F. HARPER & F. JAMES, *supra* note 13, at 368-69.

25. *E.g.*, Duvivier v. French, 104 F. 278, 281 (7th Cir. 1900); Switzer v. Anthony, 71 Colo. 291, 294, 206 P. 391, 392 (1922); Granger v. Time, Inc., 174 Mont. 42, 49, 568 P.2d 535, 540 (1977); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63, 126 N.E. 260, 262 (1920); Jones v. E. Hulton & Co., [1909] 2 K.B. 444, 456 (C.A.), *aff'd*, 1910 A.C. 20; 1 F. HARPER & F. JAMES, *supra* note 13, § 5.7, at 369; R. SACK, *supra* note 13, at 112. *Contra* Clare v. Farrell, 70 F. Supp. 276, 278 (D. Minn. 1947) (relying on dictum in two turn-of-the-century cases and a criminal libel statute which expressly required intention); Hanson v. Globe Newspaper Co., 159 Mass. 293, 295, 34 N.E. 462, 463 (1893) (Holmes wrote the dissenting opinion); Davis v. Hearst, 160 Cal. 143, 184, 116 P. 530, 548 (1911) (actual intent relevant "where the

plaintiff's belief that he had been defamed[26] was relevant. The only relevant intent was the "perceived intent" which a reader could discern from the writing. It did not even matter whether the defendant was aware of the plaintiff's existence.[27] Moreover, a writer could not affirmatively defend a suit by proving to whom the writing referred.[28] Now, however, as will be discussed in the next section, the defendant is no longer strictly liable for the accidental identification of another. Thus, actual intent is irrelevant in the first instance to whether a writing is of and concerning the defendant, but is relevant to show that the defendant acted without the requisite negligence or "actual malice."[29]

Despite this limitation on evidence of the defendant's intent, a plaintiff may introduce extrinsic facts to explain how readers might understand indicia, such as nicknames, addresses, and physical characteristics,[30] as identifying a particular person. For example, the plaintiff can demonstrate how references such as "city magistrate of . . . Jefferson Market Court"[31] or "Sheriff in Malone"[32] influence a reader. Under common law, the extrinsic facts necessary to identify the plaintiff were known as the "colloquium," which the plaintiff had to plead if he was not expressly named in the writing.[33]

Proof that the defendant based the suspect character on the plaintiff cannot satisfy the "of and concerning" requirement: Basis-in-fact is

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reference to plaintiff is so veiled, obscure, and ambiguous that the jury cannot see and say, without extrinsic evidence, that the plaintiff was aimed at and was injured").

A few cases suggested that the defendant must be at least negligent in identifying the plaintiff. *E.g.*; Clark v. North American Co., 203 Pa. 346, 351, 352, 53 A. 237, 238, 239 (1902); *see* Smith, *Liability for Negligent Language*, 14 Harv. L. Rev. 184, 198-99 (1900) (discussing circumstances under which negligence might be relevant to an identification issue).

26. *E.g.*, Robinson v. Guy Gannett Publishing Co., 297 F. Supp. 722, 726 (D. Me. 1969); Granger v. Time, Inc., 174 Mont. 42, 49, 568 P.2d 535, 540 (1977); *see also* Helmicks v. Stevlingson, 212 Wis. 614, 616, 250 N.W. 402, 403 (1933) (defendant's admission to plaintiff irrelevant).

27. *E.g.*, Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63, 126 N.E. 260, 262 (1920); Washington Post Co. v. Kennedy, 55 App. D.C. 162, 163, 3 F.2d 207, 208 (1925).

Two or more persons could be defamed by the same writing although it applied on its face to a single person. *See, e.g.*, Constitution Publishing Co. v. Way, 94 Ga. 120, 123, 21 S.E. 139, 140 (1894); 1 F. HARPER & F. JAMES, *supra* note 13, at 369-70.

28. *See, e.g.*, Memphis Commercial Appeal, Inc. v. Johnson, 96 F.2d 672, 674 (6th Cir. 1938); Washington Post Co. v. Kennedy, 55 App. D.C. 162, 163, 3 F.2d 207, 207 (1925).

29. *See infra* text accompanying notes 56-66.

30. *E.g.*, Goldsborough v. Orem & Johnson, 103 Md. 671, 682, 64 A. 36, 40 (1906).

31. Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 62-63, 126 N.E. 260, 262 (1920).

32. Lyons v. New American Library, Inc., 78 A.D. 2d 723, 724, 432 N.Y.2d 536, 537 (1980).

33. *See, e.g.*, Peterson v. Sentman, 37 Md. 140, 153-54 (1872); Velle Transcendental Research Ass'n, Inc. v. Esquire, Inc., 41 Ill. App. 3d 799, 802-04, 354 N.E.2d 622, 625-26 (1976); R. SACK, *supra* note 13, at 112-24.

irrelevant.[34] Nevertheless, similarities between the plaintiff and the character may be relevant insofar as they are known by the writing's readers.[35] For example, evidence that the defendant based a character on a childhood friend cannot enable a jury to identify the character as the plaintiff,[36] but extrinsic facts, such as a nickname common to both, may show why some readers reasonably believed the two to be the same person.

To be actionable a defamatory writing must be "published" to a third person who understands that the writing portrayed the plaintiff.[37] The understanding of the readership, be it the public-at-large or a well-defined group, determines the writing's meaning.[38] Thus, the entire world need not believe that the writing identifies the plaintiff;[39] a single reader who knows the plaintiff and has read the writing is sufficient. If, however, extrinsic facts are necessary to identify the plaintiff, the reader must know these facts.[40]

The understanding of the reader to whom the writing was published must be reasonable.[41] A witness' belief[42] that a writing identifies

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34. *E.g.*, Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 142-43 (4th Cir. 1969); Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962); Wright v. R.K.O. Radio Pictures, Inc., 55 F. Supp. 639, 640 (D. Mass. 1944); *see* Helmicks v. Stevlingson, 212 Wis. 614, 616, 250 N.W. 402, 403 (1933) (defendant's admission to plaintiff irrelevant).

35. *See supra* text accompanying notes 30-33.

36. *See* Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969).

37. *E.g.*, Great Atlantic & Pacific Tea Co. v. Paul, 256 Md. 643, 648, 261 A.2d 731, 734-35 (1970); Arnold v. Sharpe, 296 N.C. 533, 539, 251 S.E.2d 452, 456 (1979). A defendant generally is not liable if the plaintiff "publishes" the writing. *See, e.g.*, McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 796, 168 Cal. Rptr. 89, 93-94 (1980). By analogy, a plaintiff should not be able to provide his witnesses with the extrinsic facts necessary to render the writing defamatory.

38. *See, e.g.*, Werber v. Klopfer, 260 Md. 486, 491-92, 272 A.2d 631, 634 (1971) (allegedly defamatory lampoon of leftist professor distributed only to plaintiff and six alumni).

39. *E.g.*, Davis v. R.K.O. Radio Pictures, Inc., 191 F.2d 901, 904 (8th Cir. 1951); Schuster v. U.S. News & World Report, Inc., 459 F. Supp. 973, 977 (D. Minn. 1978); Restatement (Second) of Torts § 564 comment b (1977).

40. Duvivier v. French, 104 F. 278, 281 (7th Cir. 1900); Restatement (Second) of Torts § 564 comment b (1977).

41. *E.g.*, Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980); Washington Post Co. v. Kennedy, 55 App. D.C. 162, 163, 3 F.2d 207, 208 (1925) ("ordinary sensible readers, knowing the plaintiff").

A few courts and commentators would exact a higher standard. *See, e.g.*, Wright v. R.K.O. Radio Pictures, Inc., 55 F. Supp. 639, 640 (D. Mass. 1944) (requiring that "a considerable and respectable class in the communities where the defendant's picture was shown identify [the characters] as [the] plaintiffs"); Comment, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U. L. REV. 571, 593 (1981) ("average literary sophistication"); *see* Hill, *supra* note 12, at 1310 n.474.

42. A witness' opinion whether a writing is of and concerning the plaintiff is admissible. *E.g.*, Goldsborough v. Orem & Johnson, 103 Md. 671, 682, 64 A. 36, 40 (1906); Middlebrooks v. Curtis Publishing Co., 412 F.2d 141, 142 (4th Cir. 1969).

the plaintiff is not conclusive: His understanding cannot overcome a reasonable reading by the trier of fact.[43] When a writing is read as a whole,[44] shared physical traits, mannerisms, and other identifying indicia may not sufficiently portray a particular person. For example, the reader's perception that similarities between the plaintiff and the suspect character are coincidental cannot support a reasonable belief that the writing is of and concerning the plaintiff.[45] The mere use of a person's name usually cannot support a finding that the writing identified him.[46] For example, if the writing defames "John Smith," the jury must determine that the writing identified "John Smith," the plaintiff.[47] If, however, the plaintiff's name is unique or pervasively known in the community, reference to it might satisfy the "of and concerning" requirement.[48]

Although a jury must limit its inquiry to the writing and not explore the defendant's actual intent, it need not honor an author's efforts to disguise his characters in an attempt to avoid liability.[49] "[P]seudonyms and other artful dodges"[50] do not negate a reasonable understanding that the writing is of and concerning the plaintiff.[51] For example, the suspect character need not have a name.[52] The existence

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43. *E.g.*, LaVey v. Smith, 8 Media L. Rep. (BNA) 1363, 1364 (N.D. Cal. 1982). "An assertion in a single affidavit from one reader is insufficient to establish the 'of and concerning' requirement in light of a plain reading of the publication." *Id.*

44. An allegedly defamatory writing must be examined in context. *E.g.*, Smith v. Huntington Publishing Co., 410 F. Supp. 1270, 1272 n.1 (S.D. Ohio 1975), *aff'd mem.*, 535 F.2d 1255 (6th Cir. 1976); *see* Ledger-Enquirer Co. v. Brown, 214 Ga. 422, 423, 105 S.E.2d 229, 230 (1958) (defamatory headline must be construed with article).

45. *E.g.*, Summerlin v. Washington Star Co., 7 Media L. Rep. (BNA) 2460, 2462 (D.D.C. 1981); Davis v. R.K.O. Radio Pictures, Inc., 16 F. Supp. 195, 197 (S.D.N.Y. 1936); Smith v. Huntington Publishing Co., 410 F. Supp. 1270, 1274 (S.D. Ohio 1975), *aff'd mem.*, 535 F.2d 1255 (6th Cir. 1976).

46. *E.g.*, Summerlin v. Washington Star Co., 7 Media L. Rep. (BNA) 2460, 2462 (D.D.C. 1981) ("plaintiff can point to nothing except a bare coincidence of first and last names"); Allen v. Gordon, 86 A.D.2d 514, 515, 446 N.Y.S.2d 48, 49 (plaintiff, the only "psychiatrist in Manhattan named Dr. Allen," not identified by novel), *aff'd*, 56 N.Y.2d 780, 452 N.Y.S.2d 25 (1982). *But see* Gasperini v. Manhinelli, 196 Misc. 547, 549, 92 N.Y.S.2d 575, 577 (Sup. Ct. 1949) (jury question whether deletion of "Jr." identified plaintiff, rather than his son, in medical report describing son's nervous disorder).

47. Hays v. Brierly, 4 Watt. 392, 394 (Pa. 1835) (Gibson, C.J.) ("John Smith, . . . the appellative of thousands"). *But see* Jones v. E. Hulton & Co., [1909] 2 K.B. 444 (C.A.), *aff'd*, 1910 A.C. 20 ("Artemus Jones" sufficient despite numerous dissimilarities).

48. *See, e.g.*, Harrison v. Smith, 20 L.T.R. 713 (1869) ("General Plantagenet Harrison," a well-known military figure in the nineteenth century).

49. *E.g.*, Davis v. R.K.O. Radio Pictures, Inc., 191 F.2d 901, 905 (8th Cir. 1951); Kelly v. Loew's, Inc., 76 F. Supp. 473, 485 (D. Mass. 1948).

50. J. FLEMING, THE LAW OF TORTS 475 (4th ed. 1971).

51. *E.g.*, King v. Clerk, 94 Eng. Rep. 207, 207 (1728). *See infra* note 53.

52. *E.g.*, Wolfson v. Kirk, 273 So. 2d 774, 779 (Fla. Dist. Ct. App.), *cert. denied*, 279 So. 2d 32 (Fla. 1973); Harwood Pharmacal Co. v. National Broadcasting Co., 9 N.Y.2d 460, 464,

of details inapplicable to the plaintiff does not forestall liability.[53] An accumulation of "artful dodges," however, may compel a reasonable understanding that a writing does not identify the plaintiff.[54]

The components of the "of and concerning" element demand a high level of recognition and have led some courts to impose a "rule of certainty."[55] The writing must portray the plaintiff, not merely "refer to" or "be about" him. It must do more than evoke some connection between the plaintiff and the suspect character. If the reasonable reader does not interpret the allegedly defamatory writing as *representing* the plaintiff, the writing is not actionable.

