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# DEFAMATION IN FICTION: WITH MALICE TOWARD NONE AND PUNITIVE DAMAGES FOR ALL

## I. INTRODUCTION

In August, 1979, the story of a Miss America contestant who twirled the baton and performed acts of fellatio on her coach appeared in *Penthouse* magazine. Three months later, Kimberli Jayne Pring filed suit. She claimed the story was about her, and that she had been defamed.<sup>1</sup>

Until that time, defamation in fiction<sup>2</sup> was ignored by leading tort scholars. Writing of defamation in 1976, one commentator stated that litigation in fiction is "extremely rare and the law is undeveloped; the instances in which liability on such bases may be constitutionally imposed seem . . . to be quite limited."<sup>3</sup> Three years later, the California Supreme Court upheld a \$75,000 verdict against author Gwen Mitchell and her publisher, Doubleday, for libeling Paul Bindrim in the novel *Touching*.<sup>4</sup> In 1980, a Wyoming jury awarded Kimberli Pring \$26.5 million in damages in her defamation suit against *Penthouse* magazine.<sup>5</sup> The same year, a New York jury awarded \$60,000<sup>6</sup> to two men who claimed that they had been libeled by their depiction as "violent criminals" in an allegorical painting by artist Paul Georges, entitled "The Mugging of the Muse."<sup>7</sup>

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1. Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982).

2. The terminology "defamation in fiction" as used in this comment, means an action for damages for libel by a plaintiff who asserts that he or she is in fact the subject of a putative work of fiction, or can reasonably be identified with the subject, and has been defamed.

3. Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1299 (1976).

4. Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979), *cert. denied*, 444 U.S. 984 (1979).

5. Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982).

6. Silberman v. Georges, No. 22116/75 (N.Y. Sup. Ct. 1980). In the painting three male figures obviously wearing masks, two of which resembled plaintiffs' faces, are attacking a partially nude young woman draped in red cloth on a city street. A winged cherub watches from nearby and a fire hydrant spews blood into the street. Siani and Silberman claimed that the painting accused them of being violent criminals thereby damaging their reputations.

7. See R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 85 (1980) (A painting can form the basis of an action for defamation. "The manner of publication of defamation is immaterial . . . It may be effected by spoken or written language, by photograph, drawing, gesture or technique not yet imagined . . .").

Although the law has long recognized that fiction can be libelous,<sup>8</sup> these recent jury awards<sup>9</sup> evidence the modern viability of the tort and suggest that defamation judgments based on works of fiction may have a significant impact on the publishing industry and on free expression.<sup>10</sup> This comment traces the tort of defamation in fiction from its strict liability inception, through the abrogation of strict liability accomplished by *New York Times Co. v. Sullivan*,<sup>11</sup> to its reversion to strict liability in the contemporary setting.<sup>12</sup>

This comment is divided into three sections. The first section analyzes the basis of liability for defamation in fiction under the common law.<sup>13</sup> This section analyzes the three categories of fiction cases,<sup>14</sup> and

8. See RESTATEMENT (SECOND) OF TORTS § 564, comment d (1977):

A libel may be published of an actual person by a story or essay, novel, play or moving picture that is intended to deal only with fictitious characters if the characters or plot bear such a resemblance to actual persons or events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person . . . .

9. See *supra* notes 4-6.

10. The impact on the publishing industry is two-fold. First, a private person suing a media defendant for libel must first prove "fault." See *infra* text accompanying notes 194-98. One commentator notes that the determination of "fault" necessitates an inquiry into the editorial process which pressures the news media to conform to professional norms, as yet undefined. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 647 (1978). For example, Crown Books was spurred to make last-minute changes in the paperback edition of *The Spike* because of a threat of a libel action by the Institute for Policy Studies (IPS). In the new edition, the left-wing Institute for Political Reform — widely believed to be modeled on IPS — was turned into the Foundation for Progressive Reform, and its European office moved to Brussels from Amsterdam, where the IPS European affiliate is located. Marcus, *The Reality Question: When Does Libel Law Intrude on Creativity?*, 3 NAT'L L.J., June 8, 1981 at 2, col. 3.

Second, there is an economic impact on the industry because of sizeable jury awards and costs to defend. An Illinois jury awarded plaintiff Green \$6.7 million in compensatory and \$2.5 million in punitive damages for his libel suit against the *Alton Telegraph*. The case resulted from a 1969 investigation by reporters on the newspaper who recounted to the Justice Department possible connections between organized crime figures and officials of the Alton Savings and Loan Association. The *Alton Telegraph* never ran a story covering the investigation; however, the bank withdrew its credit from Green who was forced to abandon several projects. See *L.A. Daily Journal* (August 3, 1981) at 5, col. 3. The newspaper subsequently settled out of court for \$1.4 million. See *L.A. Daily Journal* (June 2, 1982) at 1, col. 3.

11. 376 U.S. 254 (1964). In *New York Times*, an elected official brought suit against a newspaper, claiming that he had been libeled by an advertisement appearing in the paper. The Supreme Court held that under the first and fourteenth amendments, the public official was not entitled to damages for defamation relating to his official conduct unless he proved "actual malice," that is, that the statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. See *infra* text accompanying notes 153-62 for discussion of abrogation of strict liability.

12. See *infra* text accompanying note 210.

13. See *infra* text accompanying notes 22-48.

14. See *infra* text accompanying notes 49-118.

evaluates five techniques for establishing or avoiding liability under the common law.<sup>15</sup> The second section analyzes the impact of constitutional defamation law on the common law tort,<sup>16</sup> and argues that the first amendment malice test derived from *New York Times*<sup>17</sup> and the punitive damage standard set forth in *Gertz v. Robert Welch, Inc.*<sup>18</sup> have been misapplied to fiction. This misapplication, if not corrected, will have the unintended effect of reinstating strict liability for defamation in a work of fiction.<sup>19</sup> The third section suggests a definition of fault to comply with the requirements of *Gertz* for defamation in fiction.<sup>20</sup> It also proposes a new standard of liability, based upon a modification of the *New York Times* test, in this type of libel action.<sup>21</sup>

## II. COMMON LAW BASIS OF LIABILITY

### A. Character of Tort — Strict Liability

Defamation, the legal remedy for injury to reputation, has been a strict liability tort since its common law inception.<sup>22</sup> The rationale underlying the tort is the belief that one's reputation is important to society, and that a statement that threatens the well-being of the individual, threatens society.<sup>23</sup> The tort of defamation, therefore, serves three purposes: vindication of one's good name, compensation for harm, and deterrence.<sup>24</sup> Although plaintiffs generally have sued to obtain a public declaration that they were improperly treated, adequate vindication of one's reputation often "require[d] compensatory or punitive damages."<sup>25</sup> This rationale and these purposes, which underlie the tort of defamation generally, apply equally when a plaintiff is libeled by a work of fiction.

15. See *infra* text accompanying notes 119-52.

16. See *infra* text accompanying notes 153-307.

17. 376 U.S. 254 (1964). See *supra* note 11 and *infra* text accompanying notes 153-62.

18. 418 U.S. 323 (1974). *Gertz* held that a private individual suing a publisher or broadcaster for a defamatory falsehood could not recover presumed or punitive damages unless he proved actual malice. See *infra* text accompanying notes 177-79.

19. See *infra* text accompanying note 210.

20. See *infra* text accompanying notes 308-50.

21. See *infra* text accompanying notes 351-62.

22. See L. ELDREDGE, *THE LAW OF DEFAMATION* 6 & 14 (1978).

23. This common law principle is reflected in the thinking of the Supreme Court. See *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (quoted with approval in *Gertz*, 418 U.S. 323, 341 (1974)) ("[T]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being' — a concept at the root of any decent system of ordered liberty.").

24. See ELDREDGE, *supra* note 22, at 3.

25. RESTATEMENT (SECOND) OF TORTS § 901 comment c (1977).

Although defamation was a strict liability tort before the time of the Norman Conquest,<sup>26</sup> it was not until early in this century that a work of fiction was held to be defamatory. In *Hulton & Co. v. Jones*,<sup>27</sup> an English case decided in 1910, the House of Lords held a newspaper publisher strictly liable for a work of fiction. The story, "Motor-Mad Dieppe . . ." described a scene at the French seaside during the motor races. It was supposed to be an amusing article about a churchwarden, Artemus Jones, who led an austere life while in England, but who became the "life and soul of a gay little band" while abroad.<sup>28</sup> Plaintiff Thomas Artemus Jones, a lawyer and a journalist, claimed to have been defamed.

Defendants argued that they did not know, nor had they ever heard of Jones, and that they had not intended to libel him.<sup>29</sup> The House of Lords reasoned that "[n]egligence does not enter into defamation," nor "was it necessary to show that the author of a libel intended it to refer to the plaintiff."<sup>30</sup> The House of Lords unanimously held that "a person charged with libel cannot defend himself by showing that he intended in his own breast not to defame the plaintiff. He has none the less imputed something disgraceful, and has none the less injured the plaintiff."<sup>31</sup>

The first reported case of defamation in fiction thus established that an author could be found liable despite proof that he or she had not intended to write about the plaintiff, or that the story was written in a benevolent spirit. In short, English courts established early that defamation in fiction is a strict liability tort. Before liability was imposed, however, the plaintiff had to satisfy an objective test, namely, that reasonable readers would conclude that the fictional article referred to the plaintiff. The House of Lords quoted from the instructions to the jury which phrased the test as follows:

The real point upon which your verdict must turn is: Ought or ought not sensible and reasonable people reading this arti-

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26. See Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

27. 101 L.T.R. 831 (1910). See *infra* text accompanying notes 59-62 for discussion of *Hulton* in the "same name" category.

28. *Id.* at 832.

29. *Id.*

30. *Id.* Although the *Hulton* court stated that negligence and intent were not necessary elements of defamation in fiction, and held the defendants strictly liable, its use of the concepts of negligence and intent should be distinguished from the modern concept of fault. See *infra* notes 194-98 and accompanying text for development of the concept of fault in defamation in fiction litigation.

31. *Id.*

cle to think that it was a mere imaginary person such as I have said — Tom Jones, Mr. Pecksniff as a humbug, Mr. Stiggins or any name of that sort which one reads in literature used as a type? If you think that any reasonable person would think that, it is not actionable at all. If, on the other hand, you do not think that, but think that people would suppose it to mean some real person, those who did not know the plaintiff of course would not know who the real person was, but those who did know of the existence of the plaintiff would think that it was the plaintiff; then the action is maintainable . . . .<sup>32</sup>

As initially stated, the objective reasonable reader test had two elements: (1) whether the reader believed that the story referred to a real person, or merely to a literary type; and (2) whether the reader believed that the story referred to the plaintiff.<sup>33</sup>

The English concept of strict liability for a work of fiction was introduced into American common law in *Corrigan v. Bobbs-Merrill Co.*<sup>34</sup> In *Corrigan*, the New York Court of Appeal relied on *Hulton* to hold an Indiana publisher of a novel strictly liable for compensatory damages.<sup>35</sup> Responding to the publisher's argument that its editors were unaware of the New York plaintiff and did not intend to injure him,<sup>36</sup> the court wryly observed that "[t]he question is not so much who was aimed at as who was hit."<sup>37</sup>

The rationale underlying these foundational cases is that an author or publisher cannot escape liability by the "varnish of fiction"<sup>38</sup> or by the defense that the defamation was unintended. Whether the author or publisher intended to injure the plaintiff is relevant, however, to the propriety of an award of punitive damages.<sup>39</sup>

32. *Id.* at 832-33. See *infra* note 46 and accompanying text for development of the reasonable reader test in American common law.

33. See *infra* text accompanying notes 321-24, and 327-34 for a proposed adaptation of this test.

34. 228 N.Y. 58, 126 N.E. 260 (1920). See *infra* text accompanying notes 49-53 for discussion of "venomous pen" category and *infra* notes 235-38 for the distinction between an author's and a publisher's liability.

35. 228 N.Y. at 64, 126 N.E. at 262.

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

37. *Id.* at 64, 126 N.E. at 262.

38. *Id.* at 72, 126 N.E. at 265.

39. *Id.* at 65, 126 N.E. at 263. The court stated that the defendant was strictly liable for compensatory damages, but punitive damages required a showing of intent to injure. The case was reversed and remanded for proof on the issue of intent for punitive damages. *Id.* at 72, 126 N.E. at 265.

### B. Proof of Defamation Under the Common Law

Under the common law, a plaintiff carried the burden of proving five basic elements: (1) defamatory words relating to the plaintiff; (2) publication to third parties; (3) falsity of facts; (4) malice, actual or implied; and (5) injury.<sup>40</sup> The first element required proof of two components: (a) that the defendant used defamatory words, that is, words that held the plaintiff up to ridicule, hatred, contempt, scorn, obloquy, or shame;<sup>41</sup> and (b) that the words were "of and concerning" the plaintiff.<sup>42</sup> Upon proof of the first and second elements, the third, fourth, and fifth elements were conclusively presumed,<sup>43</sup> shifting the burden of proof to a defendant to establish a recognized defense, usually truth or privilege.<sup>44</sup>

What is distinctive about the tort of defamation in fiction is the difficulty of establishing that the defamatory words are "of and concerning" the plaintiff. Typically, the plaintiff sets forth the similarities between the plaintiff and the character in the challenged work of fiction, while the defendant catalogs the dissimilarities. The trier of fact<sup>45</sup> then compares the plaintiff's characteristics to those of the character in the story. This is known as the process of identification.<sup>46</sup> This

40. See R. WINFIELD, LIBEL LITIGATION 167-68 (1979).

41. *Triggs v. Sun Printing & Publishing Ass'n*, 179 N.Y. 144, 154, 71 N.E. 739, 742 (1904) ("A written or printed statement or article published . . . which is false, and tends to injure his reputation, and thereby expose him to public hatred, contempt, scorn, obloquy, or shame, is libelous per se."). For a list of statements which have been found to constitute libel per se, see generally W. PROSSER, THE LAW OF TORTS 757-58 (3d. ed. 1964). Such statements include: plaintiff refuses to pay his just debts, is immoral, unchaste, queer, has wife trouble, is about to be divorced, is a coward, a crook, liar, scandal-monger, anarchist, bastard, eunuch, or even a rotten egg. *Id.*

42. See RESTATEMENT (SECOND) OF TORTS § 564 (1977).

43. See WINFIELD, *supra* note 40, at 168.

44. *Id.* These five elements were required for proof of defamation in all cases under the common law. See *infra* notes 316-50 and accompanying text for a proposed modification of these elements for defamation in fiction necessitated by the *Gertz* fault requirement.

45. See *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980). Determining if the "of and concerning" requirement has been met is an issue for the trier of fact.

46. *Smith v. Huntington Publishing Co.*, 410 F. Supp. 1270 (S.D. Ohio, (1975)) ("[T]he publication must refer to some person and the plaintiff must show that he is the person about whom the statement was made . . . . The . . . rule has been qualified somewhat in the context of fictional characters . . . . The test is neither the intent of the author, nor the recognition by the plaintiff that the article might be about him. The test is whether a reasonable person could reasonably believe that the article referred to the plaintiff."). *Id.* at 1273. Compare *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29, 39 (1979) ("The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described."); *Middlebrooks v. Curtis Publishing Co.*, 413 F.2d 141, 142 (4th Cir. 1969) ("test is whether the fictional character could reasonably be understood as a portrayal of the plaintiff"). Some courts have

process is significant because once a plaintiff meets the test that the libelous matter is "of and concerning" him, the law implies malice and infers some damage.<sup>47</sup> The nature and quality of evidence needed to sustain the plaintiff's burden of proof have never been established. Decisions made on a case by case basis have failed to provide predictable standards for authors and publishers of fiction anxious to avoid litigation.<sup>48</sup>

### C. Categories of Cases

While all of the cases of defamation in fiction turn on the issue of identification, the cases can be divided into three distinct fact patterns: (1) cases where the author intentionally uses a purported work of fiction to injure reputation ["venomous pen"]; (2) cases involving the accidental use of another's name ["same name"]; and (3) cases where a character modeled on an actual person is unsuccessfully disguised ["failed disguise"].

#### 1. Venomous pen

In one distinct category of cases, the author intends that the reader will understand who the character represents. The work is entitled fiction. Names are changed. But the author intends the reader to see the similarities and parallels between the character and the plaintiff in order to injure the plaintiff's reputation. This category might be termed the "venomous pen" case.

*Corrigan v. Bobbs-Merrill Co.*,<sup>49</sup> the first American case holding an author liable for defamation in a work of fiction, illustrates this fact pattern. In *Corrigan*, the Honorable Joseph E. Corrigan, a New York City magistrate, brought a libel action against the publisher of the novel *God's Man*.<sup>50</sup> The novel depicts an ostensibly fictitious judge named Cornigan as ignorant, brutal, corrupt, and despicable.

The plaintiff in *Corrigan* pointed to a number of similarities to satisfy the "of and concerning" test. The author had used the barely fictitious name of Cornigan; the table of contents described the courtroom events as "Justice — a la Corigan," a misspelling virtually identi-

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gone further. Cf. *Wheeler v. Dell Publishing Co.*, 300 F.2d 372, 376 (7th Cir. 1962) ("average reader"); *Clare v. Farrell*, 70 F. Supp. 276, 280 (D. Minn. 1947) ("sensible reader").

47. *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 65, 126 N.E. 260, 263 (1920).

48. See SACK, *supra* note 7, at xxvii.

49. 228 N.Y. 58, 126 N.E. 260 (1920). See *supra* text accompanying notes 34-39 for discussion of strict liability and *infra* text accompanying notes 235-38 for distinction between an author's and publisher's liability in *Corrigan*.

50. The novel was written by George Bronson Howard.

cal to the plaintiff's name; and the character in the novel was a magistrate in the same court where the plaintiff frequently presided.<sup>51</sup> The court noted that the author was full of hate and bitterness toward plaintiff due to his personal experience before the magistrate as a defendant on a criminal charge,<sup>52</sup> and had used the unsavory details and a "venomous pen" to vilify plaintiff.<sup>53</sup> The court sustained the award of \$25,000 in compensatory damages, and remanded for retrial on the issue of punitive damages.

Similarly, in *Warner Bros. Pictures, Inc. v. Stanley*,<sup>54</sup> a prison commissioner won a judgment for \$100,000 based on the reckless dissemination of advertisements for the film, "I Was A Fugitive From A Chain Gang."<sup>55</sup> The film was an adaptation of Robert Burns' novel *I Am A Fugitive From A Georgia Chain-Gang*. Author Burns, who served on a chain gang until his escape from prison, charged that Commissioner Stanley transferred him from one chain gang to another because Burns had refused to pay Stanley a bribe.<sup>56</sup>

The court noted that the advertisements clearly indicated that the film was based on an evidently defamatory novel and reasoned that defendants never verified the truth of the statements in the advertisements.<sup>57</sup> Since the statements were never verified, the court found that the defendants "recklessly disseminated" the charges of cruelty and bribery for profit and held the defendants liable for punitive damages.<sup>58</sup>

While there are only two reported cases which illustrate the "venomous pen" category, the courts appear disposed to uphold recoveries for both compensatory and punitive damages on a showing of intent to injure or reckless disregard for injury. This disposition becomes all but irresistible when the varnish of fiction is too thin to cover the venomous intent.

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51. *Id.* at 62, 126 N.E. at 262.

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

53. *Id.* at 65, 126 N.E. at 263.

54. 192 S.E. 300 (Ga. Ct. App. 1937).

55. The suit was not simply for the exhibition of the picture, but for the exhibition of a picture as advertised to have been based on a particular book. The advertisements included such phrases as: "They can't let me go now." "I've seen too much." "I've been flogged, sweated, tortured." "They've got to get me . . ." "They've got to shut me up because . . ." *Id.* at 305.

56. *Id.* at 309. Burns remained a fugitive throughout the legal proceedings.

57. *Id.*

58. *Id.*

## 2. Same name

In the "same name" category of fiction cases, the author, although ignorant of the plaintiff's existence, gives the fictional character a name that is identical to the plaintiff's.

In the English case, *Hulton & Co. v. Jones*,<sup>59</sup> a Manchester newspaper printed a story to the effect that one Artemus Jones, a married churchwarden from Peckham, had been seen at Dieppe with a woman who was not his wife.<sup>60</sup> When the story appeared, a real Thomas Artemus Jones, generally known as Artemus Jones, sued for libel. Plaintiff, who was neither married, a churchwarden, nor from Peckham claimed that his neighbors recognized him as the Artemus Jones in the story. The defendant publishers contended that they had never heard of the plaintiff, that the name Artemus Jones was entirely fictitious, and that the character was only intended to represent a type.<sup>61</sup> Except for the similarity in name, the character's description did not correspond to the plaintiff. Nevertheless, the court affirmed an award of £1,750 in damages because, in the opinion of the jury, a substantial number of readers who knew the plaintiff would believe that the article referred to him.<sup>62</sup>

*Hulton* is the single reported case in which a plaintiff satisfied the "of and concerning" test by the use of an identical name without further similarities. By contrast, American courts have tended to require more than a showing that plaintiff's name was identical to a character's. For example, in *Clare v. Farrell*,<sup>63</sup> author James T. Farrell and Vanguard Press were sued for libel in the novel *Bernard Clare*. The Minnesota plaintiff with the same name as the character, Bernard Clare, based his claim on the theory that the novel chronicled the experiences of an aspiring writer who had the same name, profession, and appearance as the plaintiff.<sup>64</sup> Farrell, living and writing in New York, had never heard of plaintiff. His working drafts indicated that the name Bernard Clare was selected because the principal character was to be of Irish extraction; the surname "Clare" evolved from the spelling "Claire" to "Clare," after County Clare in Ireland.<sup>65</sup>

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59. 101 L.T.R. 831 (1910). See *supra* text accompanying notes 27-33 for discussion of strict liability in *Hulton*.

60. The alleged libel: "Whist. There is Artemus Jones with a woman who is not his wife, who must be — you know — the other thing." *Id.* at 832.

61. *Id.*

62. See *supra* text accompanying notes 32-33 & 46.

63. 70 F. Supp. 276 (D.Minn. 1947).

64. *Id.* at 277.

65. *Id.*

Plaintiff Clare additionally argued that Farrell had been negligent in his failure to exercise reasonable care to discover the existence of the real newspaperman with the same name.<sup>66</sup> The court found this claim "astonishing," and stated that writers of fiction cannot be required to "search among all the records available in this Nation . . . to determine whether perchance one of the characters . . . may have the same name and occupation as a real person."<sup>67</sup> The court granted Farrell's motion for summary judgment holding insufficient plaintiff's showing of coincidental use of the same name.<sup>68</sup>

In the "same name" category of fiction cases, although the English courts have held for plaintiff, American courts have held to the contrary. It is unlikely that plaintiffs can recover in libel actions based on a showing of a fortuitous use of another's name.<sup>69</sup>

### 3. Failed disguise

In the "failed disguise" category of fiction cases, an author draws upon a real-life model for his novel and disguises the model through dissimilarities. The disguised model can be an ordinary citizen or a newsworthy person. If a reasonable reader could recognize the character to be the plaintiff, the disguise fails, and liability may follow.<sup>70</sup>

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66. *Id.* at 278.

67. *Id.* at 279.

68. *Id.* at 281. *Cf.* Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980). Plaintiff sued author and publisher for libel in *Match Set*. The book described a female transsexual tennis player who unscrupulously manipulates the outcome of tournaments. Both character and plaintiff have the same name. Both are young, attractive, honey-blondes with firm compact bodies. Plaintiff alleged that she was neither a transsexual tennis player, nor a manipulator of tennis tournaments. The court noted that author and plaintiff were employed by the same publishing company at the same time, and they were acquainted. The court held that Geisler was improperly denied the opportunity to adduce a full record on the "of and concerning" element before the trier of fact. Judgment to dismiss her complaint was reversed. *Id.* at 638.

69. *See* Maggio v. Charles Scribner's Sons, 130 N.Y.S.2d 514 (1954) (Author Jones' use of character's name, Angelo Maggio, in novel *From Here To Eternity*, inspired by plaintiff Joseph A. Maggio, held insufficient to state a cause of action). Use of business and professional names has also been held insufficient to state a cause of action. *See* Landau v. Columbia Broadcasting System, 128 N.Y.S.2d 254 (1954) (Use of name, Credit Consultant, Inc., on door of fictional detective's office in television program "Crime Photographer" held insufficient to state a cause of action by plaintiff whose trade name was Credit Consultant); *University of Notre Dame Du Lac v. Twentieth Century Fox Film Corp.*, 256 N.Y.S. 2d 301 (1965) (motion to enjoin distribution of film, "John Goldfarb, Please Come Home," denied for use of name of university); *Dauer & Fittipaldi, Inc. v. Twenty First Century Communications, Inc.*, 43 A.D.2d 178, 349 N.Y.S.2d 736 (1973) (use of name of bar and grill, "Busy Bee," in a short story held insufficient to state a cause of action).

70. *See supra* notes 32-33 & 46 and accompanying text.

*a. disguised ordinary citizens*

Several of the failed disguise cases were brought by ordinary citizens. In these cases, an author modeled a character on a childhood friend, relative, neighbor or acquaintance and attempted to obscure the model with dissimilarities. The author may even have forgotten that he or she was drawing on past relationships and may simply have no recollection of the model. Typically, a plaintiff not in the public eye who alleges a failed disguise must first prove that he is in fact the model for the character. Generally, he does this by proving that he once knew the author.

In *Fetler v. Houghton Mifflin Co.*,<sup>71</sup> the plaintiff sued his brother, the author, claiming that he was the model for the chief character in the novel, *The Travelers*, a thinly disguised family history. The defamation charge was based upon the chief character's cooperation with a Nazi organization for "easy money" and that character's abandonment of his dying father in "frantic pursuit" of monetary gain.<sup>72</sup> Both plaintiff and character were the first born children in families of thirteen, their fathers were ministers, and the families gave concerts in Europe while traveling in an old bus.<sup>73</sup> Based on these similarities the Second Circuit reasoned that because the events in the story and in real life were often parallel,<sup>74</sup> there was sufficient evidence of identification to make it inappropriate to grant summary judgment in favor of the defendant.<sup>75</sup>

Other courts have been more sympathetic to the need of an author to write out of his own experience. In *Middlebrooks v. Curtis Publishing Co.*,<sup>76</sup> the author and publisher avoided liability for the story "Moonshine Light, Moonshine Bright."<sup>77</sup> The story described the exploits of Esco Brooks, an unsavory character modeled after the author's childhood friend. It relied on actual place names and geographical settings. Nevertheless, the court found marked dissimilarities, including differences between plaintiff and the fictional character with respect to age

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71. 364 F.2d 650 (2d Cir. 1966). Two years prior to *Fetler*, the Supreme Court decided *New York Times*. The case had little immediate impact on defamation in fiction, and the constitutional malice standard was not applied to an action for defamation in fiction until 1979 in *Bindrim*. See *supra* text accompanying notes 93-95.

72. *Id.*

73. *Id.* at 651. Plaintiff offered the following additional similarities between himself and the character Maxim: a family of thirteen, of whom 10 were boys and the third, fourth and eighth children were girls; both were 23 in 1938, Latvian by descent, and lived in Stockholm.

74. *Id.* at 652.

75. *Id.* at 654.

76. 413 F.2d 141 (4th Cir. 1969).

77. The story was published in the *Saturday Evening Post*, March 16, 1963.

and employment. The court also noted that plaintiff no longer resided in South Carolina, the setting of the story, and that the life of the plaintiff and the character were not parallel.<sup>78</sup> These dissimilarities supported a finding against the reasonableness of identification.<sup>79</sup>

*b. disguised newsworthy personalities*

In the "disguised newsworthy personality" category, an author models the character on a person who is already known to the general public. The newsworthy personality may be an athlete, a princess, a politician, or a notorious criminal. The person is disguised, but the disguise fails and the reader recognizes the plaintiff.

In *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*,<sup>80</sup> the English Court of Appeal held that reasonable people could identify the plaintiff, Princess Irina Alexandrovna of Russia, with the fictional character, Princess Natasha, in the film, "Rasputin, the Mad Monk."<sup>81</sup> The court sustained a sizeable award of £25,000 to Princess Irina, who claimed that she was defamed in the film in which the ostensibly fictional Princess Natasha is seduced and raped by Rasputin.<sup>82</sup> Prior to the film, Princess Irina's husband, Prince Youssouppoff, had published a widely-circulated nonfictional account of his part in the murder of Rasputin.<sup>83</sup> In the film version, the fictional Prince Chegodieff is portrayed as a participant in the assassination, and the murder occurs in a palace on the Moika River owned by the Youssouppoff family. Based on these similarities the court concluded that the jury reasonably could have identified Prince Youssouppoff with the fictional Prince Chegodieff and could have drawn the inference that the fictional Princess Natasha, who is likely to marry Chegodieff, was the counterpart of Princess Irina.<sup>84</sup> Thus, in the first case involving defamation of a character modeled on a newsworthy personality, the disguise failed and the plaintiff recovered.

In *Brown v. Paramount Publix Corp.*,<sup>85</sup> the plaintiff sued for defa-

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78. 413 F.2d at 143.

79. *Id.* See *supra* notes 32-33 & 46 and accompanying text.

80. 50 T.L.R. 581 (C.A. 1934). See *infra* notes 120-22 and accompanying text for use of disclaimer in *Youssouppoff*.

81. *Id.* at 583. See *supra* notes 32-33 & 46 and accompanying text.

82. *Id.* at 581-82.

83. *Id.* at 583.

84. *Id.* Relying on *Hulton*, the court suggested that "reasonable people, not all reasonable people, but many reasonable people would take the film . . . as representing and referring to the plaintiff." *Id.*

85. 240 A.D. 520, 270 N.Y.S. 544 (1934).

mation in the film "An American Tragedy," adapted from the novel of the same title. The book, written by Theodore Dreiser, was drawn from events in a newspaper clipping. Both novel and film portrayed a girl's murder by drowning at Big Moose Lake. Grace Brown's boyfriend, Chester Gillette, was tried and executed for a similar crime. The plaintiff, who was the mother of the murdered girl, claimed she was defamed by her portrayal as an illiterate, unkempt, slovenly, low-grade person who neglected her daughter and permitted her to carry on clandestine relations with Gillette.<sup>86</sup> Based on the similarities between the characters, locations, scenes and incidents in the life of Gillette and Brown, the court held that "the public [would] believe that the [film] portrayed plaintiff's life."<sup>87</sup> *Brown* mirrored the precedent set in *Yous-soupoff* and held the defendant liable for imperfectly disguising a character modeled on a person incidentally involved in a scandalous crime.