C. *The Constitutional Intrusion*

New York Times Co. v. Sullivan and the many cases in the past two decades that have expanded upon it, such as *Gertz v. Robert Welch, Inc.*,[56] have altered greatly the law of defamation, including the "of and concerning" element. These cases radically transformed the bal-

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174 N.E. 602, 604, 214 N.Y.S.2d 725, 728 (1961). The use of the plaintiff's name, however, may be required for some state privacy actions, *e.g.*, N.Y. Civ. Rights Law §§ 50, 51 (McKinney 1976); *see, e.g.*, Levey v. Warner Bros., 57 F. Supp. 40 (S.D.N.Y. 1944) (playwright's estranged wife, the basis for a character, not named).

53. *E.g.*, Fetler v. Houghton Mifflin Co., 364 F.2d 650, 653 (2d Cir. 1966); Ellis v. Brockton Publishing Co., 198 Mass. 538, 541, 84 N.E. 1018, 1019 (1908); Clark v. North American Co., 203 Pa. 346, 351, 53 A. 237, 238-39 (1902) (different first name).

One judge reasoned that if "clumsy inventions" excused defendants from judgments, "[t]he consequence would be, that the land would be filled with violence and blood." Hays v. Brierly, 4 Watts 392, 395 (Pa. 1835) (Gibson, C.J.).

54. *See, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962) (character of plaintiff so radically altered by defendant that the literary cognate no longer represented the plaintiff).

55. *E.g.*, Golden North Airways, Inc. v. Tanana Publishing Co., Inc., 218 F.2d 612, 621 (9th Cir. 1954) (must be "certainty as to the person defamed"); Helmicks v. Stevlingson, 212 Wis. 614, 615, 250 N.W. 402, 402 (1933); *see* Yankwich, *Certainty in the Law of Defamation*, 1 U.C.L.A. L. REV. 168, 170-81 (1953); *see also* Fetler v. Houghton Mifflin Co., 364 F.2d 650, 653 (2d Cir. 1960) (this burden "is not a light one").

This "rule" has led a few courts to require that, absent the name of the plaintiff, the reasonable reader have "*no doubt* . . . as to the person's identity." Summerlin v. Washington Star Co., 7 Media L. Rep. (BNA) 2460, 2461 (D.D.C. 1981) (emphasis in original); *accord* Hutchinson v. Proxmire, 431 F. Supp. 1311, 1331 (W.D. Wisc. 1977) (applying D.C. law), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979); Harmon v. Liss, 116 A.2d 693, 695 (D.C. Mun. App. 1955). This requirement is distinct, however, from the standard of proof required of plaintiffs. Although no court has discussed what standard is appropriate in light of *New York Times* and its successors, these cases apparently compel a "clear and convincing," rather than a "preponderance of the evidence" standard. *See* R. SACK, *supra* note 13, at 124; Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 462-65 (1975); New York Times Co. v. Sullivan, 376 U.S. at 285-86; Gertz v. Robert Welch, Inc., 418 U.S. at 342; Herbert v. Lando, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting).

56. 418 U.S. 323 (1974).

ance that the common law of libel and slander had struck between an individual's right to an unblemished reputation and society's interest in free speech. After *New York Times*, the balance favored freedom of expression over an individual's reputation.[57] The imposition of a margin of error inherent in the actual malice requirement effected this shift. Although some plaintiffs must prove "actual malice," no defendant (at least one in the media[58]) is liable today without fault.[59] To buttress these protections for speech, *New York Times* imposed two requirements: a "clear and convincing" standard of proof[60] and an independent examination of the facts upon review.[61]

After *Gertz*, the defendant's actual intent to portray the plaintiff still does not support a reasonable understanding that the writing is of and concerning the plaintiff,[62] but a defendant is no longer strictly liable for an accidential reference to a real person.[63] For example, if a

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57. *See generally* Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.) (discussing effect of *Times*), *cert. denied*, 434 U.S. 834 (1977); Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785 (1979) (same). The Supreme Court recently noted an individual's interest in his reputation as a basic concern, but reaffirmed the basic principles of *New York Times*. *See* Herbert v. Lando, 441 U.S. 153, 155-57 (1979). Professors Harper and James, among others, supported the strict liability aspect of the "of and concerning" element before *New York Times*. They excused occasional harsh results, such as *Jones v. E. Hulton & Co.* [1909] 2 K.B. 444 (C.A.), *aff'd*, 1910 A.C. 20, in which the defendant was liable solely for using the plaintiff's name, arguing that:

> [t]he test is entirely independent of the state of mind of the defendant, and if persons knowing the plaintiff might reasonably suppose it referred to him, the defendant is liable. *In view of the principles of social policy involved* and the argument and analysis by the eminent judges in *Jones v. E. Hulton & Co.*, it is submitted that the decision of the House of Lords in that case is *socially desirable* and legally convenient and sound.

1 F. HARPER & F. JAMES, *supra* note 13, at 369 (emphasis added). *Jones* is no longer good law even in England. *See* Defamation Act, 1952, 15 & 16 Geo. 6 & I Eliz. 2, ch. 66, § 4.

58. Hutchinson v. Proxmire, 443 U.S. 111, 113 n.16 (1979) (Burger, C.J.) (dictum) (suggesting that *Gertz* does not apply to nonmedia defendants); Note, *Mediaocracy And Mistrust: Extending* New York Times *Defamation Protection To Nonmedia Defendants*, 95 HARV. L. REV. 1876 (1982) (arguing for protection); *see also* Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976) (applying *Gertz* to nonmedia defendant as a matter of state law).

59. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974). In *Gertz*, the Court held that "so long as [state courts] do not impose liability without fault, [they] may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347.

60. New York Times Co. v. Sullivan, 376 U.S. at 285-86 ("the convincing clarity which the constitutional standard demands"); *see* Note, *Maryland's Summary Judgment Procedure in* New York Times *Defamation Cases* — Berkey v. Delia, 40 MD. L. REV. 638, 647-48 (1981) (discussing the "clear and convincing" standard of proof).

61. New York Times Co. v. Sullivan, 376 U.S. at 285 (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)); Werber v. Klopfer, 260 Md. 486, 490-91, 272 A.2d 631, 634 (1971); RESTATEMENT (SECOND) OF TORTS § 580A comment g (1977).

62. *See supra* text accompanying notes 24-29.

63. *E.g.*, Ryder v. Time, Inc., 557 F.2d 824, 826 (D.C. Cir. 1976); Polakoff v. Harcourt, Brace, Javanonich, Inc., 3 Media L. Rep. (BNA) 2516, 2517 (Sup. Ct.), *aff'd mem.*, 67

defendant intends to describe one person, another by the same name will not be successful against the writer if he was not at fault in failing to forsee this confusion.[64]

Although the Supreme Court has not dealt expressly with the level of fault permissible in the identification requirement, it has consistently rejected strict liability as the basis for liability in defamation actions. Thus, an argument that *New York Times* and *Gertz* apply only to a defendant's knowledge, recklessness, or negligence with respect to the falsity of statements of fact,[65] is inconsistent with the principles underlying these two cases.[66]

The defendant now has the best of both worlds: His actual intention to refer to the plaintiff is not actionable unless the writing is understood reasonably as portraying the plaintiff, but an absence of fault in realizing that the reasonable reader would identify the plaintiff bars liability as a matter of consitutional law. This intrusion of constitutional principles in defamation law narrows the range of potential liability.

D. *Group Defamation: An Alternative Approach*

1. *Background* — An alternative approach to any discussion of the "of and concerning" element — and a valuable one for fictionists — is whether one who defames a group or class defames individual members of that group. The methodology is distinct from standard identification analysis, but a court applying group defamation theory is asking the same underlying question: Is the writing of and concerning the plaintiff? Approaching "of and concerning" issues in fiction by group defamation analysis provides insights into how fictionists write, and contributes to a proper application of identification principles to fiction.[67]

Generally, the plaintiff must show either that the limited size of the group induces a belief that all members are defamed, or that he is

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A.D.2d 871, 413 N.Y.S.2d 537 (1978); R. SACK, *supra* note 13, at 124; RESTATEMENT (SECOND) OF TORTS § 580A comment d, § 580B comment b and c (1977); Anderson, *supra* note 55, at 462-63.

64. *E.g.*, Ryder v. Time, Inc., 557 F.2d 824, 826 (D.C. Cir. 1976) (magazine article about unethical attorney named "Ryder" shown to describe the intended target, not the plaintiff). *Compare Ryder with* Washington Post Co. v. Kennedy, 55 App. D.C. 162, 3 F.2d 207 (1925) (newspaper liable under remarkably similar facts).

65. *See* R. SACK, *supra* note 13, at 109.

66. *See id.* at 124; Anderson, *supra* note 55, at 462. *New York Times* and subsequent cases "bespoke the Court's concern with the necessity to protect speakers and writers for *all* innocent misstatement; to free them from absolute liability for statements innocently made that prove to be false and defamatory". R. SACK, *supra* note 13, at 124.

67. *See infra* text accompanying notes 133-36.

specifically identified.[68] If the group is too large, no cause of action will lie without further indicia.[69] Although a majority of courts formerly held that qualifications such as "most" or "some" forestalled individual identification,[70] most courts now recognize that a charge against a group may cast suspicion upon all members and therefore may identify each one.[71] This relaxation of group defamation principles, however, has not been matched by any slackening in other identification standards.

A court can characterize any identification question as a group defamation problem.[72] For example, "Mrs. J.C. Johnson of Savannah"[73] can denote a group (married women named "Johnson" in towns

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68. *E.g.*, Robinson v. Guy Gannett Publishing Co., 297 F. Supp. 722, 726 (D. Me. 1969); Neiman-Marcus Co. v. Lait, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) (Kaufman, J.); *see* 1 F. HARPER & F. JAMES, *supra* note 13, at 367; RESTATEMENT (SECOND) OF TORTS § 564A (1977); R. SACK, *supra* note 13, at 116-19; *see generally* Lewis, *The Individual Member's Right to Recover for a Defamation Leveled at the Group*, 17 U. MIAMI L. REV. 519 (1963).

69. *E.g.*, Robinson v. Guy Gannett Publishing Co., 297 F. Supp. 722, 726 (D. Me. 1969); Neiman-Marcus Co. v. Lait, 13 F.R.D. 311, 313, 316 (S.D.N.Y. 1952). Some commentators have suggested that defamation of a group over 25 is not actionable. *See, e.g.*, R. SACK, *supra* note 13, at 117; RESTATEMENT (SECOND) OF TORTS § 564A comment b (1977). *But see* Fawcett Publications, Inc. v. Morris, 377 P.2d 42 (Okla.) (members of 70-man football team identified), *cert. denied*, 376 U.S. 513 (1962); Service Parking Corp. v. Washington Times Co., 67 App. D.C. 351, 353, 92 F.2d 502, 504 (1951) (recovery denied to group of 10 or 12).

70. *E.g.*, Latimer v. Chicago Daily News, Inc. 330 Ill. App. 295, 297-98, 71 N.E.2d 553, 554-55 (1947); Kassowitz v. Sentinel Co., 226 Wis. 468, 471-72, 277 N.W. 177, 178-79 (1938).

71. *E.g.*, Neiman-Marcus Co. v. Lait, 13 F.R.D. 311, 315-16 (S.D.N.Y. 1952); Gross v. Cantor, 270 N.Y. 93, 96, 200 N.E. 592, 593 (1936); *see* RESTATEMENT (SECOND) OF TORTS § 564A comment c (1977) (requiring "a high degree of suspicion"). *But see* Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 484 (D. Mass. 1980) (requiring "special application" or "particular reference").

72. Viewing an "of and concerning" issue as a group defamation problem may not only be clearer conceptually, but in the 1940's through the early 1960's it also met a preceived need to provide a weapon to private parties to combat racism and bigotry. *See, e.g.*, Belton, *The Control of Group Defamation: A Comparative Study of Law and its Limitations*, 34 TUL. L. REV. 299 (1960); Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942). Before *New York Times*, the Supreme Court appeared receptive to this use of group defamation theory. *Compare* Beauharnais v. Illinois, 343 U.S. 350 (5-4), *reh'g denied*, 343 U.S. 988 (1952), *with* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

A student commentator recently advocated the use of group defamation to combat statements that are prejudicial and likely to incite anger, but failed to realize the effect of *New York Times* and its progeny. *See* Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979) (using William Shockley and the Skokie, Illinois Nazis as examples). The author would impose criminal sanctions on persons who make false statements of fact about a group if the statements threaten serious harm to some substantial public interest and "bypass . . . the conscious faculties of its hearers." *Id. passim*.

73. Memphis Commercial Appeal, Inc. v. Johnson, 96 F.2d 672, 673 (6th Cir. 1938) (defamatory statement true of "Mrs. J.C. Johnson of Savannah, Georgia," but false about "Mrs. J.C. Johnson of Savannah, Tennessee").

called "Savannah") as does the statement "Neiman[-Marcus] models are call girls."[74] If a plaintiff alleges that a television advertisement defaming "Mario's Restaurant" is of and concerning him, the court can conclude either that the plaintiff is insufficiently identified or that the group of "Mario's Restaurants" is too large.[75]

2. *The Other Side of* New York Times *and* Rosenblatt — *New York Times* and *Rosenblatt v. Baer*,[76] decided two years later, contain significant implications for courts facing an "of and concerning" problem: Group defamation theory cannot provide an easy avenue to identifying the plaintiff, especially if the plaintiff belongs to a group that contains public officials and public figures. These cases counter the trend at common law allowing easy identification of members of defamed groups.[77] This development is particularly important to fictionists because every literary character can be viewed as a member of a "group" of like literary figures or real people. For example, the reasonable reader may question whether a novel containing the stereotypical cop-on-the-beat or sultry night club singer specifically identifies a particular policeman (a public official) or famous singer (a public figure).

Although neither *New York Times* nor *Rosenblatt* is remembered well for its discussion of the "of and concerning" requirement, both cases could have been resolved on this issue alone.[78] They held that impersonal criticism of a group containing public officials, such as a governmental body, constitutionally cannot lead to identification of the group's leaders and members without a clear reference to them as individuals. Subsequent cases have extended the constitutional protections for criticism of government to criticism of public figures.[79] Persons in the public eye bear the risk that they will suffer the unpleasantness of criticism of groups to which they belong.

New York Times' "actual malice" rule originated in the fear that

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74. Neiman-Marcus Co. v. Lait, 13 F.R.D. 311, 313 (S.D.N.Y. 1952).

75. Mario's Enterprises, Inc. v. Morton-Norwich Products, Inc., 487 F. Supp. 1308, 1312-13 (W.D. Ky. 1980) (plaintiff not identified in television ad which featured an ill customer of "Mario's," of which at least 391 restaurants exist nationwide); *see also* Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders, 563 S.W.2d 8,9 (1978) (per curiam) (Colonel Sanders' derogatory remarks concerning his former restaurant chain did not identify any particular franchise).

76. 383 U.S. 75 (1966).

77. *See supra* text accompanying notes 70-71.

78. Before the opinion in *Times*, one commentator claimed: "Freedom of Speech, clearly, is not the issue [in *New York Times*]." Comment, *Group Defamation in the U.S.A.*, 13 CLEV. MAR. L. REV. 7, 31 (1964).

79. *E.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). *See infra* note 99 and accompanying text.

"of and concerning" analysis of a breed countenanced by the Alabama Supreme Court would permit civil actions for seditious libel. The Supreme Court of Alabama had held that alleged misstatements in an advertisement describing the Montgomery police department's harassment of blacks reasonably imported a charge of improper conduct to the plaintiff, a member of the city Board of Commissioners.[80] By finding that the ad "especially" related to the commissioner because the defamed group was his responsibility,[81] the state court created a form of "vicarious" defamation unknown under common law.[82]

The Supreme Court of the United States, in addition to pronouncing the now famous "*New York Times* rule,"[83] held that the evidence was "constitutionally defective [because] it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' [Sullivan]."[84] As required in other first amendment contexts,[85] the Court made an independent review of the facts and state law, and expressly refuted the Alabama court's logic that converted defamation of a group into defamation of its leader.[86]

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80. New York Times Co. v. Sullivan, 273 Ala. 656, 675, 144 So. 2d 25, 38-39 (1962). Sullivan, as Commissioner for Public Affairs, indirectly supervised 175 full-time policemen and twenty-four "special traffic directors", but did not oversee day-to-day operations. Brief for Petitioners at 10, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), *reprinted in* 58 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 413 (P. Kurland & G. Casper, ed. 1975) [hereinafter cited as *New York Times* Brief].

81. The Alabama court reasoned that

> it is common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.

New York Times Co. v. Sullivan, 273 Ala. at 674-75, 144 So. 2d at 39.

82. *See* Comment, *Group Defamation in the U.S.A.*, *supra* note 78, at 9 ("Prior to this controversial case [the plaintiff] clearly had no grounds for protection."); *New York Times* Brief, *supra* note 80, at 463-64 (Brief for Petitioner). *Contra* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 197. Kalven argued, "It is important to stress that the Alabama decision was not simply a sham." *Id.* Professor Kalven, however, offered no support for his conclusion.

The state court's reliance on DeHoyes v. Thornton, 259 A.D. 1, 18 N.Y.S.2d 121 (1940), the only case cited for this novel argument, was misplaced. The plaintiffs in *DeHoyes* were the mayor and trustees of a small village who were identified by the phrase: "officials . . .[who] run our village." *Id.* at 2, 18 N.Y.S.2d at 122. The result in *DeHoyes*, however, may have been different under *Rosenblatt v. Baer*, 383 U.S. 75 (1966). *See infra* text accompanying notes 88-100.

83. *See supra* note 5.

84. 376 U.S. at 288.

85. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (independent examination of the whole record of black protesters' breach of peace convictions).

86. 376 U.S. at 291.

Justice Brennan, who authored *New York Times*, further reasoned that the Alabama theory was merely a device to avoid the constitutional bar to seditious libel actions

> by transmitting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is not legal alchemy by which a State may thus create [such a] cause of action . . . . [T]he proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.[87]

Thus, the Court rejected Alabama's identification analysis not only on a common law level, but also because it unconstitutionally restricted criticism of government.

In *Rosenblatt v. Baer*,[88] the Supreme Court again focused upon impersonal criticism of government, and strengthened the restrictions on group defamation analysis. Justice Brennan equated criticism of a small group of public officials with criticism of government, thereby denying the natural defamatory import of the defendant's remarks. *Rosenblatt* took the *New York Times'* bar against civil "seditious libel" actions, and extended it to preclude identification of individual members of public groups unless they were "specifically identified" by the writing.

The plaintiff in *Rosenblatt*, a former supervisor of a county-owned ski resort, sued a newspaper for an article critical of the fiscal management of the recreation area.[89] The trial judge's instruction that "an imputation of impropriety or a crime to one or some of a small group that casts suspicion upon all is actionable"[90] was consistent with the trend at common law. The verdict for the plaintiff did not appear unreasonable: The defamed group contained only four members.[91] The Supreme Court, however, held that "in the absence of sufficient evi-

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87. *Id.* at 292. Earlier in the opinion Brennan had emphasized the value of governmental criticism. *See id.* at 268-76. *See generally* Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B. FOUND. RESEARCH J. 521, 567-91 (free speech checks abuses of official power).

88. 383 U.S. 75 (1966) (Brennan, J.). The Court in the two intervening years had heard only Garrison v. Louisiana, 379 U.S. 64 (1964) (*New York Times* applicable to criminal libel) and Henry v. Collins, 380 U.S. 356 (1965) (per curiam) (actual ill-will does not constitute "actual malice"). Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966), a case involving federal labor policy, but applying *New York Times* principles, was handed down the same day as *Rosenblatt*.

89. Rosenblatt v. Baer, 383 U.S. at 78-79.

90. *Id.* at 98.

91. *See* Baer v. Rosenblatt, 106 N.H. 26, 203 A.2d 773 (1965). *See also supra* text accompanying notes 68-71.

dence that the attack focused on the plaintiff, an otherwise impersonal attack on governmental operations cannot be utilized to establish a libel of those administrating the operation."[92] The article could not be "read as *specifically directed* at the plaintiff,"[93] notwithstanding the small size of the defamed group.

Rosenblatt reasonably can be interpreted as spelling the end of traditional group libel analysis when public officials are members of the group.[94] Regardless of whether the plaintiff is a public official, if other members of the group are public officials, he must be specifically identified[95] and prove "actual malice."[96] Courts following *Rosenblatt* have required "statements [to be] reasonably susceptible of a *definite* application to a *particular* individual"[97] if the group contains either public officials[98] or public figures, or is itself a public figure.[99] Unfortunately, however, some courts have forgotten *Rosenblatt*, and have held defendants liable for impersonal criticism of governmental and other public groups, such as police departments.[100]

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92. Rosenblatt v. Baer, 383 U.S. at 80. Justice Harlan dissented on the "of and concerning" issue because he was satisfied that "conventional tort law" adequately protected public officials. *Id.* at 98 (Harlan, J., dissenting).

93. *Id.* at 81 (emphasis added).

94. *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 196 (1966).

95. Rosenblatt v. Baer, 383 U.S. at 83; *accord* Gilberg v. Goffi, 21 A.D.2d 517, 526, 251 N.Y.S.2d 823, 831 (1964), *aff'd mem.*, 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965).

96. 383 U.S. at 84-86.

97. Scelfo v. Rutgers University, 116 N.J. Super. 403, 408, 282 A.2d 445, 448 (1971) (emphasis in original). In *Scelfo*, the two plaintiffs failed to show that they were identified by a defamatory student newspaper article about six police officers who quelled an antiwar rally. *Id.* at 407-408, 282 A.2d at 447-48.

98. *E.g.*, Hansen v. Stoll, 636 P.2d 1236, 1240-41 (Ariz. Ct. App. 1981) (writing inapplicable to particular DEA agents because "the statements must reasonably relate to a certain member or members"); *accord* Mullins v. Brando, 13 Cal. App. 3d 409, 417-19, 422-23, 91 Cal. Rptr. 796, 801-03, 805 (1970) (police officers), *cert. denied*, 403 U.S. 923 (1971); Wainman v. Bowler, 176 Mont. 91, 95, 576 P.2d 268, 270 (1978) (police chief). *But see* Brady v. Ottaway Newspapers, Inc., 84 A.D.2d 226, 227, 445 N.Y.S.2d 786, 787-88 (1981) (police officers). In *Brady*, individual members of group of 53 officers were identified by the statement: "It is inconceivable to us that so much misconduct could have taken place without the guilty knowledge of the unindicted members of the department." *Id.* *See supra* note 69. *Compare Brady with* Scelfo v. Rutgers University, 116 N.J. Super. 403, 282 A.2d 445 (1971) (article about six police officers not specifically identifying the two plaintiffs).

99. *E.g.*, Ratner v. Young, 465 F. Supp. 386, 394 (D.V.I. 1979) (lawyer in Black Panther trial); *see also* Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 484 (D. Mass. 1980).

The *Rosenblatt* standard also has been applied in cases involving "public interest" — a concept of questionable validity in the Supreme Court's present defamation schema. *See e.g.*, Schuster v. U.S. News & World Report, Inc., 459 F. Supp. 973, 978 (D. Minn. 1978), *aff'd*, 602 F.2d 850 (8th Cir. 1979) In *Schuster*, the court reasoned: "To hold that statements commenting generally on the laetrile controversy are of and concerning individuals prominent in the controversy would chill heated public debate into lukewarm pap." *Id.*

100. *See, e.g.*, Cushman v. Day, 43 Or. App. 123, 129-30, 602 P.2d 327, 330-32 (1979)

The Supreme Court in *New York Times* and *Rosenblatt* severely restricted the use of group defamation analysis (and therefore also standard "of and concerning" principles) to identify public officials, public figures, and those associated with them. These cases reverse the relaxation of group identification principles, and protect criticism of public matters. The effect is readily apparent in fiction: When a fictionist selects the characters for his work, he chooses them from "groups." (An easy example is the satirist who assails stereotypical figures, such as the greedy banker and the unwelcome mother-in-law.) When the suspect character belongs to a "public" group such as a class of well-known feminists or prominent musicians, individual members of these groups may not be defamed by statements such as "the leaders of NOW are communists" or "all 'Grammy' winners in the past two years bribed their way to the top."

II. FICTION, NOT FACT

A. *Fiction: A* Calculated *Falsehood*[101]

"Fiction" is a conclusory label which attaches to a writing that fails to command the belief that it represents real persons and real events. A reader who perceives a writing (or part of it) as fiction may be unwilling to conclude that it is of and concerning the plaintiff, or makes any false statements of fact. Thus, the legal challenge to the fictionist is to gauge when "reality itself has been destroyed and replaced with fictions."[102]

(recognizing the concerns of *New York Times*, but failing to follow the stringent requirments of *Rosenblatt*); Cushman v. Edgar, 44 Or. App. 297, 302-03, 605 P.2d 1210, 1213 (1980) (same); *see also* Brady v. Ottaway Newspapers, Inc., 84 A.D.2d 226, 236-37, 445 N.Y.S.2d 786, 793-94 (1981) (applying *Rosenblatt* incorrectly).

Only one commentator has discussed the "of and concerning" aspect of this much-analyzed case. *See The Supreme Court, 1965 Term*, *supra* note 94, at 196. The Note merely observed that "the use of traditional 'group libel' theory is inappropriate" and that "it does seem clear that the Court will have more to say on the question." *Id.* The Court has not spoken since then on this point.

101. "Calculated falsehoods," in the sense that they are intentional misstatements of fact designed to be understood as true, are not protected by the first amendment. Garrison v. Louisiana, 379 U.S. 64, 75 (1965). Fiction, however, is a "calculated falsehood" of another breed. *See supra* text accompanying notes 8-9.

Two particularly helpful cases in the field of fiction are: Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980) (Meskill, J.), and Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969) (Haynsworth, C.J.). Unfortunately, the most thorough judicial analysis of defamation by fiction is not in an American case. *See* Judgment of Feb. 24, 1971, 30 BVerfGE 173 (W. Ger.) (discussing artistic freedom, the identification requirement, fiction as opinion, and the *New York Times* "actual malice" rule).

102. *See* R. SCHOLES, FABULATION AND METAFICTION 209 (1979). In a successful work

The perception that a writing is fiction is the creation of the fictionist: it is his art. Fanciful characters and events, the standard disclaimers that all characters are fictitious, and even the purchase of the book off of a shelf marked "Fiction" can compel an expectation that the reader will not encounter real persons and events.[103] Although these factors do not preclude liability, the jury cannot unreasonably disregard their effect upon the reader.