By contrast, in *Wheeler v. Dell Publishing Co.*,<sup>88</sup> another failed disguise case, the court affirmed an award of summary judgment in favor of the novel's publisher and the motion picture producer. In an odd twist of reasoning, the court fallaciously suggested that the character in the novel could *not* be identified with the plaintiff because the false nature of the libel rendered the character dissimilar to the plaintiff.<sup>89</sup>

In *Wheeler*, the widow of Maurice Chenoweth sued for libel in the novel and motion picture, *Anatomy of a Murder*.<sup>90</sup> The novel was a fictionalized account of the murder trial of Lieutenant Peterson, who shot and killed Chenoweth following Chenoweth's "rape" of Peterson's wife. The court conceded that the locale of the book was fairly identifiable with the actual locale; that those who knew of the Peterson trial would identify it with the fictional trial of Lieutenant Manion; that Barney Quill was the fictional counterpart of Maurice Chenoweth, and that John Voelker would be identified as Paul Biegler, the fictional defense attorney.<sup>91</sup> After noting these conscious parallels, it seemed likely that the court would concede that plaintiff Wheeler was identifiable as the "fictional" character Janice Quill. In a curious misapplication of

86. *Id.* at 520-21, 270 N.Y.S. at 546.

87. *Id.* at 521, 270 N.Y.S. at 546.

88. 300 F.2d 372 (7th Cir. 1962).

89. *Id.* at 376.

90. *Id.* at 374. Wheeler alleged that she was defamed by the "foul" language and "unsavory characteristics" of the character, Janice Quill, "that dame with the dyed red hair and livid scar on her right cheek who had sworn at him in everything but Arabian . . . Who'd ever forget such a noisy foul-mouthed harridan?"

91. *Id.* at 375-76. The book, published under the *nom de plume* of Robert Traver, was written by John Voelker, the Associate Justice of the Supreme Court of Michigan who had served as Peterson's attorney.

defamation logic, however, the court stated that reasonable readers would not identify Wheeler with Janice Quill because "the author created the latter in an ugly way so that none [of the book's readers] would identify her with Hazel Wheeler."<sup>92</sup>

By awarding summary judgment to defendants on the "of and concerning" issue, the court denied plaintiff the opportunity to establish that movie audiences understood that the film referred to her. However, the suggestion that because of the uncomplimentary portrayal no one who knew the real widow could reasonably identify her with the fictional widow, only affirms the conclusion that the depiction is defamatory and does not negative the element of identification. If Wheeler could show that people did identify her with Janice Quill, she should have recovered. Although the unsavory characteristics ascribed to Janice Quill should have gone to the issue of damages, they were used in the *Wheeler* case to support the argument that the disguise was successful.

Two recent cases, *Bindrim v. Mitchell*<sup>93</sup> and *Pring v. Penthouse Int'l, Ltd.*,<sup>94</sup> involve failed disguises of newsworthy personalities. These cases were tried on a combination of common law and constitutional defamation law theories.<sup>95</sup> Prior to reaching the constitutional issues, however, both plaintiffs needed to establish the identification between the character and themselves.<sup>96</sup>

In *Bindrim* the character was modeled on a person known professionally to the author. Author Mitchell had attended Dr. Bindrim's "nude therapy" sessions for two months when she entered into a contract with Doubleday for a novel describing nude therapy.<sup>97</sup> In the novel *Touching*, Mitchell described "Nude Marathon" group therapy in which patients "shed their psychological inhibitions with the re-

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92. *Id.* at 376.

93. 92 Cal. App. 3d at 61, 155 Cal. Rptr. at 29, *cert. denied*, 444 U.S. 984 (1979).

94. 695 F.2d 438 (10th Cir. 1982).

95. *Bindrim* was the first case of defamation in fiction tried under the constitutional malice standard. "As a public figure, plaintiff is precluded from recovering damages for a defamatory falsehood relating to him, unless he proved . . . 'actual malice' . . ." 92 Cal. App. 3d at 72, 155 Cal. Rptr. at 35 (citing *New York Times*, 376 U.S. 254, 279-80 (1964)).

96. *Id.* at 73 n.2, 155 Cal. Rptr. at 35 n.2 ("The fact that 'Touching' was a novel does not necessarily insulate Mitchell from liability for libel, if all the elements of libel are otherwise present.").

97. *Id.* at 69-70, 155 Cal. Rptr. at 33. The trial court struck the contract issue. On appeal, the court affirmed the dismissal of the contract issue, reasoning that professional persons cannot prevent a patient from reporting the treatment that patient received. *Id.* at 81, 155 Cal. Rptr. at 41.

moval of their clothes."<sup>98</sup> Dr. Bindrim claimed that he was defamed by the portrayal of the doctor in the novel, who used obscene and unprofessional language, and by the characterization of his mode of therapy as one involving bizarre sexual fantasies.<sup>99</sup>

Plaintiff Paul Bindrim, a young, clean shaven, balding psychologist with dark brown eyes, was disguised in the novel as Dr. Simon Herford, a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms."<sup>100</sup> The character, Dr. Herford, was older than Dr. Bindrim and was a psychiatrist rather than a psychologist. Although the name, age, physical description, and professional degrees were changed in the novel, the court held that "[t]here is overwhelming evidence that plaintiff and 'Herford' were one."<sup>101</sup> In reaching its decision, the court relied on tape recordings of the actual sessions submitted in evidence by Bindrim. The tape recordings of the sessions which the author attended indicated that "the novel was based substantially on plaintiff's conduct in the nude marathon."<sup>102</sup>

*Bindrim* is a case somewhere between the newsworthy and ordinary citizen categories. Bindrim characterized himself as a public personality,<sup>103</sup> but arguably he was only known within a small professional circle of doctors in Los Angeles. Although the test of identification is whether a reasonable person could identify the plaintiff based on the similarities,<sup>104</sup> the *Bindrim* court noted that certain individuals did actually identify Bindrim as the character in the novel.<sup>105</sup> Based on the similarity of the method of therapy and the close parallels between the narrative and the actual therapy, Bindrim recovered.<sup>106</sup>

In the most recent case of defamation in fiction, *Pring v. Penthouse International, Ltd.*,<sup>107</sup> the jury awarded plaintiff \$26.5 million on account of the publication of a short story, "Miss Wyoming Saves the World . . . But She Blew the Contest with Her Talent."<sup>108</sup> The story

98. *Id.* at 69, 155 Cal. Rptr. at 33.

99. *Id.* at 70-71 & 76, 155 Cal. Rptr. at 34-35 & 38.

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

101. *Id.* at 76, 155 Cal. Rptr. at 38.

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

103. *Id.* at 71 n.1, 155 Cal. Rptr. at 35 n.1. See *infra* note 182.

104. See *supra* notes 32-33 & 46 and accompanying text.

105. *Id.* at 71, 155 Cal. Rptr. at 35.

106. *Id.* at 81, 155 Cal. Rptr. at 41. The court awarded \$50,000 in compensatory damages as a joint and several award against author Mitchell and Doubleday, and \$25,000 in punitive damages against Doubleday.

107. 695 F.2d 438 (10th Cir. 1982).

108. The story, written by Philip Cioffari, appeared in the August, 1979, issue of *Penthouse* magazine. Cioffari, a professor of English at Patterson State College in New Jersey,

recounts the exploits of Charlene, the 1978 Miss Wyoming, a sexually promiscuous contestant in the Miss America Pageant. Charlene twirls a baton for the talent segment of the pageant and fantasizes about her true talents, which include performing acts of fellatio on her coach.

Pring claimed that the character in the story was modeled on her, and that she was defamed by her identification with a sexually immoral character. Pring pointed to the following similarities between Charlene and herself: Both were baton twirlers from Wyoming who had performed at football games there; both held the title of Miss Wyoming in 1978; and both entered the 1978-79 Miss America Pageant in New Jersey.<sup>109</sup> In the talent segment of the fictional pageant, Charlene twirled a baton; in the actual contest, plaintiff twirled three batons at once. In addition, at different points in the story, Charlene is described as "fuming inside her baby-blue warmup suit," and appearing on stage in a baby-blue chiffon gown.<sup>110</sup> Pring wore a baby-blue and white warmup suit and a blue chiffon evening gown at the pageant.<sup>111</sup>

Based on the strength of these similarities between plaintiff and the fictional character, the court held that plaintiff had satisfied the "of and concerning" test. The court stated that "the similarities in the article with her actual fact situations are too many to be coincidental."<sup>112</sup> The court concluded that the question of whether a reader of the article would understand that the character was actually the plaintiff was a question for the jury.<sup>113</sup>

On appeal, the Tenth Circuit affirmed the district court's finding that Pring satisfied the "of and concerning" test. The court stated that "the matter of the relationship of the story to the plaintiff as a matter of identity, is well developed in the record and need not be discussed."<sup>114</sup>

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attended the finals of the 1978 Miss America Pageant on September 9, 1978. Pring performed on the evening of September 7. Brief for Appellants at 8 *In re Pring v. Penthouse Int'l Ltd.*, 695 F.2d 438 (10th Cir. 1982) [hereinafter cited as Brief for Appellants].

109. Brief for Appellants at 9.

110. *Id.*

111. *Id.*

112. Order on Motions for Summary Judgment *In re Pring v. Penthouse Int'l, Ltd.*, No. C79-351B (D. Wyo. 1981) at 7 [hereinafter cited as Order on Motions].

113. *Id.* at 8. The jury found that Pring and Charlene were one and the same person and awarded Pring \$26.5 million. *See infra* note 221.

114. The Tenth Circuit in *Pring* did not discuss what has traditionally been the most difficult hurdle for plaintiffs seeking redress for defamation in fiction — the "of and concerning" test. *See generally Pring*, 695 F.2d at 439. *See also supra* text accompanying notes 40-48. By failing to address the issue of identification, the Tenth Circuit provided no guidance as to the quantity or quality of parallels necessary to satisfy the "of and concerning" test. Consequently, the significant questions remain unresolved: Had Penthouse merely changed Charlene's title from Miss Wyoming to Miss New Jersey, or made her a contestant

This failed disguise category of defamation in fiction case is the most conceptually troublesome. The plaintiff at once uses the *similarities* between the character and plaintiff to meet the "of and concerning" test, and the *dissimilarities* to show defamation. Conversely, the defendant author or publisher argues that the dissimilarities bear upon the element of identification and render the plaintiff and character readily distinguishable. The author argues that his efforts to disguise the model with dissimilarities vitiate the element of identification, without which there can be no defamation.

To date, under the common law, where an author has consciously modeled a work of fiction on a newsworthy personality, a princess,<sup>115</sup> a psychologist,<sup>116</sup> the subject of a murder trial,<sup>117</sup> or a beauty contestant,<sup>118</sup> the disguise has failed and the plaintiffs have recovered. By contrast, in failed disguise cases involving ordinary citizens the courts have split. Liability in these cases appears to hinge on the scope of an author's efforts to make the character dissimilar to the model. Apparently, where the model is not involved in some newsworthy event and some good faith effort is made to disguise the model, the courts are unprepared to assume that a reader could reasonably identify the character with the plaintiff. In this situation, the courts are more likely to give weight to the author's need to write from his own experience.

#### D. Techniques for Proving and Disproving Liability

Although there is no litmus test for avoiding identification, the defamation in fiction cases mention five techniques for establishing or negating liability. These techniques include the following: (1) using a disclaimer; (2) linking books to films; (3) using a fictional or humorous context; (4) limiting the role of the character; and (5) making pre-publication changes.

##### 1. Using a disclaimer

The standard disclaimer, now familiar in books and films: "All

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in a year other than 1978, would Pring's case have been dismissed on a motion for summary judgment? The answer to such questions could have provided valuable assistance to authors and publishers anxious to avoid defamation litigation.

115. *Youssouppoff*, 50 T.L.R. 581 (C.A. 1934), see *supra* notes 80-84 and accompanying text.

116. *Bindrim*, 92 Cal. App. 3d at 61, 155 Cal. Rptr. at 29, see *supra* notes 93-106 and accompanying text.

117. *Brown*, 240 A.D. at 520, 270 N.Y.S. at 546, see *supra* notes 85-87. See also *Wheeler*, 300 F.2d at 373, *supra* notes 88-92 and accompanying text.

118. *Pring*, 694 F.2d at 438. See *supra* notes 107-14 and accompanying text.

circumstances in this novel are imaginary, and none of the characters are in real life,"<sup>119</sup> has never been sanctioned in any reported decision as a successful technique to avoid liability. In *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*,<sup>120</sup> defendants raised the disclaimer defense for the first time in fiction litigation.<sup>121</sup> The court dismissed the argument, reasoning that it was "not . . . fitted" to the express statement in the film which represented that a few members of the royal family were still alive.<sup>122</sup> American courts have gone further in their dismissal of the technique. In *Kelly v. Loew's Inc.*,<sup>123</sup> plaintiff recovered for defamation in the film, "They Were Expendable," based on the book by the same title.<sup>124</sup> Defendants argued that they were not liable because the film carried the following disclaimer: "The events, characters and firms depicted in this photoplay are fictitious. Any similarity to actual persons, living or dead, or to actual firms is purely coincidental."<sup>125</sup> The court rejected defendants' argument, observing that the average person treats such a statement as nothing more than "tongue-in-the-cheek."<sup>126</sup>

## 2. Linking books to films

In those cases of defamation in fiction where a novel has been adapted into a motion picture, plaintiffs frequently sued the motion picture producers and distributors, in addition to or instead of, the publishers and author of the novel. Although the author changed the name of the model in his novel, and the name was again changed in the motion picture, the plaintiffs recovered. In the case of film adaptations,

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119. *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 T.L.R. 581, 583 (C.A. 1934).

120. *Id.*

121. *Id.* at 583.

122. *Id.* at 583-84.

123. 76 F. Supp. 473 (D. Mass. 1948).

124. *They Were Expendable* by William L. White, published by Harcourt, Brace and Co., is an account of the Motor Torpedo Boat Squadron (popularly called PT boats) in the Philippines during World War II. The boats were used in actual combat after Pearl Harbor and ultimately carried General MacArthur and Admiral Rockwell from Cavite to Mindanao. Plaintiff, then Lt. Kelly, commanded the boat which transported Admiral Rockwell. *Id.* at 475-76.

125. *Id.* at 480.

126. *Id.* at 485. *Accord* *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 653-54 (2d. Cir. 1966) ("[N]o justification for any reliance . . . upon the effect of the usual disclaimer that the book should be read as fiction and that the characters are not biographical but purely imaginary."). *Compare*, *Smith v. Huntington Publishing Co.*, 410 F. Supp. 1270, 1273 (1975) (S.D. Ohio 1975) ("no reasonable person could . . . believe that the article, even excluding the 'fiction' disclaimer, concerned the plaintiff.").

courts have permitted plaintiffs to rely upon the details in the novel to supplement the identification between the plaintiff and the character in the film.<sup>127</sup> In *Youssouppoff v. Metro-Goldwyn-Mayer*,<sup>128</sup> *Brown v. Paramount Publix Corp.*,<sup>129</sup> and *Warner Bros. Pictures, Inc. v. Stanley*,<sup>130</sup> the names of the plaintiffs were changed in the book and changed again in the film. Nevertheless, the courts in these cases held that a "considerable number of reasonable people" could identify the fictional film characters with their real-life counterparts.<sup>131</sup>

### 3. Using a fictional or humorous context

When the allegedly defamatory work of fiction appears in a short story, magazine, or collection of short stories, some courts have looked to a fictional or humorous context to avoid liability on the theory that the context vitiates the defamatory import of the work. This technique was first developed in *Middlebrooks v. Curtis Publishing Co.*<sup>132</sup> In *Middlebrooks*, the court emphasized that the short story was listed in the fiction section of the magazine's index, it was illustrated with cartoons,<sup>133</sup> and the character's name appeared in a fictional context.<sup>134</sup> In this case, these countervailing considerations were sufficient to uphold the finding against identification.<sup>135</sup>

In *Dauer & Fittipaldi, Inc. v. Twenty First Century Communications, Inc.*,<sup>136</sup> the defendants were similarly successful with a defense based on the work's obviously humorous context. In *Dauer*, a bar and grill and its proprietor sued *National Lampoon* for libel based on the coinci-

127. *But see* *Wright v. R.K.O. Radio Pictures, Inc.*, 55 F. Supp. 639 (D. Mass. 1944). In *Wright*, the characters in the film "Primrose Path," based on the book *February Hill* by Victoria Lincoln, were not identified with the plaintiff. The court reasoned that the film changed the names, locations, and causes of death which might have tied the characters in the film to the characters in the book. The court concluded that the book was used as a mere source of incident, plot, and characterization, and in such a way that the characters would not be identified. *Id.* at 640.

128. 50 T.L.R. 581 (C.A. 1934).

129. 240 A.D. 520, 270 N.Y.S. 544 (1934).

130. 192 S.E. 300 (Ga. Ct. App. 1937).

131. The standard generally applied in defamation in fiction cases is "reasonable" identification. *See supra* notes 32-33 & 46 and accompanying text.

132. 413 F.2d 141 (4th Cir. 1969).

133. The court reasoned that the story was illustrated by cartoons, and based on the cartoons, did not depict a real person. *Id.* at 143. However, a cartoon remains subject to the law of libel if it maliciously presents as fact defamatory material which is false. *See Yorty v. Chandler*, 13 Cal. App. 3d 469, 472, 91 Cal. Rptr. 709, 711 (1971). *See supra* note 7 and *infra* note 184 and accompanying text.

134. 413 F.2d at 143.

135. *Id.*

136. 349 N.Y.S.2d 736 (1973).

dental use of the grill's name, Busy Bee, in a short story.<sup>137</sup> The court relied on the humorous context to deny liability. The court described the magazine as a "somewhat unconventional, raffish . . . zany journal of intended humor, developed by racy language and garish photographs."<sup>138</sup> The court further characterized the story as "besprinkled with attempted humorisms, puns, chamberings, and fast-paced badinage."<sup>139</sup> Viewed in this *context* of fiction and deliberate humor, the court held that the short story could not "reasonably be susceptible of a libelous meaning."<sup>140</sup>

Thus, when an allegedly defamatory work of fiction is published in a magazine, the courts will evaluate the context as a technique to avoid liability.<sup>141</sup>

#### 4. Limiting the role of the character

The fourth technique suggested by the reported cases to avoid liability is to categorize the plaintiff's fictional counterpart as a minor character. In *Wheeler v. Dell Publishing Co.*,<sup>142</sup> the court suggested in dictum that plaintiffs portrayed as minor characters probably will not be successful in a defamation in fiction suit. The character in *Wheeler*, Janice Quill, was described as "inconspicuous" and the court reasoned that "[n]o average reader . . . would remember the very minor sub-plot in which [she] had a place."<sup>143</sup> The suggestion that a plaintiff whose

137. *Id.* at 737. The February issue, "The Humor Magazine," was devoted to "Crime." The story concerned a plainclothesman named Proctor Silex who searches for a loquacious rapist and murderer. The story is unresolved, but Silex is seen several times at the "Stop and Frisk" grog shop. The reader is led to believe that Silex is the rapist. In the photographic backdrop of the grog shop, the words "Busy Bee" appear. Busy Bee is the name of plaintiff's bar and grill.

138. *Id.* at 737.

139. *Id.*

140. *Id.* at 738. See also *Salomone v. MacMillian Publishing Co.*, 429 N.Y.S.2d 441 (1980) (Kuperman, J., concurring). In *Salomone* the court ignored words which would ordinarily be deemed defamatory and ruled that the humorous context vitiated the defamatory character of the words. *Id.* at 443.

141. The defense of a humorous context will not automatically insulate an author and publisher of fiction from liability. In *Triggs v. Sun Printing & Publishing Ass'n*, 179 N.Y. 144, 71 N.E. 739 (1904), a defendant newspaper argued that the article was intended to be understood as humor. The court rejected the argument, stating that "a person shall not be allowed to murder another's reputation in jest." *Id.* at 155, 71 N.E. at 743. It may be observed that the issues that arise with respect to fictional work employing personalities of real people are remarkably similar to those engendered by attempts at humor. "[B]oth may lay claim to a crucial role in the communication of ideas, yet both use deliberate misstatement and distortion of the literal truth." See SACK, *supra* note 7, at 238.

142. 300 F.2d 372 (7th Cir. 1962).

143. *Id.* at 376.

counterpart is a "minor" character may not be able to state a cause of action created an issue for future litigation: what constitutes an "inconspicuous" or "minor" character? Nevertheless the technique became a basis for the granting of summary judgment in subsequent cases involving fiction and nonfiction.<sup>144</sup>

The minor character suggestion of *Wheeler* has not been universally followed. In *American Broadcasting — Paramount Theatres, Inc. v. Simpson*,<sup>145</sup> plaintiff sued for defamation in a telecast of the television series, "The Untouchables." In the segment, "The Big Train," a guard is depicted as accepting a bribe and acquiescing in the murder of another official to procure Al Capone's escape from prison. Plaintiff, one of a group of sixteen guards who accompanied Capone during the actual transfer from Atlanta to Alcatraz, claimed that he was identified as the guard in the episode.<sup>146</sup> Although the guard in the telecast was a composite character, unnamed, who bore no physical resemblance to plaintiff, the court held that plaintiff was identified by implication.<sup>147</sup> Therefore, although the telecast focused on the main character of Al Capone and federal agents, a plaintiff portrayed by an arguably minor character met the "of and concerning" test.<sup>148</sup>

##### 5. Making pre-publication changes

The fifth technique for establishing or avoiding liability in defamation in fiction cases relates to pre-publication changes. The courts have focused on the author's or publisher's efforts to alter the character's background, occupation, marital status, or physical appearance [or their failure to do so, when notified of a plaintiff's claim].

In *Fetler v. Houghton Mifflin Co.*,<sup>149</sup> the court, troubled by the painful defamation litigation between brothers, took the unusual occasion to suggest in dictum how liability might be avoided by pre-publication changes. The court stated that "[a]ll first novels should be considered suspect. They tend to be autobiographical, and twentieth

144. See *Ladany v. William Morrow & Co.*, 465 F. Supp. 870 (S.D.N.Y. 1978) ("viewed in the context of the main purpose and subject of the book [the defamatory references] are incidental and isolated."). *Id.* at 881 (emphasis added). Accord *Forsher v. Bugliosi*, 26 Cal. 3d 792, 608 P.2d 716, 163 Cal. Rptr. 628 (1980) ("claimed defamatory nature of the book insofar as it relates to appellant is so *obscure* and *attenuated* as to be beyond the realm of reasonableness.") *Id.* at 805, 608 P.2d at 728, 163 Cal. Rptr. at 635 (emphasis added).

145. 126 S.E.2d 873 (Ga. App. Ct. 1962).

146. *Id.* at 876.

147. *Id.* at 881.

148. *Id.*

149. 364 F.2d 650 (2d Cir. 1966).

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 of his family."<sup>150</sup> To avoid the obvious identification between character and plaintiff, the court suggested the exercise of voluntary editorial censorship on the part of authors and publishers: "Frequently merely changing some details . . . might be sufficient to make identification improbable without at all hurting the literary values."<sup>151</sup>

The problem with the technique of pre-publication changes suggested by the *Fetler* court is, of course, that an author or publisher can seldom know in advance if changes in age, location, background, or physical appearance are sufficient to avoid identification with a particular plaintiff, which is essentially a matter of the degree of similarity. The court merely concluded that the line between liability and non-liability would be determined on a case by case basis.<sup>152</sup>

Although the courts have suggested five possible techniques to establish or avoid liability where a plaintiff claims to have been defamed in a work of fiction, only one of the techniques has met with consistent success: the technique of linking books to films. By contrast, use of the disclaimer has been uniformly rejected as a technique to avoid liability. The remaining three techniques — proof of a fictional or humorous context, establishment that plaintiff's model is a minor character, and proof of pre-publication changes — have met with mixed results. The courts have yet to develop clear standards for liability, and consequently, the various techniques attempted to prove or disprove liability have met with only fitful success.

### III. IMPACT OF *NEW YORK TIMES* and *GERTZ*

In *New York Times Co. v. Sullivan*,<sup>153</sup> the Supreme Court looked to "the central meaning of the First Amendment" and recognized a policy of "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."<sup>154</sup> To implement this policy, the Court constructed an "actual malice" test.<sup>155</sup> At the core of this test was the behavioral rationale that

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150. *Id.* at 651 n.3.

151. *Id.* at 651-52 n.3 (citing PIPEL & ZAVIN, RIGHTS AND WRITERS: A HANDBOOK OF LITERARY AND ENTERTAINMENT LAW 23, 25 (1960)).

152. *Id.* at 653.

153. 376 U.S. 254 (1964).

154. *Id.* at 270.

155. Malice is a term of art. Constitutional malice, sometimes referred to as "actual malice," requires a showing that the defendant acted with "knowledge that it was false or with

it was necessary to formulate a policy of constitutional privilege<sup>156</sup> to avoid the "chilling effect" on expression protected by the first amendment.<sup>157</sup> *New York Times* and its progeny have made an impact on the law of defamation in four major areas: (1) the drawing of a distinction between private persons and public figures, with proof of actual malice required for public figures to recover from a media defendant;<sup>158</sup> (2) the requirement of fault for a private person to recover compensatory damages from a media defendant;<sup>159</sup> (3) the requirement of actual malice for any plaintiff to recover punitive damages from a media defendant;<sup>160</sup> and (4) the definition of a broad class of comment or opinion to which defamation law does not apply.<sup>161</sup> These four developments were all in the context of nonfiction.<sup>162</sup> A number of unexpected, illog-

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reckless disregard of whether it was false or not." *Id.* at 279-80. *See supra* note 11. Common law malice is defined as ill will, spite, hatred, hostility, a deliberate intention to harm, or some sinister or corrupt motive. *See infra* note 195 and accompanying text. Common law malice is constitutionally insufficient to establish the "actual malice" required to make out a prima facie libel case. *See* RESTATEMENT (SECOND) OF TORTS § 580(B)(b) (1977). *Accord* *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 10-11 (1970); *Cf. Herbert v. Lando*, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting) ("Although I joined the Court's opinion in *New York Times*, I have come greatly to regret the use in that opinion of the phrase 'actual malice.' For the fact of the matter is that 'malice' as used in the *New York Times* opinion simply does not mean malice as the word is commonly understood. In common understanding, malice means ill will or hostility, and the most relevant question in determining whether a person's action was motivated by actual malice is to ask 'why.' As part of the constitutional standard enunciated in the *New York Times* case, however, 'actual malice' has nothing to do with hostility or ill will, and the question 'why' is totally irrelevant.").

156. In *New York Times* Justice Brennan honored the commitment to robust debate on public issues embodied in the first amendment when he stated, "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." 376 U.S. at 279. This policy, together with the burden of proof standard, became known as constitutional privilege. Constitutional privilege is a defense to libel. It affords legal immunity to a newspaper, though the newspaper unintentionally may have libeled a person, because the law recognizes that in most circumstances, the public interest requires that an individual's interest in reputation must yield to the greater constitutional right to report news freely and publicly, even where unintentionally erroneous. *See* WINFIELD, *supra* note 40, at 167. One commentator has called the use of the term "constitutional privilege" a misnomer, arguing that in the law of torts, privileges are affirmative defenses which the defendant must plead and prove rather than a requirement that plaintiff plead and prove facts to satisfy the *New York Times* standard by proof of convincing clarity. *See* ELDREDGE, *supra* note 22, at 293.

157. *See* TRIBE, *supra* note 10, at 634.

158. *See infra* text accompanying notes 163-93.

159. *See infra* text accompanying notes 194-98.

160. *See infra* text accompanying notes 199-239.

161. *See infra* text accompanying notes 240-67.

162. *See infra* note 201.

ical consequences have arisen by the application of these concepts to fiction.

*A. Distinguishing Between Private Persons and Public Figures*

In *New York Times*, the Court abrogated the common law rule of strict liability<sup>163</sup> and created a new doctrine of constitutional privilege, stating: "[w]e hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."<sup>164</sup> The constitutional privilege precluded public officials from recovering libel judgments against media defendants unless they were able to prove "actual malice." To prove actual malice, plaintiffs had to show that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>165</sup> While the Court did not define the class of persons falling into the public official category, there followed a series of decisions extending the reach of *New York Times* to defamatory statements about new categories of persons: public figures and private persons involved in matters of general public interest.<sup>166</sup>

Ten years after *New York Times*, in *Gertz v. Robert Welch, Inc.*,<sup>167</sup> the Supreme Court retrenched, narrowing the categories of plaintiffs who had to prove actual malice. In *Gertz* the Court sought to strike a balance between two competing concerns: the state's need to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual, and the first amendment freedoms of speech and press.<sup>168</sup> This accommodation was accomplished by introducing a "fault" requirement into what previously had been a strict liability tort.<sup>169</sup> The Court recognized that its accommodation of the competing values would allow states to impose liability on a publisher on a "less demanding"<sup>170</sup> showing than that required by *New York Times*, when dealing with private persons, but this approach was limited to "com-

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163. 376 U.S. 254, 278 (1964).

164. *Id.* at 283.

165. *Id.* at 279-80.

166. For a full discussion of the development of the public official private person doctrine from *New York Times* through *Gertz*, see Hill, *supra* note 3, at 1205. For a discussion of the recent developments of the doctrine post-*Gertz*, see Note, *Wolston and Hutchinson: Changing Contours of the Public Figure Test*, 13 LOY. L.A.L. REV. 179 (1979).

167. 418 U.S. 323 (1974).

168. *Id.* at 348.

169. *Id.* at 347. "We hold that so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.*

170. *Id.* at 348.

pensation for actual injury."<sup>171</sup> To recover punitive damages, however, the *Gertz* Court required a private person suing a media defendant to satisfy the *New York Times* actual malice test.<sup>172</sup>

The *Gertz* language is not absolute in terms of defining the categories of private persons or public figures. In addressing the standard for such a determination, the Court set forth a two-tier test. First, there are "all purpose" public figures, those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."<sup>173</sup> Second, there are "limited" public figures, those who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."<sup>174</sup> In both situations public figures "invite attention and comment."<sup>175</sup> This distinction<sup>176</sup> between private person and public figure is crucial because each classification carries a significantly different standard of proof. Under *Gertz* a private person suing a media defendant for compensatory damages proves "fault,"<sup>177</sup> whereas public figures must prove actual malice.<sup>178</sup> Both private persons and public figures are required to prove actual malice to recover punitive damages.<sup>179</sup>

The private person/public figure classifications necessitated by *New York Times* and *Gertz* have created an additional, burdensome, and unpredictable step in the litigation process of suits for defamation. Prior to reaching the defamation issues, plaintiffs suing media defendants must initially establish whether they are private persons or public figures. To establish that he or she is a private person, the plaintiff generally relies on the first two sentences of the *Gertz* test, arguing that he does not "occupy a position of persuasive power or influence" nor is he in the "forefront of public controversies." Simultaneously, the de-

171. *Id.* at 349.

172. *Id.*

173. *Id.* at 345.

174. *Id.*

175. *Id.* One commentator considers the *Gertz* test "plainly inadequate," and suggests that the language of the test poses its own problems. See Hill, *supra* note 3, at 1216 n.56.

176. Until 1980, this determination was for the court. Compare *Hotchner v. Castillo-Puche*, 551 F.2d 910, 911 (2d Cir. 1977) ("Because the evidence on this issue is inadequate to support the jury's verdict, we reverse . . .") with *Rancho La Costa, Inc. v. Superior Court*, 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980) ("determination of whether plaintiffs' conduct made them public figures required the trier of fact to hear and weigh evidence."). *Id.* at 651, 165 Cal. Rptr. at 351.