A reader's instinctive reaction that fiction cannot be defamatory unfortunately cannot be translated into a blanket protection for all writings that fall within a category labeled "fiction." Although some courts have focused on the reader's perception of a writing as a whole as fiction,[104] a conclusory approach is unwieldy and fails to recognize how a perception that an entire writing, or passage, is fiction affects each component of the tort of defamation. Every court and most commentators that have encountered an absolute protection argument have rejected it.[105] Instead, they have adhered to the Supreme Court's balancing approach which examines the effect of individual words and abstains from gross characterizations.[106] Some commentators, however, persist in urging an absolute protection standard for "fiction" to

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"[w]riter and reader [together] withdraw from the world to the printed tale." T. GOODMAN, THE TECHNIQUES OF FICTION 17 (1955); *accord* S. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 115-17 (1972); R. SCHOLES, *supra*, at 3-8.

103. *E.g.*, Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980); Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969).

104. *See* University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 455, 256 N.Y.S.2d 301, 304 (movie ending in a football game in which Notre Dame looses to "Fawz U." because of a pregame meal of spiced mongoose and an oil gusher which floods the field), *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 508 (1965). The *Notre Dame* court asked, "Is there any basis for any inference on the part of rational readers or viewers that the antics engaging their attention are anything more than fiction?" *Id.*

105. *See, e.g.*, Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280, 1282 (D.N.J. 1981) (parody and satire); Embrey v. Holly, 48 Md. App. 571, 581-82, 429 A.2d 251, 259-60 (1981) (humor), *aff'd*, 293 Md. 128, 442 A.2d 966 (1982); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29, 39 (fiction), *cert. denied*, 444 U.S. 984 (1979), *reh'g denied*, 444 U.S. 1040 (1980); Salomone v. MacMillan Publishing Co., Inc., 97 Misc. 2d 346, 350, 411 N.Y.S.2d 105, 109 (Sup. Ct. 1978) (parody); Hill, *supra* note 12, at 1309 (fiction); *see also* Dailey v. Bobbs-Merill Co., 136 N.Y.S. 570, 571 (Sup. Ct. 1912) (appearance as fiction may be deceitful).

106. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The Court in *Times* rejected the absolutist approach proposed by Justices Black, Goldberg, and Douglas. *See* New York Times Co. v. Sullivan, 376 U.S. at 295 (Black, J., concurring) ("an absolute immunity for criticism of the way public officials do their duty"); *id.* at 305 (Goldberg, J., concurring) ("an unconditional freedom to criticize official conduct").

A writing may identify some characters and not others. For example, a fictionalized account of an event may portray some persons and at the same time distort the personalities of others so that the "of and concerning" requirement is not met. *See, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372, 375-76 (7th Cir. 1962) (study of a murder).

relieve "the courts of the impossible task of applying the elements of defamation to fiction . . . ."[107]

Although a bright-line test protecting fiction has enormous initial appeal, the prospect of freedom from suits and judgments is idealistic. A categorical approach would not remove complications, but would create new ones. A comprehensive definition would have to encompass the inherent protections now recognized in the elements and defenses of defamation, and recognize plaintiffs' legally protected interests in their reputations. A conclusory standard would neither establish clear, protective boundaries, nor obviate the need for future adjudication.[108] Trial courts would be tempted to bend the definition to their perception of the equities in each case. In addition, courts would have to distinguish constantly between "fiction" and "fact."[109]

The historical novel or "faction" accutely illustrates the difficulties inherent in distinguishing between fiction and fact, and presents significant challenges to the fictionist's lawyer.[110] The impact of fictional reportage as fact is its allure to some writers, and the cause of its legal vulnerability. For example, Truman Capote's design in writing *In Cold*

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107. Comment, *supra* note 41, at 592. *Accord* Stam, *Defamation in Fiction: The Case For Absolute First Amendment Protection*, 20 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 77, *passim* (1981); Wilson, 44:4 LAW & CONTEMP. PROBS. 27, 38-39 (1981); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 262-63; *see* Time, Inc. v. Hill, 385 U.S. 374, 401-02 (1967) (Douglas, J., concurring) (arguing for absolute protection from privacy actions for fictionalized treatments of public events); *see also* Franklin & Trager, *Literature and Libel*, 4 COMM/ENT 205, 218-21 (1982) (arguing for this standard, but realizing its incompatibility with first amendment case law).

Fiction, of course, is a mode of expression that is protected by the first amendment. Meiklejohn, *supra*, at 262-63; A. MEIKLEJOHN, POLITICAL FREEDOM 73 (1960); Comment, *supra* note 9, at 943-45; Donahue v. Warner Bros. Pictures, Inc., 194 F.2d 6, 19-20 (10th Cir. 1952) (Phillips, C.J., dissenting).

108. *See* Easterbrook, *Ways Of Criticizing the Court*, 95 HARV. L. REV. 802, 810 n.22 (1982) (generally discussing balancing tests and bright-line rules).

109. One absolutist admits that "the development of a comprehensive definition of fiction has troubled literary scholars and philosophers for centuries . . . ." Comment, *supra* note 41, at 592. Her attempt at a definition fails: A fictionist who must judge "whether the written piece purports to be factual, with the goal of informing, as opposed to fictional, with the goal of enlightening or commenting upon some aspect of the human experience . . . [as judged by] a reasonable person of average literary sophistication . . .," *id.*, at 592-93, is not relieved of his concern whether his writing is defamatory.

In addition, the distinction between informing and enlightening or commenting is constitutionally impermissible when determining the breadth of first amendment protection: "The line between the informing and the entertaining is too elusive for the protection of [the] basic right [of freedom of the press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." Winters v. New York, 333 U.S. 507, 510 (1948) (holding state law prohibiting sale of "magazine thrillers" containing tales of criminal deeds unconstitutional).

110. *See generally* Silver, *supra* note 9, *passim* (essay discussing application of existing law to the "new literature"); Philpel & Chasen, *supra* note 1, *passim* (faction).

Blood, one of the best known works in this field, was "to produce a journalistic novel, . . . that would have the credibility of fact, the immediacy of film, the depth and freedom of prose, and the precision of poetry."[111] This credibility may be dangerous: Authors who give their readers fiction as fact do so at their peril.[112] A work may so effectively portray a fictional reality that a reader reasonably may mistake the writing for a factual representation of real persons and real events. In addition, the fictionist's success in depicting "fact" may leave him unable, as a practical matter, to assert successfully that he accidentally portrayed the plaintiff.

An author who attempts to mask his portrayal of a real person should remember an oft-quoted maxim: "Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction, or in jest . . . ."[113] Fanciful events, disclaimers, and other techniques do not guarantee immunity from liability.[114] To assess a fictionist's vulnerability to suit each allegedly defamatory passage should be studied not only in context, but also individually. Similarly, each element and defense of defamation may preclude or contribute to the conclusion that the writing is defamatory.

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111. T. CAPOTE, MUSIC FOR CHAMELEONS xiv (1980).

112. *See, e.g.*, Dall v. Time, Inc., 252 A.D. 636, 640, 300 N.Y.S. 680, 684 (1937) (fictional article in a news magazine), *aff'd mem.*, 278 N.Y. 635, 16 N.E. 2d 297, *reargument denied*, 278 N.Y. 718, 17 N.E.2d 138 (1938); Jones v. E. Hulton & Co., [1909] 2 K.B. 444 (C.A.) (in a newspaper), *aff'd*, 1910 A.C. 20; Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., 50 T.L.R. 581, 583 (C.A. 1934) (fictionalized account of Russian Revolution portraying plaintiff); *see also 'Missing'-makers sued*, The Sun (Baltimore), Jan. 11, 1983, at D2, col. 1 (suit by U.S. ambassador in Chile for alleged portrayal in movie).

113. Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 65, 126 N.E. 260, 262 (1920). *See also* Donoghue v. Hayes, [1831] Ir. Ex. 265, 266 ("If a man in jest conveys a serious imputation, he jests at his peril.").

114. The standard frontispiece disclaimer: "All of the characters in this book are fictitious, and any resemblance to actual persons, living or dead, is purely coincidental," *e.g.*, J. BARTH, THE SOT-WEED FACTOR ii (1969), does not accord complete protection because "[t]he disingenuous legend . . . [may] not have been treated by the average person . . . as any more than a tongue-in-the-cheek disclaimer [under the circumstances]." Kelly v. Loew's, Inc., 76 F. Supp. 473, 485 (D. Mass. 1948).

Quaere what protection the following disclaimer commands: "Much of this book is true, but much is fictional, and for that reason, the names of the family members and other names have been changed, and the book should be considered a work of fiction." L. KESSNER, THE SPY NEXT DOOR iv (1981) (fictionalized account of a father-son spy team). A mere change in name does not insulate a writing from liability. *See supra* text accompanying notes 49-51.

B. *Literary Characters in Search of Plaintiffs:*[115] *The "Of and Concerning" Element Applied to Fiction*

The "of and concerning" element is crucial to the analysis of any writing that portrays a fictional reality.[116] Although rarely a contested issue in cases involving writings that purport to be factual, this requirement provides valuable protection to the fictionist. As one fictionist claims, an author's characters may be "galley slaves" with no identity except on paper.[117] To satisfy the "of and concerning" requirement the plaintiff must demonstrate that the reasonable reader has overcome the fictionist's representation of his work as fiction and perceived the writing to represent real persons involved in real events.

Readers and viewers usually perceive characters in novels, movies, plays, and other fictional works as not portraying real persons.[118] If a reader considers a writing as a whole to be "fiction," his perception of the fictionist's characters will be different than if the writing purported to be factual.[119] Consequently, as a practical matter,

> [m]uch stronger proof [is] required to satisfy a jury that readers could reasonably understand a living person to be described in a novel, than to satisfy them that such an interpretation could reasonably be given to a newspaper article purporting to describe recent occurrences at a specified place and date. In a play or novel there is, practically speaking, a *prima facie* presumption that the

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115. In Luigi Pirandello's play, *Six Characters in Search of An Author*, six stage characters search for their identity. Unable to obtain an answer from their pool of experience — the writing — they beleaguer a director to help them finish the play in which an author has abandoned them. The final line of *Six Characters* is particularly apt to a discussion of the "of and concerning" requirement: "No! I am the one for which you take me." Similarly, the reasonable reader cannot explore beyond the writing and search for the author's "true" intent. *See supra* text accompanying notes 24-29.

116. Other authors recently have noted the protections inherent in the "of and concerning" element. *See* Franklin & Trager, *supra* note 107, at 208-12; Comment, *Fiction Based on Fact: Writer's Liability for Libel or Invasion of Privacy*, 14 U.C. DAVIS L. REV. 1029, 1040-42 (1981), Comment, *"Hey, That's Me!" — The Conundrum of Identification in Libel and Fiction*, 18 CAL. W.L. REV. 442, *passim* (1982).

117. V. NABOKOV, STRONG OPINIONS 11 (1973).

118. *E.g.*, Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969); Landau v. Columbia Broadcasting System, Inc., 205 Misc. 357, 360, 128 N.Y.S.2d 254, 257 (Sup. Ct. 1954), *aff'd*, 1 A.D.2d 660, 147 N.Y.S.2d 687 (1955); RESTATEMENT (SECOND) OF TORTS § 564 comment d (1977); RESTATEMENT (SECOND) OF TORTS § 580 comment j (Tent. Draft No. 12, 1966).

119. *E.g.*, Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969); RESTATEMENT (SECOND) OF TORTS § 580 comment j (Tent. Draft No. 12, 1966); *see* Nebb v. Bell Syndicate, Inc., 41 F. Supp. 929 (S.D.N.Y. 1941) (comic strip entitled "The Nebbs").

characters are fictitious . . . .[120]

Thus, the reader might not identify a literary character as an actual person despite indicia that would compel identification if the writing purported to be factual.[121]

Although the realization that all fiction is based to some extent on real persons, places, and events[122] may affect a reader's perception that the writing portrays an ascertainable person, a finding that the fictionist indeed based a character on the plaintiff cannot satisfy the identification requirement.[123] Neither is a fictionist liable for the mere use of the plaintiff's name or otherwise presenting his characters so that some readers perceive a coincidental or superficial parallel between the plaintiff and a literary character.[124] The reasonable reader realizes that a fictionist cannot create a character completely devoid of any similari-

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120. Smith, *supra* note 23, at 476. *See* Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980).

Professor Alfred Hill has proposed a qualified privilege that would preclude "liability . . . unless the attributes of the fictitious [character] are basically different in kind from those of the real and identifiable [plaintiff]." Hill, *supra* note 12, at 1309. This privilege would accord only partial protection, and actually yields less protection than now available, *see, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962). In addition, satirists and others with strong opinions would be liable despite a reader's perception of the writing as opinion, not representation of fact. *See infra* text accompanying notes 137-71.

121. *Compare* Leopold v. Levin, 45 Ill. 2d 434, 259 N.E.2d 250 (1970) (author not liable for fictionalized account of Leopold and Loeb murder trial), *with* Spahn v. Julian Messner, Inc., 212 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967) (author liable for fictionalized *biography* of baseball player), *appeal dismissed*, 393 U.S. 1046 (1968).