177. See *infra* text accompanying notes 194-97.

178. See *infra* note 199 and accompanying text.

179. 418 U.S. 323, 349 (1974). "[W]e hold that the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

fense looks to the summation sentence of the test and asserts that the plaintiff "invited attention and comment." Typically, the defense catalogs examples of the publicity sought and achieved by the plaintiff. This approach, recently dubbed the "shoe-boxful method of proof,"<sup>180</sup> has led to a dilemma when applied to the classification of a plaintiff as public or private in a suit for defamation in fiction. If the defense claims that the story in question is a work of creative imagination, *i.e.*, fiction or fantasy, in which none of the characters is real or has a living counterpart, then it seems inconsistent to argue in the alternative that there is a living counterpart to the character who is a public figure.

In the first case of defamation in fiction tried under the *New York Times-Gertz* standards, *Bindrim v. Mitchell*,<sup>181</sup> the plaintiff conceded that he was a public figure.<sup>182</sup> However, in the next post-*Gertz* case involving fiction, *Pring v. Penthouse Int'l, Ltd.*,<sup>183</sup> the dilemma was manifest. In its motion for summary judgment in *Pring*, Penthouse argued that Pring was a public figure who could not prove actual malice by clear and convincing evidence.<sup>184</sup> Penthouse argued that Pring had sought publicity for many years, "invited attention," and "voluntarily

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180. See *Rancho La Costa, Inc. v. Superior Court*, 106 Cal. App. 3d 646, 165 Cal. Rptr. 351 (1980) ("in proving that plaintiff in a libel action is a public figure, it is not enough simply to present evidence of much publicity."). *Id.* at 661, 165 Cal. Rptr. at 357.

181. 92 Cal. App. 3d at 61, 155 Cal. Rptr. at 29.

182. *Id.* at 71 n.1, 155 Cal. Rptr. at 35 n.1. Arguably, Bindrim need not have conceded that he was a public figure necessitating the greater burden of proof. Known only to the Los Angeles medical community, he might have argued that he was a private person because he had not assumed an influential role in ordering society. *Id.*

183. 695 F.2d 438 (10th Cir. 1982).

184. Defendants' Memorandum in Support of Motion for Summary Judgment on Ground of Public Figure In re *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982) [hereinafter cited as Defendants' Public Figure Memorandum]. Penthouse moved for summary judgment on the additional ground that the story was entitled to constitutional protection as a form of art and entertainment, and that it should be protected "regardless of its literary merit or value." *Id.* at 20. Penthouse reasoned that the magazine was entitled to the same protection as *Time*, *Newsweek* or the *Smithsonian* magazines. "The sexual nature of the Penthouse article and whatever social value it represents as a form of art or entertainment should not interfere with the legal determination, compelled by principles of free expression, that the work as fiction is entitled to constitutional protection." *Id.* at 15-16. Defendants pointed out that the story was listed in the table of contents as "humor," bore the customary legend on the table of contents page, and was illustrated by a cartoon. *Id.* at 3. These arguments have been rejected by other courts. See *supra* notes 126 & 133 and accompanying text. Defendants asked the court to recognize that the similarities between the character and the plaintiff were "unintended coincidence," and that an unintended coincidence should not entitle Miss Wyoming to recover millions of dollars. *Id.* at 12. The court denied the motion for summary judgment, reasoning that the story was not labeled fiction and that the similarities in the article and real life were too many to be coincidental. Order on Motions at 8.

thrust" herself before the public.<sup>185</sup> Penthouse cataloged Pring's efforts to gain publicity and examples of the media attention she received.<sup>186</sup>

Penthouse and Pring each asserted that the other was in a logical quandary. Penthouse urged that Pring could not simultaneously seek publicity and claim to be a private person.<sup>187</sup> Pring retorted that Penthouse could not simultaneously claim that the article was "purely imaginary" yet assert that Pring was a public figure of national repute. "[C]ould there ever be any public figure," Pring argued, "when the position of the defense is that there were *no real people at all* in the article — it was '*all just fiction.*'"<sup>188</sup>

While Penthouse argued that publicity seekers cannot remain private persons, and Pring responded that fictional characters cannot be public figures, the federal district court ignored the fiction dimension of the arguments and ruled that Pring was not a public figure.<sup>189</sup> The court reasoned that former beauty contestants fade into private life, do not assume an influential role in ordering society, and do not occupy positions of persuasive power and influence. In addition, the court reasoned that Pring had not drawn herself into any particular public controversy so as to become a limited public figure.<sup>190</sup>

Although Pring's status as a public figure or private person was contested before the district court<sup>191</sup> and the court of appeals,<sup>192</sup> the Tenth Circuit decision is notably silent on the issue of classification.<sup>193</sup>

A suit for defamation in fiction, therefore, like any other defama-

185. Defendants' Public Figure Memorandum at 9.

186. *Id.* at 1-6. Pring had entered numerous beauty contests, including the Miss Universe and Miss USA Pageants. She reigned as Miss Wyoming from 1978-79. She was the 1978-79 Grand National Twirling Champion, appeared on the cover of *Gente* magazine, won the 1975 Wyoming baton twirling championship, placed fourth in the National Twirling championship, and was runner-up in the Miss Majorette of America contest. Her photograph appeared on the covers of *Drum Major* and *Twirl* magazines.

187. *Id.* at 9.

188. Letter from plaintiff's counsel to Honorable Clarence A. Brimmer, Judge United States District Court, District of Wyoming, July 31, 1980, *In re Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982).

189. Order on Motions at 7.

190. *Id.* at 6-7.

191. *See* Defendants' Public Figure Memorandum at 1-20.

192. *See* Brief for Appellants at 42-4, *In re Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982) [hereinafter cited as Brief for Appellants].

193. Since *Pring* was the first defamation in fiction case in which the plaintiff's status as a public or private person was contested (*cf. Bindrim, supra* text accompanying notes 181-82), it is unfortunate that the Tenth Circuit did not discuss the district court's determination that Pring was a private person. By its silence on this issue, the decision fails to suggest guidelines for future defamation in fiction cases in which the status of the plaintiff will necessitate classification.

tion action, necessitates an initial determination of the plaintiff's status as public or private. Although the fiction genre seemingly poses an initial twist of logic — that fictional characters cannot have real public figure counterparts — the determination of the plaintiff's status will be made by an analysis of the plaintiff's position in society. At this stage of the proceedings, the court will not link the character to the plaintiff. To link the character to the plaintiff would create the potentially fallacious argument that private persons portrayed as public figure characters have become public figures by identification, and conversely that public figures portrayed by private characters have lost their prominence.

### B. *The Elusive Requirement of Proof of Fault*

Under *Gertz* private persons suing a media defendant must prove "fault" to recover compensatory damages; however, the elements of proof of fault vary from state to state.<sup>194</sup> Some states rely on a negligence standard, while others require the plaintiff to prove common law malice.<sup>195</sup> Still others require a defendant to show that the matter was published with "good motives or justifiable ends."<sup>196</sup> *Pring* went to trial in Wyoming under a unique common law rule which shifted the burden to Penthouse to show the good motives or justifiable ends of a farcical short story describing acts of fellatio at the Miss America Pageant. Whether Penthouse or any other publisher of fiction describing explicit sexual fantasies could make such a showing is doubtful.

Penthouse might have challenged the Wyoming common law rule on the ground that it placed an affirmative burden of proof on a defendant in contravention of the policies underlying *Gertz*. The *Gertz* formula, "no liability without fault,"<sup>197</sup> was developed to ensure that a private plaintiff seeking damages from a media defendant carried the burden of proof.<sup>198</sup> While *Gertz* did not specifically address the constitutionality of a state common law rule which imposes an affirmative burden upon a media defendant, the Court sought to shield the media from strict liability and did not intend to increase a defendant's burden. Thus, it is arguable that the Wyoming fault standard undermines the

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194. See generally SACK, *supra* note 7, at 250-55.

195. Sixteen states have adopted the negligence standard, while six others have adopted variations of "actual malice." New York has applied a standard adapted from *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). See SACK, *supra* note 7, at 250-60.

196. See R. PHELPS, LIBEL 255 (1978).

197. 418 U.S. 323, 347 (1974).

198. *Id.* at 348-49.

policy of *Gertz*, which favors free expression absent fault on the part of the media defendant.

### C. Actual Malice in Fiction

If a plaintiff seeks punitive damages from a media defendant, the plaintiff must prove actual malice.<sup>199</sup> The actual malice test has two prongs, which necessitate a showing of "falsity." When applied to fiction, the application of a "falsity" test creates a quandary. As one commentator stated, "[s]ince by the nature of the work the statements are known to be 'false,' the 'actual malice' standard seems necessarily to be met."<sup>200</sup>

The first case to apply the actual malice standard to a work of fiction was *Bindrim v. Mitchell*.<sup>201</sup> In *Bindrim* a doctor recovered \$50,000 in compensatory damages from an author who described nude therapy as vulgar and abusive.<sup>202</sup> In upholding the compensatory damage award, the *Bindrim* court reasoned that author Mitchell's reckless disregard for the truth was apparent from her knowledge of what transpired at the therapy sessions. Since she had attended the sessions for two months prior to writing the novel, the court reasoned that "there can be no suggestion that she did not know the true facts."<sup>203</sup> The court did not hold that Mitchell would be liable for *any* novel written about a practitioner of nude therapy. However, since she was aware of the actual character of the therapy Bindrim practiced, the court reasoned that she could not depict him in a manner which would injure his professional reputation.<sup>204</sup> As the concurring opinion observed: "Had the defendant author . . . limited her novel to a truthful or fictional description of the techniques employed in nude encounter therapy, I would agree . . . that plaintiff had no cause of action for defamation."<sup>205</sup>

The *Bindrim* court reasoned that when an author deliberately defames a person through the use of a fictional counterpart, the author is

199. *Id.* See *supra* note 179.

200. SACK, *supra* note 7, at 243 n.290.

201. 92 Cal. App. 3d at 61, 155 Cal. Rptr. at 29. It was fourteen years before the *New York Times* standards were applied to fiction. *Id.* at 74, 155 Cal. Rptr. at 36-37. See *supra* text accompanying notes 93-106 for discussion of the "of and concerning" test in *Bindrim*.

202. *Id.* at 81, 155 Cal. Rptr. at 41. The court awarded \$50,000 in compensatory damages as a joint and several award against author Mitchell and Doubleday, the publisher; and \$25,000 in punitive damages against Doubleday.

203. *Id.* at 73, 155 Cal. Rptr. at 35.

204. *Id.* at 80, 155 Cal. Rptr. at 40. Three doctors testified that they could recognize Bindrim as Herford because Bindrim had written about "peak experiences."

205. *Id.* at 83, 155 Cal. Rptr. at 41 (Jefferson, J., concurring).

guilty of actual malice.<sup>206</sup> Mitchell's mischaracterization of Dr. Bindrim's therapy could not be protected by the first amendment because the author knew that her depiction of Bindrim's therapy was false and "[t]he first amendment right to comment does not include the right to commit libel."<sup>207</sup> When an author knows that she is creating a "devastating portrait"<sup>208</sup> — a depiction which is both false and injurious of reputation — constitutional malice exists.

The confusion wrought by the *Bindrim* decision stems from Justice Files' dissenting opinion. The dissent suggested that the analytical problem with the majority opinion was that "it brands a novel as libelous because it is 'false,' *i.e.*, fiction; and infers 'actual malice' from the fact that the author and publisher knew it was not a true representation of plaintiff."<sup>209</sup> This view is based on the following syllogism: (a) a work of fiction is a work of imagination which is not intended to be literally true; (b) an author who knows the falsity of her writing is guilty of actual malice; (c) all writers of fiction are guilty of actual malice.<sup>210</sup> If *Bindrim* stands for this proposition, as the dissent believed, and correctly states the law, then all authors and publishers face punitive damage awards upon proof of defamatory words and proof that they are "of and concerning" the plaintiff, without more. The more loudly the publisher and author protest that the work is "fictional," the more they affirm that they have acted maliciously.<sup>211</sup> *Gertz* permits an award of punitive damages where the actual malice standard is satisfied.<sup>212</sup> Consequently, if fiction satisfies the malice standard by tautological reasoning, then punitive damages follow automatically.

This application of the *New York Times* actual malice and *Gertz* punitive damages standards is based on a misreading of *Bindrim* and is illogical in any event. *Bindrim* held that an author who uses a work of purported fiction to cloak an intentionally deceptive and injurious depiction of a plaintiff is liable for punitive damages.<sup>213</sup> The majority's

206. *Id.* at 72, 155 Cal. Rptr. at 35.

207. *Id.* at 84, 155 Cal. Rptr. at 42 (concurring opinion). A court will "refuse to permit a writer and publisher to libel a person and hide under the banner of having written only fictional material." *Id.*

208. *Id.* at 69, 155 Cal. Rptr. at 34.

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

210. Hereinafter cited as *Bindrim* syllogism.

211. "In a case of fiction, the [*New York Times*] standard must be cast in different terms. Otherwise, publishers of fiction, who by definition know of its literal falsity, will be strictly liable, even if they have no reason to believe that their publication would be understood as depicting language and conduct by any real person." Brief for Appellants at 30.

212. *See supra* note 179.

213. 92 Cal. App. 3d at 84, 155 Cal. Rptr. at 42.

conclusion that the author was liable for damages did not flow automatically from proof that the work was fictional. It was based, rather, upon a finding of subjective intent to injure the plaintiff.

1. "Falsity" creates strict liability

The *Bindrim* decision served as persuasive precedent in *Pring*,<sup>214</sup> illustrating the danger lurking behind the formulation set forth by the dissent in *Bindrim*. *Pring*, a non-public figure, was required to satisfy the *New York Times* actual malice standard to recover punitive damages.<sup>215</sup> The plaintiff relied on the *Bindrim* dissent's syllogism and argued: "How can a magazine [publisher] believe that an article was obviously fictional and obviously incredible, and still contend that it did not know it was false? If they claim it was fiction, then they cannot say that they thought it was true."<sup>216</sup> In fact, Penthouse never claimed that the story was true. To the contrary, the magazine contended that "the inherent improbability of the story and the physical impossibility of some of the sexual feats described, lead to a single inevitable conclusion — the article is pure fiction. Could a reasonable person ever believe that the events related were true? Of course not."<sup>217</sup>

The argument that the article was "pure fiction" missed the mark. *Pring* had argued to the jury that if Penthouse knew that the story was "not true," then it was false, permitting her a recovery of punitive damages. To a reasonable juror no other conclusion was possible, because no other alternative had been presented. Penthouse should have attacked the *Bindrim* syllogism as imposing a false dichotomy. The "knowledge of the falsity" test was developed by the Supreme Court to protect news media defendants who are, of course, expected to print the truth.<sup>218</sup> A reader of a newspaper expects that what he is reading is "true." Thus, set in this context the dichotomy is appropriate. Readers of novels or short stories, on the other hand, expect that what they read is creative fiction. Therefore, to the extent that a publisher has printed fiction, it has published neither "falsity" nor "truth" in the sense these

214. See Letter from plaintiff's counsel to Honorable Clarence A. Brimmer, Judge, United States District Court, District of Wyoming, October 28, 1980, in re *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982).

215. See *supra* text accompanying note 199.

216. Letter from plaintiff's counsel to Honorable Clarence A. Brimmer, Judge, United States District Court, District of Wyoming, October 28, 1980, in re *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982).