122. *See* H. Pilpel & T. Zavin, *supra* note 2, at 22-23; N. HALE, THE REALITIES OF FICTION 178-97 (1963); J. HELLER, GOOD AS GOLD 87 (1979); Boren, *"Dear Constance," "Dear Henry": The Woolson/James Affair — Fact, Fiction, or Fine Art?*, 27 AMERIKASTUDIEN 457, *passim* (1982); Henderson, *The search for 'Julia': Was Hellman's anti-Nazi hero really Muriel Gardiner?*, The Sun (Baltimore), May 3, 1983, at B1, col. 1. *See supra* note 2.

123. *See supra* text accompanying notes 34-36. The discovery of the "acorn of fact" that is "the progenitor of the oak" cannot override a reasonable interpretation that the writing criticizes the literary "oak," but not the "acorn." People v. Charles Scribner's Sons, 205 Misc. 818, 821, 130 N.Y.2d 514, 517 (Mag. Ct. 1954) (the movie "From Here to Eternity" based on defendant's wartime compatriots); *see* Waters v. Moore, 70 Misc. 2d 372, 375-76, 334 N.Y.S.2d 428, 433 (Sup. Ct. 1972) ("The French Connection"); Wojtowicz v. Delacourt Press, 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 218 (1978) ("Dog Day Afternoon").

Saul Bellow in *Herzog* based the character of Valentine Gersbach, the lover of Moses Herzog's wife, on a fellow professor at Bard College who had run off with Bellow's wife. Ellenberg, *Saul Bellow Picks Another Fight*, Rolling Stone, March 4, 1982, at 14, 16. According to Ellenberg, "Bellow said, 'I'll fix him. I'm going to stick him in my new novel. By the time I'm through with him he'll be laughed right out of the literature business . . .' or words along that line," but the author later changed the character. *Id.*

124. Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 142-43 (4th Cir. 1969) (nickname, town, and numerous other shared characteristics insufficient); Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962) (same name and other similarities insufficient); Landau v. Columbia Broadcasting System, Inc., 205 Misc. 357, 360-61, 128 N.Y.S.2d 254, 257-58 (Sup. Ct. 1954) (name of plaintiff's company on fictional gangster's door not of and

ties to real persons.[125] Thus, the fictionist need not search to see if actual persons exist with names or other characteristics identical to his characters.[126] If fictionists had this duty, they would have

> to scan thousands of telephone directories and business indices, to comb voting lists and a myriad listings of names, individual, trade and corporate. With our population stemming from every national origin, bearing names of infinite variety, even to anagrammatize a name like Jones or spell it backwards would be little protection, for somewhere in this wondrous land there must be someone named Senoj.[127]

Although the "of and concerning" requirement does not require statements of fact, the assertion of "facts" about the suspect character contributes to a reasonable conclusion that the writing portrays some person. For example, the reasonable reader will be more hesitant to identify a character in a science fiction novel as the plaintiff, than one in a work of "faction." The lack of any "facts" about a literary character has a dual effect: The writing may not identify a real person, or contain the constitutionally required false statements of fact (which will be discussed later) because there is no ascertainable person with whom the truth or falsity of the statements can be judged.

The reader's first-hand knowledge about the plaintiff and the writing's defamatory nature may dissuade him from believing that the writing portrays the plaintiff. The correct standard is whether the reasonable reader, knowing the plaintiff, would identify the literary character as the fictionist's attempt to represent the plaintiff.[128] A person who denies having any of his counterpart's "unsavory characteristics" unwittingly may negate a perception that the writing describes him.[129] A curious paradox arises: the less tarnished a person's reputa-

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concerning plaintiff), *aff'd*, 1 A.D. 2d 660, 147 N.Y.S.2d 687 (1955). *See supra* text accompanying notes 49-52.

125. Whether the names of an author's characters were "conjured out of thin air" or "stolen" from an actual person, most names have a basis-in-fact: they denote some actual person. *See Real T.J. Hooker sues over name*, The Sun (Baltimore), April 9, 1982, at A3, col. 1 (wildlife artist suing for use of "his" name in television series).

126. *E.g.*, Clare v. Farrell, 70 F. Supp. 276, 279 (D. Minn. 1947); *see* Lake Havasu Estate, Inc. v. Reader's Digest Ass'n, Inc., 441 F. Supp. 489, 493 (S.D.N.Y. 1977) (factual account).

127. Landau v. Columbia Broadcasting System, Inc., 205 Misc. 357, 360-61, 128 N.Y.S.2d 254, 258 (Sup. Ct. 1957) (Frank, J.).

128. *E.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962); Lahr v. Adell Chemical Co., 300 F.2d 256, 259 (1st Cir. 1962); Washington Post Co. v. Kennedy, 55 App. D.C. 162, 163, 3 F.2d 207, 208 (1925). In Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980, the court stated that "the reasonable reader must rationally suspect that the protagonist is in fact the plaintiff, notwithstanding the author's and publisher's assurances that the work is fictional." *Id.* at 639.

129. *See, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962). Al-

tion is in his community, the more difficult it will be for those who know him well to identify a literary character as that person.[130] A reader cannot mechanically disregard all defamatory characteristics and indentify the character based solely on the remaining nondefamatory characteristics. All attributes which the fictionist gives his characters are part of the identification calculus.

Similarly, the apparent portrayal of a pervasively known person by the use of the person's name and other identifying characteristics that together usually would satisfy the "of and concerning" element may be insufficient in fiction. The reader may know, or have readily available to him, information that precludes identification. As will be discussed later,[131] by placing an "archetypal character" paralleled after a well-known person (such as Richard Nixon or Frank Sinatra) in a fictional world, the fictionist may be invoking the public persona of this person who has achieved an almost mythological status, not portraying him factually. For example, the use of "Richard Nixon" in a political satire of the Fifties might not identify the real person.[132]

A valuable approach to "of and concerning" questions involving fiction is group defamation analysis.[133] Fictionists often select names and other "group denominators" that evoke desired reactions from their readers: The Irish cop-on-the-beat, the domineering stage mother, and the spy in the trench coat are all familiar archetypal characters. Even the use of more mundane stereotypes, such as "grandmothers" and "stewardesses," cause the reader to envision grandmothers and stewardesses he has met or seen portrayed. The technique is so common — and unavoidable — that the reasonable

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though the locale and some of the fictional characters in Dell's *Anatomy of a Murder* were comparable to the true participants, the court reasoned that "none who knew [the plaintiff] could reasonably identify her with Janice Quill, 'that . . . noisy foul-mouthed harridan . . . .' . . .[T]hose who knew she was [the person upon whom the character was based] could not reasonably identify her with Janice Quill, for [the plaintiff] denies having any of the unsavory characteristics' of Janice Quill." *Id.*

130. *See, e.g.*, Geisler v. Petrocelli, 616 F.2d 636, 639 (1980). The court noted "the disturbing irony inherent in the scheme: the more virtuous the victim of the libel, the less likely it will be that she will be able to establish this essential confusion in the mind of the third party." *Id.*

This is analogous to the use of "a first-person narrator [who] is not . . . identified with the real-life author. Indeed, the ironic distance created between author and *persona* can be one of the most telling effects of any fiction." Silver, *supra* note 9, at 1086 (emphasis in original).

131. *See infra* text accompanying notes 166-71.

132. *See* R. COOVER, THE PUBLIC BURNING (1977) ("Richard Nixon" seduces Ethel Rosenberg and is sodimized by "Uncle Sam"); *see also* Silver, *supra* note 9, at *passim* (discussing *The Public Burning*).

133. *See supra* text accompanying notes 67-100.

reader is reluctant to rely on the use of these archetypal characteristics to satisfy the "of and concerning" requirement. For example, "Sheriff in Malone" might not identify the sheriff in that town because a reader who believes the novel to be fiction may consider the reference to this sheriff to be an arbitrary choice from the groups of "law enforcement officials" and "towns" in the locale in which the story is set.[134] Group denominators that are necessary to a subject matter are particularly unreliable: Movies about Hollywood need "actors;" novels about war need "generals." A book about a prostitute, however, does not need to make her a "stewardess."[135] In addition, the stringent requirements of *New York Times* and *Rosenblatt* hinder reliance on characteristics that place literary figures in groups of public officials and public figures.[136]

C. *Fiction as Ridicule or Opinion*

Fiction unquestionably can hurt the feelings of a person whom readers assume to be the target of the fictionist's barbs and derisive comments, but nevertheless may fail to injure any legally protected interest. Under common law, a writing may be nondefamatory if its readers understand it to be merely a comment, or perhaps a joke, which was not taken literally. This notion that the writing must affect the recipient's perception of the plaintiff has been transformed in recent years into a constitutional requirement that a writing yield a false statement of fact, whether express or implied. Fiction, as the antithesis of fact, may be incapable of stating any facts, true or false, about a person whom the writing identifies. Thus, fiction may deserve protection either as a nondefamatory comment, as a vehicle for expression of opinion, or as "rhetorical hyperbole," an apparent admixture of the common-law and constitutional strands of protection.

1. *Background* — Although "the whole sting and injury of the libel [may be] in the comment,"[137] the tort of defamation protects only against damage to one's reputation and is not intended to compensate for the infliction of emotional distress absent a misrepresentation of the

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134. *See* Lyons v. New American Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (1980) (fictionalized account of "Son of Sam" murders depicting an incompetent "Sheriff in Malone").

135. *Cf.* Springer v. Viking Press, 7 Media L. Rep. (BNA) 2040 (N.Y. Sup. Ct. 1981) (former girl friend of defendant portrayed as a prostitute).

136. *See supra* text accompanying notes 76-100.

137. Cooper v. Lawson, 112 Eng. Rep. 1020, 1023 (K.B. 1838). *See also* Hill, *supra* note 12, at 1238-39.

plaintiff's character.[138] Although some courts prior to *New York Times* and *Gertz* had held defendants liable merely for effective invective, lampoon, parody, and ridicule,[139] "dishonest" expressions of opinion, and "unfair" comment,[140] many courts required some statement or imputation concerning the plaintiff's character.[141]

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138. *E.g.*, Gobin v. Globe Publishing Co., 232 Kan. 1, 5-6, 649 P.2d 1239, 1242-43 (1982); W. PROSSER, *supra* note 13, § 111, at 737.

139. *E.g.*, Burton v. Crowell Publishing Co., 82 F.2d 154, 156 (2d Cir. 1936) (L. Hand, J.); Pignatelli v. New York Tribune, Inc., 117 Misc. 466, 469, 192 N.Y.S. 605, 607 (Sup. Ct. 1921) ("Ridicule in and of itself, if it has harmful results, is sufficient."); Triggs v. Sun Printing & Publishing Assn., 179 N.Y. 144, 71 N.E. 739 (1904). For an effective discrediting of *Triggs* and other cases in this line see Christie, *Defamatory Opinions and the* Restatement (Second) of Torts, 75 MICH. L. REV. 1621, 1636-40 (1977). *Burton* is discussed *infra* at note 140.

In many opinions that contain strong language about ridicule, the defendant had made a false statement of fact. *See, e.g.*, Farnsworth v. Hyde, 266 Or. 236, 512 P.2d 1003 (1973); Kirman v. Sun Printing & Publishing Co., 99 A.D. 367, 91 N.Y.S. 193 (1904).

140. *E.g.*, Buckstaff v. Viall, 84 Wis. 129, 135, 54 N.W. 111, 113 (1893). In *Buckstaff*, a sarcastic lampoon of state senator containing "gibes, taunts, and contemptuous and insulting phrases" were not "reasonable comments upon his personal or official derelictions of duty." *Id.*

The concepts of "honest" opinion and "fair" comment arose from the common-law privilege of "fair comment" which generally allowed criticism of public officials if the comment was "honest" and was not made with spite, ill will, or hatred. *See generally* 1 F. HARPER & F. JAMES, *supra* note 13, § 5.28, at 456-63.

New York Times' constitutional privilege is an adaptation of the minority view of fair comment that held defendants not liable for false statements of fact made negligently. Recently, one commentator urged a return to "fair comment" in cases where the court rejects the *New York Times* privilege. *See* Carman, Hutchinson v. Proxmire *and the Neglected Fair Comment Defense: An Alternative to "Actual Malice,"* 30 DE PAUL L. REV. 1 (1980). The advice is well taken because the two privileges are not identical (e.g., in some states the "public interest" concept is accepted, but with *New York Times* it is not) and may provide additional protection to defendants.

141. *See, e.g.*, Smith v. Journal Co., 271 Wis. 384, 388, 73 N.W.2d 429, 431 (1955) ("nothing in the picture itself which *falsely* tends to bring plaintiff into public disgrace or ridicule") (emphasis in original); Carr v. Hood, 1 Comp. 355, 357-58, 170 Eng. Rep. 983, 984-85 (K.B. 1808) (ridicule is *damnum absque injuria* without "an attack on the moral character of [the] plaintiff"); Donoghue v. Hayes, [1831] Ir. Ex. 265, 266 ("If a man in jest *conveys a serious imputation*, he jests at his peril.") (emphasis added); Brown v. Harrington, 208 Mass. 600, 602, 95 N.E. 655, 655 (1911).