217. Defendants' Memorandum in Support of Motion for Summary Judgment at 5.

218. One commentator argues that works of fiction should be absolutely immune from libel suits. See Note, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U.L. REV. 571, 578-88 (1980).

terms were used in *New York Times*.<sup>219</sup>

Unfortunately, the *Pring* case went to the jury on instructions derived from *New York Times*, without modifications appropriate to fiction. The jury was asked to determine whether (1) Penthouse had knowledge of the falsity of the published information; or (2) Penthouse published the article with reckless disregard of whether it was false or not.<sup>220</sup> This emphasis on "falsity" led to the inevitable conclusion that since Penthouse itself admitted that Pring did not commit fellatio at the pageant, the magazine published with knowledge of the falsity. Pring had proved her case, and was awarded \$25 million in punitive damages.<sup>221</sup>

## 2. Reckless disregard may mitigate damages

The *New York Times* "reckless disregard" standard for the proof of constitutional malice was defined in *St. Amant v. Thompson*.<sup>222</sup> In *St. Amant*, the Court stated that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact *entertained serious doubts as to the truth* of his publication."<sup>223</sup>

In *Bindrim*, the publisher was not liable for the original hardback edition of the novel *Touching*. Doubleday was held liable for the subsequent paperback edition.<sup>224</sup> The court observed that Doubleday had published the hardback edition with assurances from the author that "no actual, identifiable person was involved and that all the characters were fictitious . . ." <sup>225</sup> Although courts have required that publishers investigate the truth or falsity of authors' statements, this duty is imposed on "factual stories about actual people."<sup>226</sup> The *Bindrim* court

219. See *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) ("Fiction is the conscious antithesis of truth.").

220. Letter from plaintiff's counsel to Honorable Clarence A. Brimmer, Judge, United States District Court, District of Wyoming, October 28, 1980, In re *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982).

221. Judgment was entered as follows: Actual Damages: Cioffari, \$10,000; Penthouse, \$1,500,000. Punitive Damages: Cioffari, \$25,000; Penthouse, \$25,000,000. See Brief for Appellants at 6. The court conditioned its denial of a new trial upon a remittur of the punitive damage award against Penthouse in the sum of \$12,500,000. *Id.* at 7.

222. 390 U.S. 727 (1968).

223. *Id.* at 731 (emphasis added). *Accord Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974).

224. 92 Cal. App. 3d at 74, 155 Cal. Rptr. at 36.

225. *Id.* at 73, 155 Cal. Rptr. at 36.

226. *Id.*

reasoned that in the case of fiction, where there is nothing to suggest inaccuracy, Doubleday could not have "entertained serious doubts as to the truth or falsity of the [hardback] publication."<sup>227</sup> The court therefore extended to a work of fiction the rule that investigatory failure alone is insufficient to find actual malice.<sup>228</sup>

Prior to the paperback edition, however, Bindrim's attorney notified Doubleday by letter that the character in *Touching*, Dr. Herford, was a defamatory portrayal of Dr. Bindrim. This letter constituted notice to Doubleday that it faced possible defamation litigation, and the publisher could no longer rely on Mitchell's assurances.<sup>229</sup> At this point, Doubleday either had or should have had serious doubts as to the possibility that plaintiff was defamed in *Touching*<sup>230</sup> but published anyway. Accordingly, Doubleday was found liable for punitive damages for the subsequent paperback edition.

The logic of the *Bindrim* court with respect to "reckless disregard" might have been applied to *Pring*. The story was a fantasy written by an English professor who had previously published four stories and several film reviews in *Penthouse*. The story was submitted to *Penthouse* by the author's New York agent and ultimately was purchased

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227. *Id.* at 74, 155 Cal. Rptr. at 36.

228. Investigatory failure will not establish constitutional malice under the *New York Times* "reckless disregard" standard. In *New York Times*, the Court reasoned that the *Times* was not negligent for its failure to check the accuracy of the advertisement against its own files. The Court reasoned that the *Times* relied upon knowledge of the good reputation of many of those whose names were listed as sponsors in the advertisement, and upon a letter from A. Phillip Randolph, who was known to the *Times* as a responsible individual. Randolph certified that the use of the names listed in the advertisement was authorized. 376 U.S. at 287 (emphasis added). This reliance upon a "known responsible individual" has become a factor to ameliorate "reckless disregard." See *Baldine v. Sharon Herald Co.*, 391 F.2d 703, 707 (3d Cir. 1968); *Rosanova v. Playboy Enterprises Inc.*, 411 F. Supp. 440, 448 (S.D. Ga. 1976). This reliance standard has been applied to investigatory failure in books as well as newspapers. See *Bindrim*, 92 Cal. App. 3d at 73, 155 Cal. Rptr. at 39; *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977), cert. denied, 434 U.S. 969 (1977).

229. Since Mitchell had previously published a novel, she was "known" to Doubleday as a reliable source. The court found it reasonable for Doubleday to "rely" on Mitchell's assurances that the characters in her second novel were fictitious until Bindrim's letter, which acted to put Doubleday on notice that they could no longer rely on Mitchell's assurances. 92 Cal. App. 3d at 74, 155 Cal. Rptr. at 36. The concept of reliance on a known author may insulate a publisher from damages in the case of a second novel, but it provides no protection for a publisher of first novels. In the case of first novels, the publishing industry will not be able to rely on the author's assurances, and new standards will have to be developed. Publishers will have to concentrate on the element of identification between characters and potential plaintiffs prior to publication.

230. 92 Cal. App. 3d at 74, 155 Cal. Rptr. at 36.

pursuant to a written agreement.<sup>231</sup> "Based upon the author's assurance that the story was fictional, and its preposterous nature," the editors at *Penthouse* "deemed no factual investigation was necessary."<sup>232</sup> Accordingly, *Penthouse* could not be said to have entertained serious doubts as to the truth or falsity of the story because its editors believed "factual investigation" unwarranted or inappropriate for a fantasy.<sup>233</sup> Under the "reckless disregard" standard, a publisher of fiction should not be liable for punitive damages if it fails to investigate the possible defamatory nature of a work of fiction written by a "reliable source."<sup>234</sup>

The early case of *Corrigan v. Bobbs-Merrill Co.*<sup>235</sup> had established a similar demarcation between publisher and author based on the old common law malice standard. In that case, the New York Court of Appeals applied the common law rule of agency and reasoned:

Actual malice might be inferred as against the author from the falsity of the publication . . . but not as against the mere publisher of a libel in a novel which on its face does not purport to be serious . . . . The publisher in such a case is not liable to exemplary damages for the acts of the author upon mere proof of publication.<sup>236</sup>

The *Corrigan* court did hold, however, that punitive damages may be imposed against the publisher on a showing that knowledge of the author's intent to injure was chargeable to the publisher.<sup>237</sup> The court reasoned that such a recovery could be based on proof that an editor employed by the publishing company knew that the author intended to injure *Corrigan* by publication.<sup>238</sup>

231. Brief for Appellants at 7-8.

232. *Id.* at 8.

233. *Id.*

234. *Id.* at 38. See *supra* note 228 and accompanying text. Liability for punitive damages under the reckless disregard test must be distinguished from liability for compensatory damages under the fault standard. It would not be inconsistent for an author or publisher to be found liable for compensatory damages without being found liable for punitive damages. Compare *supra* notes 222-39 and accompanying text with *infra* notes 335-43 and accompanying text.

235. 228 N.Y. 58, 126 N.E. 260 (1920). See *supra* notes 34-39 for discussion of strict liability and *supra* notes 49-53 for discussion of the "of and concerning" test in *Corrigan*.

236. *Id.* at 66, 126 N.E. at 263.

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

238. *Id.* at 69, 126 N.E. at 264. Testimony indicated that an editor, Bernhardt, was intimately connected with author Howard. Bernhardt aided Howard on the manuscript and galley proofs at Howard's home on weekends. Witnesses testified that Bernhardt "knew" Howard had sought to "get even with *Corrigan* . . . but was willing to take a chance on the book for the sake of the publicity that might result." *Id.* at 68, 126 N.E. at 264. The court was not convinced that Bernhardt's acts in connection with Howard were within the scope of his employment, and the court remanded for a new trial on that issue.

This ruling concerning agency law is relevant to defining the scope of a publisher's exposure to punitive damages. To the extent authors are independent contractors<sup>239</sup> whose manuscripts reach publishers through independent agents, the publisher should not be charged with knowledge of the possible false depiction contained in a novel. Where, however, an editor employed by the publisher interacts with the author in revising and editing the work, a basis may exist for imputing the author's intent to the publisher.

#### *D. Fact/Opinion Syllogism for Fiction*

Just as the *New York Times* actual malice test has given rise to a plaintiff's argument that publishers of fiction are necessarily liable,<sup>240</sup> the *Gertz* decision has given rise to a defendant's argument that publishers of fiction can never be liable. Based on *Gertz*, defendants have asserted that an idea is either a fact or an opinion.<sup>241</sup> Since fiction is by definition "not factual," defendants contend it is entitled to absolute protection as privileged opinion.<sup>242</sup>

At common law both statements of fact<sup>243</sup> and opinion<sup>244</sup> could form the basis of a defamation suit. The words were presumed false and actionable unless the defendant proved them true.<sup>245</sup> Determining whether an allegedly defamatory communication was a fact or opinion was difficult, but crucial, because at common law statements of opinion gave rise to the "fair comment" privilege.<sup>246</sup>

The Supreme Court in *New York Times* constitutionalized the common law fair comment privilege.<sup>247</sup> The Court held that as a matter of constitutional law, commentary about public officials is protected even if the factual assertions upon which it is based are false, provided there is no showing that these factual assertions were made with actual

239. For an application of a defense for liability based upon the theory of a writer's acting as an independent contractor, see *Belli v. Curtis Publishing Co.*, 25 Cal. App. 3d 384, 102 Cal. Rptr. 122 (1972).

240. See *supra* notes 214-21 and accompanying text.

241. Brief for Appellants at 13.

242. *Id.*

243. RESTATEMENT (SECOND) OF TORTS § 565 (1977).

244. *Id.* at § 566.

245. *Id.* at § 581A comment b.

246. See PROSSER, *supra* note 41, at 812-15. The common law privilege of fair comment was developed to protect statements of opinion regarding matters of public concern. At common law, the privilege, which became a qualified defense, was limited to opinion and did not extend to any false assertion of fact. This led to a most unsatisfactory and unreliable need to distinguish between opinions and facts.

247. See *supra* notes 153-57 for discussion of the *New York Times* abrogation of strict liability.

malice.<sup>248</sup> Ten years later, however, the *Gertz* decision may have subsumed the defense of fair comment under the broader defense that all opinion is privileged.<sup>249</sup> In effect, *Gertz* held that comment need no longer be "fair," provided it was comment. The Court stated: "[u]nder 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 judges and juries, but on the competition of other ideas."<sup>250</sup>

This sweeping pronouncement, which suggests that an idea is synonymous with an opinion, posits that an opinion can neither be true nor false.<sup>251</sup> Since the law of defamation only permits recovery for statements proved false, it would appear that an opinion can no longer give rise to a successful defamation action.<sup>252</sup>

In the companion case to *Gertz*, *Old Dominion Branch No. 496, National Ass'n. of Letter Carriers v. Austin*,<sup>253</sup> the Court similarly stated that even in a labor dispute, "[t]he *sine qua non* of recovery for defamation . . . is the existence of falsehood . . . . [T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth . . . ." <sup>254</sup> Citing *Gertz*, the Court further stated that "[b]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact."<sup>255</sup> Based on this reading of *Gertz* and *Letter Carriers*, the courts treated statements of opinion as constitutionally protected and imposed civil liability for false statements of fact.<sup>256</sup>

In *Good Government Group of Seal Beach, Inc., v. Superior Court*,<sup>257</sup> the California Supreme Court recognized that the distinction

248. 376 U.S. 254, 279-80 (1964). The Alabama statute invalidated by the Supreme Court in *New York Times* had limited the fair comment privilege to opinions based on true statements of fact. *Id.* at 267. The Court held that the first amendment warranted an extension of the doctrine of fair comment to include misstatements of underlying facts as long as they were not made with knowledge that they were false or with reckless disregard for the truth. *Id.* at 279-80.

249. *See infra* note 252.

250. 418 U.S. 323, 339-40 (1974). *Accord* Brief for Appellants at 13.

251. 418 U.S. at 339-40.

252. *See* SACK, *supra* note 7, at 164. "The common law 'fair comment' privilege, [is] now arguably obsolete as a result of developments in constitutional doctrine . . . ."

253. 418 U.S. 264 (1974). *See infra* text accompanying notes 279-94 for a discussion of this case in the context of literal defamation.

254. *Id.* at 283-84.

255. *Id.* at 284.

256. *See* Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 552 P.2d 425, 428, 131 Cal. Rptr. 641, 644 (1976). This determination between fact and opinion was a question of law. *Id.* at 601, 552 P.2d at 488, 131 Cal. Rptr. at 644.

257. 22 Cal. 3d 672, 586 P.2d 572, 150 Cal. Rptr. 258 (1978).

between fact and opinion is not easily drawn. The court stated that "[a]n allegedly defamatory statement may constitute a fact in one context but an opinion in another, depending upon the nature and content of the communication taken as a whole."<sup>258</sup> The court concluded that when an article is ambiguous, "it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion . . . or whether the statements were generally understood as an opinion."<sup>259</sup>

The dichotomy of fact or opinion has created a second illogical syllogism when applied to defamation in fiction: (1) defamation is a false statement of fact which causes injury; (2) neither opinions nor fiction involve statements of fact; (3) neither opinions nor fiction may give rise to a cause of action for defamation.<sup>260</sup> Since fiction is not a statement of "fact," one can argue that it is a protected form of speech and therefore outside the ambit of the libel laws.<sup>261</sup>

In *Pring v. Penthouse Int'l, Ltd.*, Penthouse argued the opinion syllogism on appeal before the Tenth Circuit.<sup>262</sup> Penthouse contended that the offending portions of the story [*i.e.*, levitation during fellatio] were factually impossible, and concluded that the story contained no false statement of fact.<sup>263</sup> Because the acts described were not "factual," Penthouse argued, the story was an expression of opinion and therefore not actionable.<sup>264</sup> Indeed, the syllogism can be applied to all works of fiction: since fiction is by definition not "factual," it is arguably an expression of opinion and therefore does not give rise to any claim.

The difficulty with this argument, like the argument that fiction is knowing falsehood,<sup>265</sup> is that it is based on a false dichotomy. Works of fiction, by definition, are neither fact nor opinion; they are imaginative narration.<sup>266</sup> It is possible for a work of fiction to be defamatory if (1)

258. *Id.* at 680, 586 P.2d at 575, 150 Cal. Rptr. at 261.

259. *Id.* at 682, 586 P.2d at 576, 150 Cal. Rptr. at 262.

260. Hereinafter cited as *Gertz* syllogism.

261. *See* Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977) ("An assertion that cannot be proved false cannot be held libellous."), *cert. denied*, 434 U.S. 834 (1977). For a criticism of this view see Hill, *supra* note 3, at 1239.

262. *See generally* Brief for Appellants at 10-19.

263. *See id.* at 14-15.

264. *Id.* at 14-19.

265. *See supra* notes 209-13 and accompanying text.

266. *Cf.* Landau v. Columbia Broadcasting Sys. Inc., 128 N.Y.S.2d 254, 257 (1954) ("[Fiction is] '[t]he species of literature which is concerned with the narration of imaginary events and the portraiture of imaginary characters . . . .'" (quoting NEW ENGLISH DICTIONARY 187 (1901))).

the author cloaks a misrepresentation of fact in the mantle of creative expression, as the court found in *Bindrim*;<sup>267</sup> or (2) a work of evident imagination mischaracterizes and misrepresents a person's character so as to injure his or her reputation. Defamation in fiction, then, is broad enough to include narrative misrepresentation and narration which impliedly impugns the character and injures reputation.

### E. *Literal and Inferential Defamation*

Under the common law, a plaintiff could be defamed by the literal meaning of words or by an inference suggested by the words,<sup>268</sup> and a defendant sued for defamation could be found "liable for what [was] insinuated, as well as for what [was] stated explicitly."<sup>269</sup> When a plaintiff claimed to have been defamed either by the literal or inferential use of language, the common law required a court to determine, as a matter of law, the sufficiency of such language to state a cause of action.<sup>270</sup> In making this decision, a court applied a reasonable reader test,<sup>271</sup> and "determined the sense or meaning of the language of the complaint for libelous publication . . ."<sup>272</sup> Subsequent to *Gertz*, courts making a determination of the sufficiency of language to state a cause of action must additionally determine as a matter of law whether the allegedly defamatory language contains or implies a false statement of fact.<sup>273</sup>

These two determinations, sufficiency and false statement of fact, which require an analysis of the allegedly defamatory language in its literal or inferential context, proved fatal to Pring on appeal before the Tenth Circuit. Prior to trial at the district court level, Pring amended her complaint to limit her cause of action to "literal defamation"<sup>274</sup> and thereby forestalled what plaintiff characterized as "a wide-open assault on all areas of her privacy — areas that were not raised by the article."<sup>275</sup> Although Penthouse opposed plaintiff's election to amend,<sup>276</sup> it was this tactical procedural move which ultimately led to a reversal of

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267. See *supra* note 207 and accompanying text.

268. See SACK, *supra* note 7, at 50. Accord *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 547, 343 P.2d 36, 41 (1959). See *infra* note 327.

269. *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 547, 343 P.2d 36, 41 (1959).

270. *Id.* at 547, 343 P.2d at 41. Cf. *Letter Carriers*, 418 U.S. at 264 ("The Court has often recognized that in cases involving free expression we have the obligation, not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under federal law.")

271. *Id.*

272. *Id.*

273. *Gertz*, 418 U.S. at 339-40. See *supra* notes 250-52 and accompanying text.

274. See *infra* text accompanying notes 300-03.

275. Letter from plaintiff's counsel to Honorable Clarence A. Brimmer, Judge, United

the jury award by the Tenth Circuit.<sup>277</sup>

Confronted by the application of libel to a work of fiction, an issue which had never been addressed at the federal appellate level, the Tenth Circuit relied upon two Supreme Court decisions: *Greenbelt Co-operative Publishing Ass'n v. Bresler*,<sup>278</sup> and *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*.<sup>279</sup> Both decisions, although decided in a nonfiction context, addressed the issues of literally defamatory words used as exaggerated figures of speech.

In *Greenbelt*, a newspaper carried reports of tumultuous city council meetings at which Bresler, a land developer, conditioned his sale of land to the city for use as a school upon receiving certain zoning concessions on his other parcels of land.<sup>280</sup> The newspaper reports characterized Bresler's negotiating position as "blackmail," and the word appeared several times in the articles.<sup>281</sup>

The Court analyzed the literal and figurative use of the term "blackmail" and suggested that reasonable readers would ignore the literal meaning of that word and look to the context to see that it was used as obvious and intentional exaggeration. The Court stated:

No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, 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 Bresler's negotiating position extremely unreasonable.<sup>282</sup>

Concluding that no reader reasonably could have understood that Bresler was charged with the crime of blackmail,<sup>283</sup> and that the words in context were a mere exaggerated figure of speech, the Court held "that the imposition of liability on such a basis was constitutionally impermissible — that as a matter of constitutional law, the word 'blackmail' in these circumstances was not . . . libel."<sup>284</sup>

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States District Court, District of Wyoming, October 28, 1980, *In re Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982).

276. *Id.*

277. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982).

278. 398 U.S. 6 (1970).

279. 418 U.S. 264 (1974).

280. 398 U.S. at 7.

281. *Id.* at 7-8.

282. *Id.* at 14.

283. *Id.*

284. *Id.* at 13.

In *Letter Carriers*, the Supreme Court addressed the "extent to which state libel laws may be applied . . . in the course of labor disputes,"<sup>285</sup> and in so doing, the Court again distinguished between literal language and the meaning of that language in a figurative context. In *Letter Carriers*, a union newsletter repeatedly listed the plaintiff's name under the heading "List of Scabs."<sup>286</sup> The Court noted that the allegedly defamatory epithet "scab" was "literally and factually true,"<sup>287</sup> while references in the same newsletter to Jack London's definition of a "scab" as one who "is a traitor to his God, his country, his family and his class,"<sup>288</sup> could not be construed as a representation of fact about the plaintiff.<sup>289</sup> Relying on the logic of *Greenbelt*, the Court stated:

It is similarly impossible to believe that any reader of the Carrier's Corner would have understood the newsletter to be charging the appellees with committing the criminal offense of treason. As in *Bresler*, Jack London's 'definition of a scab' is merely rhetorical hyperbole, a lusty and imaginative expression . . . .<sup>290</sup>

The Court reasoned that the use of the definition of "scab" was a familiar piece of union literature amounting to mere hyperbole, and no inference of a crime of treason could be drawn from the term.<sup>291</sup> Therefore, by distinguishing between the literal use of "scab" and the hyperbolic charge of treason, the Court suggested that liability could be based upon the former but not upon the latter.<sup>292</sup> In *Letter Carriers*, the Court concluded that since the term "scab" was not "used in such a way as to convey a false representation of fact,"<sup>293</sup> and no false "factual representation [could] reasonably be inferred,"<sup>294</sup> the publication was protected.

When *Greenbelt* and *Letter Carriers* are viewed as cases involving literally defamatory words which are rendered non-actionable by their use as rhetorical hyperbole, it is apparent why they were relied on in *Pring*. On appeal in *Pring* the Tenth Circuit relied on these cases to

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285. 418 U.S. at 279.

286. *Id.* at 267.

287. *Id.* at 283.

288. *Id.* at 268.

289. *Id.* at 284.

290. *Id.* at 285-86.

291. *Id.* at 286.

292. *Id.*

293. *Id.*

294. *Id.*

reverse the district court, holding as a matter of law that the story, "Miss Wyoming Saves the World" was "rhetorical hyperbole" protected by the first amendment.<sup>295</sup>

In *Pring* the Tenth Circuit reaffirmed that "First Amendment-defamation interaction" necessitates a "false statement of fact."<sup>296</sup> "This factual statement and 'reasonably understood' element," stated the court, "is described by the Supreme Court as a constitutional requirement."<sup>297</sup> To satisfy the false statement of fact requirement, the court reasoned that in the peculiar procedural posture of the *Pring* case, defamatory statements had to be taken *literally* or not at all.<sup>298</sup> However, literal defamatory statements which could not be taken seriously could not be held to be defamatory. Based on this analysis, the Tenth Circuit framed the central issue in *Pring* as whether "the story [could] reasonably be understood to describe *actual facts* about the plaintiff . . ."<sup>299</sup>

The Tenth Circuit's imposition of the literal-fact requirement stemmed from *Pring's* amended complaint. In her amended complaint, *Pring* alleged:

The net effect of the aforementioned article was to create the impression throughout the United States, Wyoming and the world that the Plaintiff committed fellatio on one Monty Applewhite and also upon her coach, Corky Corcoran, in the presence of a national television audience at the Miss America Pageant. The article also creates the impression that Plaintiff committed fellatio like acts upon her baton at the Miss America contest.<sup>300</sup>

The court reasoned that *Pring's* complaint, as amended, had the effect of limiting her cause of action to "descriptions with no general implications."<sup>301</sup> This foreclosure of general implications had consequences for both plaintiff and defendant. Penthouse was denied discovery into *Pring's* general reputation or sexual history; and *Pring* could not rely on a general imputation of immorality,<sup>302</sup> but was forced to contend that the particular descriptions in the story were defamatory factual assertions.<sup>303</sup>

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295. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982).

296. *Id.* at 440.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 441.

301. *Id.*

302. *Id.*

303. *Id.*

Penthouse had sought discovery of Pring's reputation to address issues of credibility, truth, and mitigation of damages.<sup>304</sup> These issues might have justified inquiry into Pring's prior sexual history. By eliminating "general implications" from the complaint, however, Penthouse was restricted to discovery concerning the conduct specifically described in the article: three instances of levitation during fellatio.

Plaintiff was similarly restricted. While Pring gained the advantage of blocking discovery into her sexual history, she lost the possibility of proving she was defamed by inference.<sup>305</sup> By choosing not to rely on general imputations of immorality, Pring could not claim that the story implied that she was immoral, promiscuous, unchaste, or even sexually deviant. Rather, she elected to argue that unlike the character Charlene, Pring had not committed fellatio on national television. The consequence of this restriction proved fatal to her claim. The court characterized the three incidents of levitation during fellatio as "fanciful" rather than "factual."<sup>306</sup> As fantasy, the court reasoned that the incidents "provid[ed] a sufficient signal that the story could not be taken literally, and the portions charged as defamatory could not reasonably be understood as a statement of fact."<sup>307</sup>

In *Pring*, the Tenth Circuit failed to address the more difficult issues surrounding defamation in fiction. The opinion is narrowly drafted to address defamation without "general implication." Consequently, the opinion will be of little precedential value to those cases involving the broader issue of defamation by inference.

#### IV. AVOIDING AUTOMATIC STRICT LIABILITY AND PUNITIVE DAMAGES FOR DEFAMATION IN FICTION

What is needed is a fresh analytical framework for determining liability for defamation in fiction, one which embraces the unique character of the genre. This section proposes such a framework and the appropriate standards.

Litigation surrounding defamation in fiction poses three central problems: (1) the elusive nature of the *Gertz* fault standard,<sup>308</sup> (2) the imposition of strict liability under the *Bindrim* syllogism,<sup>309</sup> and (3) the

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304. Letter from plaintiff's counsel to Honorable Clarence A. Brimmer, Judge United States District Court, District of Wyoming, October 28, 1980, In re *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982).

305. See *infra* note 327 and *supra* notes 268-73 and accompanying text.

306. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 441 (10th Cir. 1982).

307. *Id.* at 442.

308. See *supra* text accompanying notes 194-98.

309. See *supra* text accompanying notes 214-21.

automatic exaction of punitive damages under the *Bindrim* syllogism.<sup>310</sup> This comment suggests several approaches to solving these problems with a view that publishers and authors of fiction may be afforded the same "breathing space"<sup>311</sup> afforded publishers of news and political commentary.

#### A. *The Fault Standard Does Not Apply to Fiction*

Properly understood, *Gertz* did not state a rule which is literally applicable to a work of fiction. The Court observed that different considerations would obtain if a state imposed liability for a "factual misstatement whose content did not warn a reasonably prudent editor . . . of its defamatory potential."<sup>312</sup> The Court intimated no view as to the proper resolution of such a case. Fiction, it is submitted, is such a case. Accordingly, first amendment protections of speech and expression dictate a different result. That is, to the extent that a work of literature remains a product of creative imagination, *i.e.*, fiction, it does not "make substantial danger to reputation *apparent*."<sup>313</sup> Since there is no apparent identifiable plaintiff, a prudent publisher would not be warned of potential liability.

Fiction, it is posited, exists as an exception to the rule of *Gertz*. Carving out exceptions to the *Gertz* doctrine is not without precedent. In *Harley-Davidson Motorsports, Inc. v. Markley*,<sup>314</sup> the Oregon Supreme Court held that *Gertz* did not apply to purely private defamation. The court reasoned that *Gertz* was properly applied in the context of a private person suing a media defendant, but it was inapplicable in the case of a private person suing a private person.<sup>315</sup>

#### B. *Fault Must Be Defined for Fiction*

*Gertz* was designed for application to a work of nonfiction.<sup>316</sup> If the basic architecture of *Gertz* is to be applied to works of fiction, then

310. See *supra* text accompanying notes 199-213.

311. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) ("[E]rroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive . . .'" (citations omitted).

312. 418 U.S. 323, 348 (1974).

313. *Id.* at 348 (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967)). Accord *Bindrim*, 92 Cal. App. 3d at 73-74, 155 Cal. Rptr. at 35. The *Bindrim* court suggested that a work of fiction does not put a publisher on notice that there are inaccuracies which necessitate investigation.

314. 568 P.2d 1359 (Or. 1977).

315. *Id.* at 1365.

316. See RESTATEMENT (SECOND) OF TORTS § 580B comment e (1977). Accord *Harley-Davidson*, 568 P.2d at 1364.

the standard "no liability without fault" needs to be defined.<sup>317</sup> The states cannot be left to determine on a state-by-state basis the appropriate standard. Such an approach creates the potential for fifty standards with little predictability for a publisher involved in interstate commerce.<sup>318</sup> The publishing industry requires greater protection than ordinary interstate businesses because it manufactures and ships material protected by the first amendment. The full protection of first amendment interests requires the development of a nationwide standard defining the rudimentary elements of "fault." Some of the same considerations which led Justice Powell to condition liability of media defendants upon a finding of fault<sup>319</sup> make it imperative for the Supreme Court to take the logically anterior step of defining fault.

In defamation actions based on works of fiction, "fault" should necessitate affirmative proof of four elements of the common law tort of defamation without benefit of the presumptions. The plaintiff should also prove culpability as an alternative to the common law malice standard. That is, the plaintiff would have to prove (1) use of defamatory words relating to the plaintiff; (2) publication to third parties; (3) falsity of facts; (4) culpability; and (5) injury.<sup>320</sup>

#### 1. Use of defamatory words relating to the plaintiff

Under the common law, the first element of the tort of defamation was tested by a reasonable reader standard.<sup>321</sup> As initially stated in *Hulton & Co. v. Jones*,<sup>322</sup> the court had to determine whether reasonable readers would believe the character referred to a real person, and whether reasonable readers would believe the story referred to the plaintiff.<sup>323</sup> This reasonable reader test was applied only to the first

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317. Justice White dissented in *Gertz*, arguing that the states would have to struggle to discern the meaning of the ill-defined concept, "liability without fault." He reasoned that the concept had not been argued, and its workability not seriously explored. 418 U.S. 323, 380 (1974) (White, J., dissenting). One California judge recently dismissed a million dollar defamation suit against *Los Angeles Magazine* and KCET, holding Cal. Civ. Code §§ 45, 45a & 46 unconstitutional because the statute permits liability without fault. See L.A. Daily Journal, July 13, 1982, at 1, col. 3.

318. Justice Brennan warned that the elusive *Gertz* standard would saddle the press with an intolerable burden of guessing how a jury might assess the reasonableness of the steps it took. See 418 U.S. 323, 366 (1974) (Brennan, J., dissenting). See *infra* note 339.

319. These considerations included evidence of actual loss, presumed injury, and uncontrolled jury discretion. 418 U.S. at 350.

320. See *supra* notes 40-44 and accompanying text for a comparison to the common law malice standard.

321. See *supra* notes 32-33, 42, & 46 and accompanying text.

322. 101 L.T.R. 832 (1910). See *supra* notes 32-33, 42, & 46 and accompanying text.

323. See *supra* notes 32-33, 42, & 46 and accompanying text.

element of the tort, because the third, fourth, and fifth elements were presumed at common law. To establish fault under the newly proposed standard, the plaintiff would be required to prove five elements of the tort to receive compensatory damages. As explained below,<sup>324</sup> the reasonable reader test would apply to elements one and three.

## 2. Publication to third parties

Publication in the law of defamation is a term of art.<sup>325</sup> It requires communication to someone other than the person defamed. The communication can take the form of oral or printed publication; or it can be conveyed by gestures, paintings, pictures, or statues.<sup>326</sup> In the case of defamation in fiction, the book or magazine containing the defamatory material would be evidence of publication.