Burton v. Crowell Publishing Co., 82 F.2d 154 (2d Cir. 1936) (L. Hand, J.), is perhaps the best known case holding a defendant liable solely for ridicule in the absence of any false statement of fact. The defendant published a photograph of the plaintiff, with his permission, that showed him dressed in his riding habit and holding a saddle. The ribald result was "patently an optical illusion, and carries its correction on its face as much as though it were a verbal utterance which expressly declared that it was false": the plaintiff's genitals appeared to be exposed and "grotesque, monstrous, and obscene." *Id.* at 154-55. Although Learned Hand held that ridicule in itself was actionable and that a libel need not comment on one's "moral character," *id.* at 155-56, he did strive to show that the plaintiff's reputation was thus permanently affected. *Id.* The plaintiff would be known as the type of person who posed for such photographs.

An excellent example of the incompatibility between *Burton* and the present struc-

Recently, in the light of Supreme Court cases in defamation law, most courts have realized that subjective evaluations of the legitimacy of a defendant's opinions are constitutionally impermissible.[142] In *Gertz*, a case that substantially completed the edifice begun by *New York Times*, the Supreme Court noted: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of the judges and juries but on the competition of other ideas."[143] Although this proposition was dictum, most courts and commentators have recognized that an expression of opinion *qua* opinion is entitled to absolute constitutional protection.[144] An "opinion" from which a reader can infer defamatory statements of fact, however, deserves no protection.[145]

An argument that the first amendment does not protect opinion would be incongruous with the present structure of defamation law. An opinion *qua* opinion can be neither true nor false, and "actual mal-

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ture of defamation is State v. Anonymous, 6 Conn. Cir. 751, 360 A.2d 909 (1976). This bizarre opinion refused to dismiss a criminal libel action for an obscene caricature of a presidential candidate that was not a "statement, inference, or opinion of facts," but nonetheless remanded the case to the trial court to find "falsity." *Id.* at 758, 360 A.2d at 912. *See also* Birnbaum, *Libel by Lens*, 52 A.B.A.J. 837, 839 (1966) (pre-*Gertz* article noting that the *New York Times* standards would "present challenging problems" to *Burton*); Christie, *supra* note 139, at 1623-25 (discussing RESTATEMENT (SECOND) OF TORTS § 567A, at 46 (Tent. Draft No. 20, 1974), which was based on *Burton* and was rejected after *Gertz*).

142. *E.g.*, Miskovsky v. Oklahoma Publishing Co., 7 Media L. Rep. (BNA) 2607, 2612 (Okla.) ("Hatchet man" held to be "an epithet [that] is not libelous because it is not a statement of fact, but rather a judgmental statement in which the maker of the same expresses his views."), *cert. denied*, 103 S. Ct. 235 (1982); Gobin v. Globe Publishing Co., 232 Kan. 1, 5-6, 649 P.2d 1239, 1242-43 (1982); *see* Note, *supra* note 60, at 653 ("[A] defendant in a defamation case cannot be held liable for exaggerations, half-truths, and rhetorical hyperbole."). *Compare* Dall v. Time, Inc., 252 A.D. 636, 639, 300 N.Y.S. 680, 683 (1937) (defendant liable for rendering plaintiff "contemptible and ridiculous"), *aff'd mem.*, 278 N.Y. 635, 16 N.E.2d 297 (1938), *with* Scheinblum v. Long Island Daily Press Publishing Co., 37 Misc. 2d 1015, 1017, 239 N.Y.S.2d 435, 438 (Sup. Ct.) (not liable for a remarkably similar fact situation), *aff'd mem.*, 18 A.D.2d 841, 239 N.Y.S.2d 533 (1962).

143. 418 U.S. 323, 339-40 (1974) (Powell, J.) (citing Thomas Jefferson's first Inaugral Address). Jefferson argued that "error of opinion may be tolerated where reason is left free to combat it." *Id.* at 340 n. 8.

144. *E.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.) ("however unreasonable . . . or vituperous"), *cert. denied*, 434 U.S. 834 (1977); Miskovsky v. Oklahoma Publishing Co., 7 Media L. Rep. (BNA) 2607, 2612 (Okla.), *cert. denied*, 103 S. Ct. 235 (1982); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 765 (D.N.J. 1981); From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 56 (Fla. Dist. Ct. App. 1981); R. SACK, *supra* note 13, at 179; 1 A. HANSON, LIBEL AND RELATED TORTS § 141 (Supp. No. 3, 1976). *But see* Mashburn v. Collin, 355 So. 2d 879, 885 (La. 1977) (only opinion on public matters protected); Miskovsky v. Oklahoma Publishing Co., 103 S. Ct. 235, 235-36 (1982) (Rehnquist, J., dissenting from the denial of certiorari) (federal law does not compel states to protect opinion).

145. *See infra* text accompanying notes 154-56.

ice" or fault can arise only from a false statement of fact.[146] Thus, to prove fault the plaintiff must show that the writing contains or implies a statement of fact, and the falsity of that statement.[147]

Although some commentators have criticized this approach as impracticable — an attempt to draw a line between "fact" and "opinion"[148]—the question whether a writing contains or implies statements of fact does not require the court, or trier of fact, to pigeonhole the writing in one of these categories. The jury asks whether a writing *contains* statements of fact,[149] not whether it *is* a statement of fact or an opinion. Thus, the inception of an absolute protection standard for opinion, unlike one for "fiction,"[150] is conceptually useful. The test is not to identify a writing as an "opinion" and to declare its invulnerability from defamation actions. The conclusory label "opinion" does not afford talismatic immunity.[151] For example, it is erroneous to state categorically that cartoons and editorials fall into a one category, and articles, as opinions and not fact, fall into another.

The proper test is whether the writing, reasonably read and in context, tends to damage the plaintiff's reputation by an express or implied statement of facts.[152] An "opinion" can be defamatory only insofar as

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146. *E.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.) ("An assertion that cannot be proved false cannot be held libelous."), *cert. denied*, 434 U.S. 834 (1977); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 765 (D.N.J. 1981).

147. *E.g.*, Jacron Sales Co. v. Sindorf, 276 Md. 580, 597, 350 A.2d 688, 698 (1976) ("the burden of proving falsity rests upon the plaintiff"); Miskovsky v. Oklahoma Publishing Co., 7 Media L. Rep. (BNA) 2607, 2609 (Okla.), *cert. denied*, 103 S. Ct 235 (1982); Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 374-76 (6th Cir.), *cert. granted*, 454 U.S. 962, *cert. dismissed*, 454 U.S. 1130 (1981).

148. *E.g.*, Titus, *Statement of Fact Versus Statement of Opinion — A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962); Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 276-81 (1978); *see* 1 F. HARPER & F. JAMES, *supra* note 13, at 458-59 (noting difficulty in distinguishing between the two).

149. If the court determines that the writing is susceptible to an interpretation that it contains or implies statements of fact, *e.g.*, From v. Tallahasse Democrat, Inc., 400 So. 2d 52, 56 (Fla. App. 1981); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 765 (D.N.J. 1981), the jury then decides whether the writing is actionable, *e.g.*, Pease v. Telegraph Publishing Co., 121 N.H. 62, 65, 426 A.2d 463, 465 (1981); Good Government Group v. Superior Court, 22 Cal. 3d 672, 682, 586 P.2d 572, 576, 150 Cal. Rptr. 258, 262 (1978), *cert. denied*, 441 U.S. 961 (1979).

150. *See supra* text accompanying notes 104-08.

151. *E.g.*, Cianci v. New Times Publishing Co., 639 F.2d 54, 63 (2d Cir. 1980).

152. *E.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *see* Anderson, *supra* note 55, at 452 n.150.

> [T]he test to be applied in determining whether an allegedly defamatory statement [in a writing] constitutes an actionable statement of fact requires that the court examine the statement in its totality in the context in which it was . . . published. The court must consider all words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement.

it contains or reasonably implies the allegation of undisclosed defamatory facts as the basis for the opinion,[153] and if the defendant knew or should have known the falsity of these facts.[154] If the writing contains the facts upon which it is based or the reader knows these facts (or has them readily available to him),[155] an interpretation that the writing implies a false statement of fact may be unreasonable.

Although the Supreme Court has not held expressly that opinions are constitutionally protected, it has recognized that the reasonable reader may understand certain words that usually are defamatory to be "rhetorical hyperbole" — language that is nondefamatory because the writing does not affect the recipient's perception of facts about the plaintiff.[156] For example, to call someone a "murderer" may be defamatory, but in the context of a restaurant review the reader probably would understand the critic to be expressing an opinion about the food.[157] In *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*,[158] the Court excused a newspaper that characterized a real estate developer's negotiating stance with a city council as "blackmail." Justice Stewart stated that liability was constitutionally impermissible because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable."[159] The protection for rhetorical hyperbole is not limited to the use of a single word: The reader may perceive a sentence, a para-

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> Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.

Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980).

153. *E.g.*, Hotchner v. Castillo-Puche, 555 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977).

154. *E.g.*, Kapiloff v. Dunn, 27 Md. App. 514, 531-33, 343 A.2d 251, 263-64 (1975), *cert. denied*, 426 U.S. 907 (1976).

155. *E.g.*, Fisher v. Washington Post Co., 212 A.2d 335, 338 (D.C. 1965) ("available" or "readily accessible"); RESTATEMENT (SECOND) OF TORTS § 566 (1977); *see* Christie, *supra* note 139, *passim*; Note, 23 MD. L. REV. 76, *passim* (1963). *But see* A.S. Abell Co. v. Kirby, 227 Md. 267, 282, 176 A.2d 340, 348 (1962) (pre-*New York Times* Case holding that facts must be known or referred to, not merely accessible to the reader).

156. Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970); *see also* Letter Carriers v. Austin, 418 U.S. 264 (1974) (rationale founded in federal labor policy, but drawn from *New York Times*).

157. *See, e.g.*, Mashburn v. Collin, 355 So. 2d 879, 885 (La. 1977) (restaurant review complaining of "trout a la green plague").

158. 398 U.S. 6 (1970) (Stewart, J.).

159. *Id.* at 14. "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant." *Id.*

graph, or even an entire book as nondefamatory.[160] The reasonable reader judges the "vigorous epithet" in context.

In addition, *Gertz* forces courts to examine the writer's level of care in stating "opinions" if the writing appears to be defamatory. As with the "of and concerning" requirement,[161] the fictionist has the best of two worlds: A writing may be nondefamatory, but if the reader perceives otherwise, the defendant nevertheless can prevail because of an absence of fault in realizing that the reasonable reader would consider the writing defamatory.[162]

2. *Fiction's Influence on the Reader* — Readers realize that fiction may fail to make any false representations of fact. Assuming sufficient statements of fact exist to satisfy the identification requirement,[163] the allegedly defamatory portions of the writing may fail to represent the plaintiff. For example, "[t]he invented action of a novel [may be] nothing more than the author's *opinion* of what a character would do under certain circumstances."[164] Thus, the character's inner thoughts, his intimate conversations, and his involvement in purely speculative events may suggest how an actual person would act under similar conditions, or his motivation in past events. Quotes of conversations, physical descriptions, and other indicia attributed to the defendant, even if "false," do not necessarily provide the requisite falsity to show "actual malice" or fault; some fictionalization is permissible.[165]

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160. *See, e.g.*, University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 455, 256 N.Y.S.2d 301, 304 (movie), *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 508 (1965) (movie); Werber v. Klopfer, 260 Md. 486, 496, 272 A.2d 631, 637 (1971) (pamphlet).

161. *See supra* text accompanying notes 62-66.

162. *See, e.g.*, Good Government Group of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 682, 586 P.2d 572, 576, 150 Cal. Rptr. 258, 262 (1978), *cert. denied*, 441 U.S. 961 (1979).

163. *See supra* text accompanying notes 128-30.

164. Silver, *supra* note 9, at 1069 (emphasis added); *accord* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29, 39 (1979). "It is clear that, on principles enunciated in *Sullivan* and elucidated in its progeny, creative works of fiction (and speculative works of scholarship) could be protected when clearly understood as such. In essence, psychological character probing is an educated guess about human motivation — an opinion." Silver, *supra* note 9, at 1069.

165. *E.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910, 914 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); Varnish v. Best Medium Publishing Co., 405 F.2d 608, 612 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969). In *Hotchner*, the defendant contended that

> Doubleday should be liable simply because it knowlingly published a bowdlerized version of Hemingway's alleged statement [about the plaintiff]. . . . It is true that in transforming Hemingway's words to the much milder 'I don't trust him,' Doubleday was fictionalizing to some extent. However, the change did not increase the defamatory impact or alter the substantive content of Hemingway's statement about Hotchner. If Doubleday could not have been liable for publishing the uncut version, it cannot be liable for deciding to make the passage less offensive to Hotchner.

Id. at 914. *See also* RESTATEMENT (SECOND) OF TORTS § 581A comment f (1977) ("It is not

The characterization of a real person as a saint or as a prostitute (either in a similie or actually portrayed as such a person) may further the reader's understanding of the fictionist's appraisal of the real person. For example, Richard Nixon did not participate in the Watergate burglary, but some cartoons at the time placed him in burglar's garb inside the Democratic headquarters. This characterization is another form of "rhetorical hyperbole."