## 3. Falsity of facts

Having established that the reasonable reader would identify the plaintiff as the character under element one, the plaintiff would next prove falsity of facts. The plaintiff would have to prove that the defamatory words are false, and that a reasonable reader would believe them to depict accurately the plaintiff. The falsity of the defamatory language would be measured by the reasonable reader test. Would a reasonable reader believe that the conduct or characteristics ascribed to the character in fact were true of the plaintiff? If the answer is yes, then the plaintiff has shown that he has been defamed.

To illustrate, in *Bindrim* the plaintiff would allege the similarities between the character, Dr. Herford, and himself for element one, and would also allege that the use of vulgar and abusive language was false under element three. The issue would then be whether a reasonable reader would believe that Dr. Bindrim used vulgar and abusive language, and whether Dr. Bindrim in fact used such language. If the answer to the first question is yes and the second is no, then Bindrim has proved his case under elements one and three of the fault test.

In a case of fantasy, such as *Pring*, the test would be applied in similar form. Would a reasonable reader believe that Pring performed acts of fellatio at the Miss America Pageant, and did Pring in fact perform such acts? Here the fantastical aspects of the short story may re-

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324. See *infra* notes 327-34 and accompanying text.

325. SACK, *supra* note 7, at 85 (citing *Ostrowe v. Lee*, 256 N.Y. 36, 38, 175 N.E. 505 (1931) (Cardozo, J.)).

326. See *supra* note 7.

quire an inference.<sup>327</sup> Although no reasonable reader would believe that Pring levitated her coach during fellatio, a reasonable reader might believe the inference that Pring was promiscuous. If the reasonable reader believes either that Pring participated in fellatio or was promiscuous, and those charges were false, then Pring has been defamed.

Requiring the plaintiff to prove falsity of facts under element three represents a departure from the common law. Under the common law, once a plaintiff alleged falsity, falsity was *presumed*.<sup>328</sup> Truth was an affirmative defense raised by the defendant on which the defendant had the burden of proof.<sup>329</sup> Following *New York Times* and *Gertz* and the imposition of "fault," commentators have split on the issue of the "exact location" of the burden of proof as to truth or falsity.<sup>330</sup> Indeed, in *Cox Broadcasting Corp. v. Cohn*,<sup>331</sup> the Court noted that it had "carefully left open the question whether the First and Fourteenth Amendments require . . . that truth be recognized as a defense in a defamation action brought by a private person . . . ." <sup>332</sup> Where a plaintiff seeks compensatory damages from a media defendant, the common law presumption of falsity should be abandoned and the plaintiff should have to prove the statement false. Support for this position can be found in *Goldwater v. Ginzburg*,<sup>333</sup> in which the Second Circuit stated that "the burden of establishing that the published material was false is on the plaintiff."<sup>334</sup>

327. Defamatory language can be conveyed by an inference. See SACK *supra* note 7, at 50 ("A publisher is, of course, liable for the *implications* of what he has said or written, not merely the specific, literal statements made.") (citing *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 547, 343 P.2d 36, 41 (1959) (emphasis in original). See *supra* text accompanying notes 268-70.

328. RESTATEMENT (SECOND) OF TORTS § 581A comment a (1977). See *supra* note 43.

329. *Id.* at § 581A(b). See *supra* note 44.

330. See Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA.L. REV. 1349, 1381-86 (1975). See also RESTATEMENT (SECOND) OF TORTS § 581A comment b (1977).

331. 420 U.S. 469 (1975).

332. *Id.* at 490. Writing for the majority in *Cox*, Justice White avoided the "broader question" of the location of the burden of proof, and "focus[ed] on the narrower interface between press and privacy that the case present[ed]." *Id.* Who must bear the burden of proof, and whether truth must be recognized as a defense, are issues which remain to be addressed by the Supreme Court.

333. 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

334. *Id.* at 338. Compare RESTATEMENT (SECOND) OF TORTS § 581A comment b (1977):

At common law the majority position has been that although the plaintiff must allege falsity in his complaint, the falsity of a defamatory communication is presumed . . . . [T]ruth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof . . . . The practical effect of this rule has been eroded, however, by the recent Supreme Court holdings that the First

## 4. Culpability [formerly malice]

The fourth element of the tort, malice, was never clearly defined by the various state courts under the common law.<sup>335</sup> Some states required an intent to injure, and others held intent irrelevant.<sup>336</sup> In defamation in fiction cases, malice should be replaced with a modified culpability standard.

*Gertz* requires that liability for defamation must be premised on fault.<sup>337</sup> Consequently, it is inappropriate to rely, as did the common law, on a presumption of malice flowing automatically from a mere showing that the defendant published defamatory matter.<sup>338</sup> Conversely, it would be anomalous to require, as a condition to the granting of compensatory damages, a showing of malice in either the common law or constitutional sense. Such a requirement would involve an undue shift in the sensitive balance between protection of reputation and free speech contrary to the intention of the *Gertz* Court. Rather, a more modest element of fault or culpability should be required. To satisfy the culpability or fault element, a plaintiff should be required to show, at a minimum, that defendant acted with a want of the reasonable and ordinary care which a publisher should exercise to avoid injury to reputation. Obviously, a showing of specific intent to injure reputation or reckless disregard for reputation would more than suffice. However, the plaintiff should not be required to prove so great a degree of culpability merely to recover compensatory damages, which the common law granted without a showing of any fault at all.

To illustrate, in *Pring*, although the author claimed that the story was "purely fictional," the editorial directors at Penthouse admitted that there was reality in the story, as well.<sup>339</sup> The editors knew that a

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Amendment to the Constitution requires a finding of fault on the part of the defendant regarding the truth or falsity of the communication. Pending further elucidation by the Supreme Court, *the Institute does not purport to set forth with precision the extent to which the burden of proof as to truth or falsity is now shifted to the plaintiff.*

*Id.* (emphasis added).

335. See generally SACK, *supra* note 7, at 42-43.

336. *Id.*

337. 418 U.S. 323, 347. See *supra* text accompanying notes 194-95. This proposal only goes to private persons. Public figures must still prove actual malice.

338. See *supra* text accompanying notes 40-44.

339. *Miss America Pageant, Inc., v. Penthouse Int'l. Ltd.*, 524 F. Supp. 1280, 1285 (D.C.N.J. 1981). In *Miss America Pageant*, the corporation sued Penthouse International, Ltd. for defamation arising out of the short story, "Miss Wyoming Saves the World," which appeared in the August 1979 issue of *Penthouse* magazine. See *supra* note 108 and accompanying text. The court reasoned that the plaintiff failed to come forward with evidence from which a jury could find actual malice, and the court granted the defendants' motion for

Miss America Pageant was actually held in Atlantic City, that there is a boardwalk in Atlantic City, and that there was a Miss Wyoming among the contestants at the Pageant.<sup>340</sup> After one of the senior editors at Penthouse wrote the subtitle, "But She Blew The Contest With Her Talent," and approved the artwork (including the drawing of a half-naked female with a Wyoming banner), the editor admitted that "he had qualms about it because the subject was the Miss America Pageant and because that subject had been overdone satirically."<sup>341</sup> The editor sent the article to an attorney in the legal department at Penthouse for review. After reading the manuscript, the attorney "*inquired as to whether the article was fiction.*"<sup>342</sup> If an attorney in the legal department of Penthouse read the story and questioned whether it was fiction, arguably a reasonable reader might also have entertained the same doubt.

Penthouse easily could have telephoned the Miss America Pageant Corporation to determine whether the 1978 Miss Wyoming, who they knew existed, was also a baton twirler. Given the doubts of their editor and attorney, and the ease of determining whether the character could be identified with an actual person, Penthouse's failure to investigate can be characterized as want of the reasonable and ordinary care which a publisher should exercise to avoid injury to reputation.<sup>343</sup>

## 5. Injury

The fifth element, proof of actual injury, was imposed by the Supreme Court in *Gertz*. In *Gertz*, the Court abolished the common law's ancient presumption of injury for defamatory statements, noting that "the presumption of injury is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss."<sup>344</sup> Having characterized the presumption as an "oddity," the Court demanded that private plaintiffs suing media defendants prove

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summary judgment. *Id.* at 1288. This case illustrates the need for a nationwide, uniform fault standard. In the absence of such a standard, publishers who ship books and magazines across state lines, if sued for defamation in fiction, may be required to litigate "fault" arising out of the same piece of literature under varying standards, and must guess as to the extent of any duty they owe.

340. *Id.*

341. *Id.*

342. *Id.* (emphasis added).

343. See *supra* note 234 for discussion of the possibility that authors and publishers of fiction may be found liable for compensatory damages without being found liable for punitive damages.

344. 418 U.S. 323, 349-50 (1974).

actual injury.<sup>345</sup> Although the Court did not define actual injury, it suggested that such recovery would include out-of-pocket loss, impairment of reputation, standing in the community, personal humiliation, and mental anguish and suffering.<sup>346</sup> The Court did not impose a requirement that the plaintiff assign an actual dollar value to the injury.<sup>347</sup> In defamation in fiction cases, courts might properly require that damages should bear a fair and reasonable relationship to the injury.<sup>348</sup> Pring, for example, suffered out-of-pocket losses of \$50.00,<sup>349</sup> but she recovered a jury award of \$1.5 million in compensatory damages. Such an award permitted the jury, in its discretion, to "punish unpopular opinion" rather than to compensate for actual injury.<sup>350</sup>

### C. Punitive Damage Standard

In *Gertz* the Court held "that the States may not permit recovery of . . . punitive damages . . . when liability is not based on a showing of knowledge of the falsity or reckless disregard for the truth."<sup>351</sup> When the double negatives of the Court's holding are removed, it is clear that punitive damages are available when actual malice is proved. As already discussed, when applied to fiction, proof of "falsity" created a linguistic trap giving rise to strict liability for authors and publishers.<sup>352</sup>

To avoid automatic awards of punitive damages based on actual malice, plaintiffs seeking damages in actions involving works of fiction should have to prove a modified version of the *New York Times* actual malice test. To suggest modification of the *New York Times* test is not a radical proposal.<sup>353</sup> Indeed, the *Gertz* formulation of the *New York*

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345. *Id.*

346. *Id.* at 349-50.

347. *Id.*

348. See *Rosenbloom v. Metromedia*, 403 U.S. 29, 77 (1971) (Harlan, J., dissenting) ("I would hold unconstitutional jury authority to award damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.").

349. Brief for Appellants at 55.

350. 418 U.S. 323, 350 (1974).

351. *Id.* at 349. One commentator suggests that punitive damages should be precluded from defamation actions since the function of punitive damages is deterrence, and deterrence of speech regardless of its content is inconsistent with the thrust of the commitment to free expression. See Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 477 (1975).

352. See *supra* text accompanying notes 209-10.

353. Troubled by difficulties in dealing with the subjective *New York Times* test, some courts and commentators have suggested abandonment of the "knowing or reckless falsehood" standard and the adoption of Justice Harlan's still-born standard in *Curtis Publishing*

*Times* test for an award of punitive damages already contains a modification of the actual malice standard expressed in *New York Times*. In *New York Times*, the Court demanded "knowledge that it was false or . . . reckless disregard of whether it was false or not."<sup>354</sup> Ten years later, in *Gertz*, the Court stated that punitive damage awards must be based on a showing of "knowledge of falsity or reckless disregard for the truth."<sup>355</sup> Whereas *New York Times* referred to falsity under both prongs of the test, the *Gertz* decision referred to falsity under only one prong. The *New York Times* Court appeared to create a dichotomy between truth or falsity; the *Gertz* Court appeared to recognize that disregard for truth would not necessarily involve falsity per se. When the actual malice test is applied to fiction, therefore, the Supreme Court should take the next logical step and eliminate the concept of falsity entirely.

As modified, plaintiffs should be required to prove knowledge or reckless disregard with respect to two elements of defamation: (1) identification and (2) likelihood of injury. Specifically, the jury should be required to determine (a) whether the media defendant had knowledge or manifested reckless disregard that the character in the work of fiction reasonably could be identified as the plaintiff; and (b) whether the media defendant had knowledge or manifested reckless disregard that the conduct ascribed to the character is reasonably likely to injure plaintiff's reputation.

For example, in *Bindrim*, Doubleday had notice that there was a doctor claiming to be identified as the character in the novel but published anyway.<sup>356</sup> Arguably, having knowledge of the existence of a likely counterpart to the character, Doubleday was reckless in its failure to investigate whether the conduct ascribed to the character was likely to injure the potential plaintiff's reputation. If, hypothetically, Doubleday had investigated and learned that Dr. Bindrim were vulgar and abusive, then Doubleday could have published the paperback edition and argued the defense of truth. The defense of truth should remain available to a media defendant sued for defamation in fiction. However, this defense should be applied to the defamatory characteristics ascribed to the character. A publisher of fiction should not be

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Co.: "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." See SACK, *supra* note 7 at 211 n.159 (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)).

354. 376 U.S. 254, 279-80 (1964).

355. 418 U.S. 323, 349 (1974).

356. 92 Cal. App. 3d at 72, 155 Cal. Rptr. at 36.

asked to prove the *truth* of the genre, that the "fiction" is "true," but rather that the defamatory characteristics ascribed to the character accurately depict the plaintiff. As stated by the court in *Miss America Pageant, Inc., v. Penthouse Int'l, Ltd.*,<sup>357</sup> "It would seem too simplistic in the case of a fictional or satirical work simply to question whether the author/publisher had the subjective intent to publish a *falsity*, since such works are not intended to convey truth."<sup>358</sup>

To prove actual malice for punitive damages, Pring should have been required to show that Penthouse had knowledge of, or was reckless with respect to her identification, and the likelihood of injury. Arguably, since Penthouse believed the story to be a piece of fantasy, it had no knowledge of the existence of a real-life counterpart to the character, Charlene, nor had it any reason to doubt the author's representation that the story was purely imaginary.<sup>359</sup> Since Penthouse had no knowledge of the existence of a potential litigant, they could not be considered reckless by their failure to foresee that the conduct ascribed to the fictional character was reasonably likely to injure Pring's reputation.<sup>360</sup>

In sum, to prove actual malice for punitive damages in works of fiction, the concept of "falsity" should be eliminated entirely from the *Gertz* test. Deletion of the reference to falsity would eliminate the potential for strict liability in defamation actions for works of fiction. As the California Supreme Court observed in *Guglielmi v. Spelling-Goldberg Productions*,<sup>361</sup> "[truthful and fictional accounts] have equal constitutional status and each is as likely to fulfill the objectives underlying the constitutional guarantees of free expression."<sup>362</sup>

## V. CONCLUSION

The Supreme Court has not, and probably will not accept absolutist arguments in the arena of tort versus first amendment issues. While some commentators have argued for strict liability, and others have suggested absolute privilege for fiction,<sup>363</sup> this commentator believes that the Court will continue to balance the public interest in preserving reputation under the common law against the first amendment interest

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357. 524 F. Supp. 1280 (D.N.J. 1981).

358. *Id.* at 1284.

359. *Id.* at 1285.

360. *See supra* note 234.

361. 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

362. *Id.* at 867, 603 P.2d at 461, 160 Cal. Rptr. at 359.

363. *See Hill, supra* note 3, at 1308; *see also* Note, *supra* note 218, at 578-88; & *supra* note 317.

in free expression. The recent imposition of strict liability on authors and publishers of fiction is a misapplication of the Supreme Court's policy in this area and undermines the fundamental right to free speech and a free press. Therefore, a new fault standard and a modification of the actual malice standard should be promulgated to avoid the automatic and unwarranted imposition of punitive damages in actions for defamation in fiction.

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