Similarly, the blatant use of pervasively known persons as literary characters may be protected notwithstanding apparent satisfaction of the "of and concerning" requirement and a derogatory description of the literary double. The reasonable reader realizes that the reference to well-known figures is a common literary device and modifies his recognition of the character accordingly.[166] For example, using the name "Ronald Reagan," is artistically more expedient and effective than creating a "President of the United States" totally dissimilar from any real president. The technique is defensible on two grounds: First, the reader nevertheless may understand that the fiction does not identify the actual person.[167] Second, the reader, in the alternative, may conclude that although the writing identifies the plaintiff, the allegedly defamatory portion does not factually represent him.

An argument that the fictionist is portraying the mythological character embodied in the plaintiff's name, not the plaintiff himself, can preclude the defamation of this limited class of plaintiffs. If a pervasively known person's public persona has "a life of its own," the reader may interpret the presence of these archetypal characters as exploiting and expanding the mythological connotations the name suggests, and feel free to disregard the apparent representation of the real person. For example, a fanciful spy novel set in the Vietnam era could contain "Lyndon Johnson" or "Richard Nixon" as characters and nevertheless forbid an understanding that the writing factually represented these presidents falsely.

Courts generally have been tolerant of the fictitious treatment of real persons who have captured the public's attention, even if only for a moment.[168] Throughout history many people, places, and events have

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necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."). McBee v. Fulton, 47 Md. 403, 426 (1878) ("substantial truth" doctine).

166. *See, e.g.*, University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 455, 256 N.Y.S.2d 301, 304-05 (well-known college), *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 508 (1965).

167. *See supra* text accompanying notes 16-100 & 115-36.

168. *See, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962) (murder victim's widow and daughter); Cohen v. New York Herald, Inc., 63 Misc. 2d 87, 310 N.Y.S.2d

become part of our mythology, and in an age of pervasive media the list is expanding rapidly.[169] Even private persons who fleetingly, and often unwittingly, impress themselves into our collective consciousness become recognizable archetypal characters — the victims of a tragic murder and their families, a police officer who investigated a famous crime, or a child genius.[170] These lesser known public personae, however, later may recede into obscurity once public recognition has waned.[171]

III. *BINDRIM* AND *PRING*: LIABILITY WITHOUT REPRESENTATION

Bindrim v. Mitchell and *Pring v. Penthouse International, Ltd.*, two cases which have attracted fictionists' attention, are dangerous touchstones for a court confronting an allegedly defamatory work of fiction. These opinions demonstrate the traps awaiting courts that mechanically apply common-law and constitutional defamation principles. Regardless of whether the publications involved in these cases are defamatory, the *Bindrim* and *Pring* courts failed to understand how a reasonable reader perceives fiction.

A. Bindrim v. Mitchell:[172] *An "Inaccurate Portrayal"*

Bindrim held a novelist and her publisher liable for a breed of

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709 (Sup. Ct. 1970) (witness to gangland murder); Polakoff v. Harcourt, Brace, Jovanovich, Inc., 3 Media L. Rep. (BNA) 2516 (N.Y. Sup. Ct.) (gangster's lawyer), *aff'd mem.*, 67 A.D.2d 871, 413 N.Y.S.2d 537 (1978). *But see* American Broadcasting-Paramount Theatres, Inc., 106 Ga. App. 230, 126 S.E.2d 873 (1962) (guard from whom Al Capone escaped portrayed in an episode of *The Untouchables*).

169. Consider "Frank Sinatra" in M. PUZO, THE GODFATHER (1969); "Howard Hughes" in *Diamonds are Forever* (1971); "Judy Garland" in *Valley of the Dolls* (1968).

170. *See, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962) (no liability for fictionalization of tragic murder); Leopold v. Levin, 45 Ill. 2d 434, 259 N.E.2d 250 (1970) (same); Waters v. Moore, 70 Misc. 2d 372, 376, 334 N.Y.S.2d 428, 433 (Sup. Ct. 1972) (police officer in *The French Connection*); Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.) (child prodigy), *cert. denied*, 311 U.S. 711 (1940); *see also* Polakoff v. Harcourt, Brace, Jovanovich, Inc., 3 Media L. Rep. (BNA) 2516 (Sup. Ct. N.Y.) (Lucky Luciano's lawyer), *aff'd mem.*, 67 A.D.2d 871, 413 N.Y.S.2d 537 (1978); Bilney v. Evening Star, 43 Md. App. 560, 406 A.2d 652 (1979)(state university basketball players).

171. *See* Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.) (former child prodigy), *cert. denied*, 311 U.S. 711 (1940); *cf.* Wolston v. Reader's Digest Assn. Inc., 443 U.S. 157, 165-68 (1979) (suspected spy who "led a thoroughly private existence prior to the grand jury inquiry [in 1957 and 1958] and returned to a position of relative obscurity after his sentencing" not a public figure in 1974).

172. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (Kingsley, J.)(2-1), *cert. denied*, 444 U.S. 984 (1979), *reh'g denied*, 444 U.S. 1040 (1980). Justices Brennan, Stewart, and Marshall dissented from the denial of certiorari. 444 U.S. 984 (1979).

Some commentators have condemned *Bindrim*, but to date no article has thoroughly analyzed the court's logic. *See, e.g.*, Kulzick & Hogue, *Chilled Bird: Freedom of Expression*

falsehood that the Supreme Court never envisioned when it imposed constitutional law in the area of defamation. A California District Court of Appeal transformed the first amendment into a device that renders all fiction defamatory because of its inherent falsity.

If courts follow *Bindrim*,[173] fictionists will be unable to present fictional accounts of real life phenomena. Gwen Davis Mitchell's novel, *Touching*,[174] sought to expose the failings of a brand of group therapy which she thought dishonest: the "Nude Marathon" in which people "shed their psychological inhibitions with the removal of their clothes."[175] In preparation for writing her novel, Mitchell attended Nude Marathon sessions offered by the plaintiff, Dr. Paul Bindrim. Although the author undeniably drew from this experience in writing *Touching*, she did not seek to portray Bindrim, but created as her main character a "Dr. Simon Herford," a doctor radically different from Bindrim.

Instead of first determining whether the writing was of and concerning Bindrim, and then considering whether it contained unprivileged false statements of fact about him, the court perversely infused constitutional law into the "of and concerning" calculus, and decided that Mitchell had acted with "actual malice" toward the plaintiff *before* finding that the novel identified the plaintiff.[176] The majority reasoned that a fictionist knows the "falsity" of his fiction, and used *New York Times* to cast out all identifying indicia that were "false,"[177] leaving the literary character naked except for the characteristics that he shared with the plaintiff. Thus, characteristics that under common law belied the plaintiff's contention that the writing referred to him and supported a reasonable inference that the character was fictional became the requisite intentional false statements of fact needed to overcome the defendant's constitutional privilege. The reasonable reader does not ignore the suspect character's defamatory characteristics.

No reader who knew Bindrim — the perspective from which the writing must be analyzed[178] — reasonably could have attributed the

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in the Eighties, 14 *Loy. L.A.L. Rev.* 57, 69-71 (1980); Goodale, *Stranger Than Fiction: The Novel That Gave Rise to Libel Damages*, Nat'l L.J., May 5, 1980 at 26; Pilpel & Chasen, *The Trouble With "Faction"*, Publishers Weekly July 18, 1980, at 20.

173. One court incorrectly stated that "*Bindrim* is the only decision in which a court applies the clear and convincing proof of actual malice requirement to a work of fiction [and therefore] is the only bench mark for this court." Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280, 1286 (D.N.J. 1981).

174. G. DAVIS, TOUCHING (1971).

175. 92 Cal. App. 3d at 69, 155 Cal. Rptr. at 33.

176. *Id.* at 71-76, 155 Cal. Rptr. at 35-38.

177. *Id.* at 72-73, 155 Cal. Rptr. at 35-36.

178. *See supra* text accompanying notes 128-130.

character's behavior to the plaintiff. The dissimilarities between Bindrim and his literary counterpart should have precluded identification of Herford as the plaintiff. The differences were overwhelming: Bindrim, a thin, clean-shaven licensed clinical psychologist, was transformed in *Touching* into the unstable, even violent, Simon Herford, a psychistrist who was a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms."[179] Herford's sessions bore little resemblance to those Mitchell had attended. The similarities between the two were superficial: Both (1) were male, (2) offered Nude Marathon group therapy (as did at least ten others in California at that time), and (3) shared a few speech mannerisms.[180] Bindrim did not claim that the defendant had described him, but instead argued that he was "libeled by the suggestion that he used obscene language which he did not in fact use . . . [and] various other libels due to Mitchell's inaccurate portrayal . . . ."[181]

In lieu of parallels between Bindrim and his literary counterpart, the majority relied upon "a close parallel between the narrative of the plaintiff's novel and the actual real life events,"[182] and failed to realize that those readers who could recognize the parallel would not identify

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179. 92 Cal. App. 3d at 75, 155 Cal. Rptr. at 37. Bindrim "was clean shaven and had short hair," and did not act like Herford. *Id.*

In Wheeler v. Dell Publishing Co., 300 F.2d 372 F.2d 372 (7th Cir. 1962), a case also involving severe distortions of the plaintiff, the court affirmed a summary judgment for the defendant on the identification requirement by reasoning:

> [A]ny reasonable person who read the book and was in a position to identify [the plaintiff] with [the literary character] would more likely conclude that the author created the latter in an ugly way so that none would identify her with [the plaintiff]. It is important to note that while the [events] and locale might suggest [the plaintiff] to those who knew [her] family, suggestion is not identification.

Id. at 376.

180. 92 Cal. App. 3d at 86, 155 Cal. Rptr. at 43-44. *Compare Bindrim with* Springer v. Viking Press, 7 Media L. Rep. (BNA) 2040 (N.Y. Sup. Ct. 1981) (overwhelming similarities). In *Springer*, the trial judge noted,

> Plaintiff points not only to certain similar physical features between plaintiff and [the literary character], but also describes other apparently unique characteristics to wit: both lived on 114th Street in Manhattan; both received gifts of a solitary diamond and a necklace from a boyfriend; both spoke fluent French and dated men of Iranian heritage.

Id. at 2041.

181. *Id.* at 71, 155 Cal. Rptr. at 35. *Compare Bindrim with* Lahr v. Adell Chemical Co., 300 F.2d 256, 259 (1st Cir. 1962) (poor imitation of Bert Lahr's voice in radio ad not actionable), *and* Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962) (inaccurate portrayal bars identification).

182. 92 Cal. App. 3d at 76, 155 Cal. Rptr. at 38. One reason that these parallels may have overwhelmed the court is shown in the original text of the *Bindrim* opinion (before orders of modification): "[T]he court [incorrectly] believed [that the defendant] possessed actual transcripts of the encounter session she had attended and that she had intended to 'report' the facts therein as if she were writing a news account." Petition of Doubleday & Company, Inc. for a Writ of Certiorari to the Supreme Court of the State of California, at 19-20, Bin-

Herford as portraying Bindrim.[183] The cavalcade of evidence that showed that the defendant used the encounter sessions as the basis for her novel — a contract (invalid under California law) in which she promised not to write about the sessions,[184] tape recordings of actual sessions which were compared to passages of *Touching*,[185] testimony by the plaintiff and his colleagues,[186] and even Mitchell's own admissions[187] — yielded parallels of a brand that exist in every work of fiction. These parallels between the real and imaginary worlds, however, cannot satisfy the "of and concerning" requirement.[188]

In addition to ignoring dissimilarities between Bindrim and Herford and relying on basis-in-fact, the court failed to distinguish properly between two elements of defamation: the "of and concerning" and false statement of fact requirements.[189] It upheld the jury's conclusion that the novel was a factual statement, not an opinion, about Bindrim or his therapy "since there was evidence that people had identified plaintiff with the 'Dr. Herford' of the book . . . ."[190] A writing, however, can be a constitutionally protected expression of opinion despite satisfaction of the "of and concerning" requirement.

The dissenter on the three-judge panel predicted a "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.' "[191] He relied on group defamation analysis[192] and a "right"

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drim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *reh'g denied*, 444 U.S. 1040 (1980) [hereinafter cited as Petition for Certiorari].

183. *See supra* text accompanying notes 128-30.

184. 92 Cal. App. 3d at 69, 81, 155 Cal. Rptr. at 33, 41.

185. *Id.* at 70-71, 75, 155 Cal. Rptr. at 34, 37. The opinion quotes an actual session and a passage of the novel side-by-side. *Id.* at 70-71, 155 Cal. Rptr. at 34.

186. *Id.* at 71, 155 Cal. Rptr. at 35. The defendant raised a question whether the "publication" requirement was satisfied, *see id.* at 79, 155 Cal. Rptr. at 39, but failed to challenge the judgment on the grounds that these "certain colleagues" may have been given the book by Bindrim himself. *See supra* note 37.

187. *Id.* at 69, 155 Cal. Rptr. at 33-34.

188. *See supra* text accompanying notes 34-36.

The court attempted to distinguish Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962), and Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969), cases in which the "of and concerning" requirement was not satisfied, by downplaying the differences between the plaintiff and Herford and relying on basis-in-fact. *See* 92 Cal. App. 3d at 75-76, 155 Cal. Rptr. at 37-38. The court ignored language in *Wheeler* and *Middlebrooks* that basis is not relevant to the issue of identification. *See Wheeler*, 300 F.2d at 376; *Middlebrooks*, 413 F.2d at 143.

189. *See* 92 Cal. App. 3d at 76-78, 155 Cal. Rptr. at 38-39. The court applied the "of and concerning" test from Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969), to determine if the writing expressed an opinion about the plaintiff. *See* 92 Cal. App. 3d. at 78, 155 Cal. Rptr. at 39.

190. 92 Cal. App. 3d at 78, 155 Cal. Rptr. at 39.

191. *Id.* at 89, 155 Cal. Rptr. at 45 (Files, P.J., dissenting).

to criticize a profession, and challenged the majority's logic in disregarding the "falsity" in *Touching*.[193]

The California District Court of Appeal transformed the shield of *New York Times* into a sword for the plaintiff. The *Bindrim* opinion thus fulfilled Professor Kalven's dire prophecy made shortly after *New York Times*:

> There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff, then that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to the plaintiff in the first place.[194]

Having committed this fatal mistake, the court could only accept the plaintiff's case.

B. Pring v. Penthouse International, Ltd:[195] *A One-in-Fifty Chance*

In *Pring*, the Tenth Circuit Court of Appeals reversed a trial court judgment against author Phillip Cioffari and his publisher, *Penthouse* magazine, for a bawdy parody of the Miss America pageant and its contestants. A two-to-one majority held that the story was too fanciful to be reasonably understood as a statement of fact. But in sparing the defendants from liability, the court incorrectly analyzed the "of and concerning" issue, and broadly framed its holding to enable a mischievous fictionist to escape liability for defamation merely by presenting impossible feats in bizarre settings.

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192. *See, e.g.*, Ryckman v. Delavan, 25 Wend. 185, 197-98 (N.Y. 1840) (group of malting establishments). Justice Jefferson wrote a concurrence especially to refute the dissenter's group defamation analysis. 92 Cal. App. 3d at 82-84, 155 Cal. Rptr. 41-42.

193. 92 Cal. App. 3d at 84-89, 155 Cal. Rptr. at 42-45. *See* Petition for Certiorari, *supra* note 182, at 19-25.

194. Kalven, *supra* note 82, at 199 (analyzing argument of plaintiff in *New York Times*). Kalven noted that "the Court did not have to confront this logic," but that the argument "remains temporarily buried for resurrection at some later time." *Id.*

195. 695 F.2d 438 (10th Cir. 1982), *reversing* No. C79-251 (D. Wyo. Feb. 20, 1981). The plaintiff has filed a petition for a writ of certiorari, 51 U.S.L.W. 3738 (U.S. Apr. 12, 1983) (No. 82-1621). *See also* Pring v. Penthouse Int'l, Ltd., 7 Media L. Rep. (BNA) 1101 (D. Wyo. 1981) (denial of *Penthouse*'s motion for summary judgment); Miss America Pageant, Inc. v. Penthouse Int'l Ltd., 524 F. Supp. 1280 (D.N.J. 1981) (same story).

The portion of the district court's denial of *Penthouse*'s motion for summary judgment on the "of and concerning" issue merely quoted comment d of section 564 of the *Restatement (Second) of Torts*, and stated that the "of and concerning" requirement is a question for the jury. 7 Media L. Rep. (BNA) at 1104.

The trial court entered a judgment for $14 million against *Penthouse* and one for $35,000 against Cioffari. Opening Brief of Defendants-Appellants, at 7, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982).

In August, 1979, Cioffari and *Penthouse*[196] published *Miss Wyoming Saves the World . . . But She Blew the Contest With Her Talent*,[197] which the Tenth Circuit labeled "a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants . . . [with] no redeeming features whatever."[198] The story chronicled the rise of a "Miss Wyoming" named "Charlene" who had performed or was willing to perform fellatio upon anyone, from the local high school football star to the entire Soviet Central Committee. Kimerli Jayne Pring, the reigning Miss Wyoming and the natural brunt of many jokes from this bawdy story,[199] sued, alleging that the story "create[d] the impression" that she performed fellatio upon "one Monty Applewhite" (the imaginary football star), her pageant coach, and her twirling baton both on and off national television.[200]

Although the defendants escaped liability because of the fantastic nature of the tale, the Tenth Circuit disregarded the "of and concerning" element by simply distinguishing it from the statement of fact requirement, and holding that the record supported the jury's finding.[201] But Cioffari did not portray Pring. Instead, he used a permissible literary device: the American beauty queen, an archetypal character.[202]

The appellation "Miss Wyoming" is insufficient in itself to identify any one person who holds or has held this title. Even if the story had purported to be factual, additional indicia are required.[203] Regardless

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196. In Wyoming, libel defendants are subject to criminal sanctions:

> Whoever makes, composes, dictates, prints or writes a libel to be published; or procures the same to be done; and whoever publishes or knowingly aids in publishing or communicating a libel, is guilty of libel, and shall be fined not more than one thousand dollars ($1,000.00), to which may be added imprisonment in the county jail for not more than three (3) months.

Wyo. Stat. § 6-6-204 (1977); *see also* Wyo. Stat. § 6-6-205 (1977) (slander).

Although the last reported case of criminal libel in Wyoming was in 1928, *see* State v. Levand, 37 Wyo. 372, 262 P. 24 (1927), *reh'g denied*, 263 P. 623 (1928), and the constitutionality of criminal libel has been challenged, *e.g.*, Garrison v. Louisiana, 379 U.S. 64, 69-70 (1964) (requiring "actual malice"); *see* Spencer, *Criminal Libel — A Skeleton in the Cupboard*, 1977 CRIM. L. REV. 383, 465, the Wyoming statute is an effective chill on free speech.

197. Cioffari, *Miss Wyoming Saves the World . . . But She Blew the Contest With Her Talent*, Penthouse, August, 1979, at 155.

198. Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 443 (10th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3738 (U.S. Apr. 12, 1983) (No. 82-1621).

199. Emotional distress is not compensable unless the writing invades the plaintiff's legally protected interest in her reputation. *See supra* text accompanying notes 137-38.

200. *Id.* at 441.

201. *Id.* at 439. Chief Judge Seth correctly noted that the "of and concerning" element and the false statement of fact requirement are distinct, *see id.* at 440, but may have failed to realize that a lack of factual assertions contributes to an understanding that a writing is fiction and identifies no real person. *See supra* text accompanying notes 127-28.

202. *See supra* text accompanying notes 133-34.

203. An assertion that "a Miss Wyoming has performed fellatio on her pageant coach"

of whether the plaintiff herself was a public or private figure,[204] "Miss Wyoming" has an identity all her own. The plaintiff and others who have held this and similar titles have contributed to the image that the name invokes.[205] Archetypal titles, such as "mayor of Snow Hill,"[206] "Sheriff in Malone,"[207] or "Miss Wyoming," cannot identify a person temporarily holding the title without additional specific identification. Additionally, the story, which named thirteen other state contestants,[208] gave the reader no reason to assume that Wyoming was not an arbitrary choice out of the fifty contestants. In parodying a beauty contest as well known as the Miss America pageant, a fictionist need not create an imaginary contest with fabricated titles. This subterfuge would fail on a literary level, and is unnecessary to satisfy standards imposed by the majority of courts that have encountered defamation problems in fiction that depicts contemporary events.[209]

Pring presented scant evidence that she was the "Miss Wyoming" depicted in the story, or that her title was anything other than an arbitrary choice. Both she and the literary Miss Wyoming wore articles of blue clothing (albeit different ones) and twirled batons (as did other contestants).[210] All of "Miss Wyoming's" other attributes, such as the names of her high school and friends, were different from those in the plaintiff's past. Neither did the story state the year of "Miss Wyoming's" reign. The performance of incredible, and impossible, feats —

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would not be actionable by itself under either standard or group identification analysis. *See infra* note 206 and accompanying text.

204. The trial court opinion on the denial of summary judgment, *see supra* note 195, and a large portion of the defendant's and the two amici curiae's briefs, *see* Brief of the Authors League of America, Inc., Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), and Brief of The Reporters Committee for Freedom of the Press, *id.*, were devoted to this issue. Whether Kimerli Jayne Pring was a "public figure" is beyond the scope of this Comment. But the group of Miss America contestants may have included some "public figures." *See Pring*, 7 Media L. Rep. (BNA) 1101, 1103 (D. Wyo. 1981) (winners of major beauty pageants might be public figures). If so, *Rosenblatt* may require that she be "specifically identified" beyond the mere use of her title. *See supra* text accompanying notes 80-101.

205. *See supra* text accompanying note 133-34.

206. *See* Barnes v. State, 88 Md. 347, 353, 41 A. 781, 783-84 (1898) (county newspaper article did not identify local mayor absent name, year of office, or any other indicia). *See supra* text accompanying notes 46-48.

207. *See* Lyons v. New American Library, 78 A.D.2d 723, 432 N.Y.S.2d 536 (1980) (fictional "Sheriff in Malone").

208. "Miss Alaska," "Miss Montana," "Miss Idaho," "Miss New Jersey," "Miss New York," "Miss Florida," and "Miss Tennessee" also behaved improperly in the story. Six other contestants who were named appear to have behaved themselves. *See* Cioffari, *supra* note 199, *passim*.

209. *See supra* text accompanying notes 111-38 & 170-73.

210. *See* Opening Brief for Defendants-Appellants, at 9, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982).

a point that the court emphasized in finding no statement of fact about the plaintiff — contributed to a reasonable perception that the story was a fictional, not a factual, representation of the Miss America pageant and one of its contestants.[211] The reasonable reader could not conclude that notwithstanding the story's appearance as fiction the writing portrayed the plaintiff.

Although the Tenth Circuit affirmed the finding that the story was of and concerning Pring, it held as a matter of law that "it is simply impossible to believe that a reader would not have understood that the [allegations of fellatio] were pure fantasy and nothing else."[212] The standard set forth by Chief Judge Seth — that the story must reasonably be understood as describing actual facts about the plaintiff or her actual conduct — is entirely correct, but the majority's discussion of this standard suggests that a fictionist might escape liability merely by placing his defamation in an impossible setting. As the reasonable reader may perceive apparent "statements" to be rhetorical hyperbole, exaggerative language similarly can be understood as a factual assertion. A writing need not be taken "literally," as Seth requires,[213] because the reasonable reader nonetheless may cut through the superflous verbiage and discover a defamatory statement of fact. For example, the detail that Charlene's partners levitated should not in itself bar liability. Although defiance of gravity may be impossible, the reasonable reader occasionally may disregard flamboyant details in fiction.

Despite these broad generalizations, Chief Judge Seth was correct in holding that this story was a complete fantasy and that the reasonable reader would not understand it to make any statement of fact. Although Judge Breitenstein, in dissent, properly stated that "[r]esponsibility for an irresponsible and reckless statement of fact, fellatio, may not be avoided by the gratuitous addition of fantasy,"[214] Cioffari's story is fiction, not fact embellished by fiction. The fantasy in *Miss Wyoming Saves the World* was not "gratuitous," but compelled an understanding that the tale did not portray real people and events.

By ignoring the "of and concerning" requirement, *Pring* allows a plaintiff who has been in the limelight, even if only for a moment, to profit from fiction that depicts similar characters. Had Cioffari been mundane in his description of the pageant and its contestants he might not have escaped liability under the Tenth Circuit's opinion. Fiction-

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211. *See supra* text accompanying notes 127-28.

212. 695 F.2d at 443.

213. *Id.* at 442. Judge Seth relied primarily upon Greenbelt Publishing Ass'n., Inc. v. Bresler, 398 U.S. 6 (1970), and Letter Carriers v. Austin, 418 U.S. 264 (1974).

214. 695 F.2d at 444.

ists who rely on "presidents," "Miss Wyomings," and other common archetypal characters should not have to fear defamation suits.

CONCLUSION

Defamation law is no stranger to fiction. Fiction does not require special privileges and protections,[215] but an awareness of how the reasonable reader's perception of a writing as fiction affects every element and defense in defamation law. Primarily, the "inaccurate portrayal" of a real person may not satisfy the "of and concerning" requirement. Unlike writings that purport to be factual, suspect characters in fiction rarely portray real people. The process of identification requires more than correctly guessing upon whom the fiction is based or to whom the writing is otherwise related. Second, if a character is identified as the plaintiff, the writing nevertheless may be nondefamatory as failing to make a false representation of fact about the plaintiff or as a constitutionally protected expression of opinion. A sensitive application of these principles will protect both interests at stake: the fictionist's need for free speech and a remedy for the individual's injured reputation.

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215. Some commentators have been unable to find sufficient protection for fiction in the common and constitutional law of defamation, and have proposed a myriad of special privileges and protections. *See, e.g.*, Wilson, *supra* note 107, at 38-39, 43-49 (absolute protection standard); Comment, *supra* note 41, *passim* (same); Comment, *supra* note 9, at 944 (rebuttable presumption). Part of their dissatisfaction may result from misunderstanding current defamation law. *See, e.g.*, Wilson, *supra* note 107, at 27 (*New York Times* and *Gertz* "offer no first amendment protection to . . . literary works classified as fiction"); Comment, *supra* note 41, at 592 ("the impossible task of applying the elements of defamation to fiction").