Falsity, Fault, and Fiction: A New Standard for Defamation in Fiction

Matthew Savare*

TABLE OF CONTENTS

* J.D. Candidate 2004, Seton Hall University School of Law; M.A. 2001, Monmouth University; B.A. 1995, Drew University; Future Associate September 2004, Lowenstein Sandler PC. I would like to thank Robert McCarthy, Scott Shagin, Peter Skolnik, and Daniel Solove for their helpful feedback.

"Whatever a man publishes, he publishes at his peril."
Justice Holmes in Peck v. Tribune Co.,
214 U.S. 185, 189 (1909)

"Any apparent similarity to real persons is not intended by the author and is either a coincidence or a product of your own troubled imagination."
DAVID FOSTER WALLACE, INFINITE JEST (1996)

I. INTRODUCTION

From Superman to Anna Karenina to James Bond and Scarlett O'Hara, compelling characters are an essential component of any work of fiction[1] and are a valuable commodity in the entertainment industry.[2] The creative importance of characters flows from the nature of the narrative form.[3] A story's setting, dialogue, and insights are all linked through its characters.[4] Similarly, the choices that characters make and the changes that they undergo not only reveal their inner selves, but also drive the story towards its ultimate climax.[5] A reader may forget the plot or the details of a story, but he often remembers the characters with whom he took the journey.[6]

In addition to their creative worth, characters with whom the public identifies have a special kind of commercial value. Popular characters can transcend the original work in which they appear, enabling their owners to build a brand around their fictional creations.[7] Modern entertainment conglomerates, focused on maximizing shareholders' profits, are becoming increasingly risk averse.[8] This conservative business environment has created a mass media landscape in which art is

[1] *See* RIB DAVIS, DEVELOPING CHARACTERS FOR SCRIPT WRITING 1-3 (2001); LAJOS EGRI, THE ART OF CREATIVE WRITING 11-13 (1995); ROBERT MCKEE, STORY 374-387 (1997); DWIGHT V. SWAIN, CREATING CHARACTERS 182-83 (1990).

[2] *See* Benjamin A. Goldberger, *How the "Summer of the Spinoff" Came to Be: The Branding of Characters in American Mass Media*, 23 LOY. L.A. ENT. L. REV. 301, 302, 317-60 (2003); Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 432-38 (1986).

[3] DAVIS, *supra* note 1, at 1.

[4] *Id.* "It all comes back to people, to characters: all the elements of a play or a film are interlinked, and the most important of those elements is character." *Id.*

[5] MCKEE, *supra* note 1, at 100-09.

[6] SWAIN, *supra* note 1, at 183.

[7] Goldberger, *supra* note 2, at 318.

[8] *Id.* at 302.

"becoming increasingly derivative,"[9] and entertainment companies strive to exploit the full value of their characters by reusing them in a variety of contexts.[10] Thus, the creative import of characters is matched, and sometimes exceeded, by this emergent economic significance.

Although authors conceptualize and craft characters differently, it is undeniable that "real life experiences are the source of all artistic inspiration."[11] Authors, particularly new ones, often model their fictional people on real individuals.[12] This type of creative development generally engenders no legal significance, as authors often craft composite characters based on the attributes of several different people.[13] There are cases, however, in which courts have held that a particular fictional character was a representation "of and concerning" a real person, thereby exposing the author and the publisher to a defamation claim.[14]

Although the concept of defamation in fiction seems counterintuitive and the incidence of such suits is less frequent than other forms of defamation claims, there are compelling reasons to reexamine the doctrine. First, such cases are more prevalent than it appears. As media attorney Peter Skolnik contends, "[t]here are many more of these claims than we are aware of, but since some settle without ever getting to court, we have no knowledge of them."[15] Second, the current state of the law in this arena fosters uncertainty among content creators and

---

[9] *Id.* at 301. "Our movies were once television shows, our television shows were once video games, our video games were once books, and our books were once movies." *Id.*

[10] *Id.* at 319. Such reuses include: "remakes, adaptations, sequels/prequels, spinoffs, cameos, . . . cross-overs," advertising campaigns, and merchandising. *Id.* For a full discussion of the different ways in which entertainment companies can exploit the full value of their characters, see *id.* at 322-51.

[11] Dan Rosen & Charles L. Babcock, *Of and Concerning Real People and Writers of Fiction*, 7 HASTINGS COMM. & ENT. L.J. 221, 226 (1985).

[12] *Id.* at 225-33. There are three ways in which an author can base a character on a real person. Goldberger, *supra* note 2, at 309. First, the writer can simply name the character after a real person. *Id.* Second, the author can develop the character after a real person. *Id.* Finally, the author may create an historical novel in which real figures are the characters. *Id.* These distinctions and the concomitant consequences will be discussed in Part II, *infra.*

[13] DAVIS, *supra* note 1, at 10. "The process of creating characters, then, can be seen as sewing together fragments of individuals from here, there and everywhere — not randomly, of course, but to create human beings who are both credible and right for the particular script." *Id.*

[14] *See, e.g.*, Bindrim v. Mitchell, 92 Cal. App. 3d 61 (1979), *cert. denied*, 444 U.S. 984 (1979).

[15] Telephone Interview with Peter Skolnik, Partner, Lowenstein Sandler (Mar. 25, 2004). Skolnik is also the current Chair of New Jersey's Media Lawyers' Association, a former literary agent, and the former President of a national literary agent association, the Independent Literary Agent's Association.

distributors, which has the potential to chill speech.[16] Third, the lack of clear, discernible principles in defamation in fiction cases imposes unnecessary economic and social costs, not only on the creative community, but also on the consuming public.[17] Finally, the methodology by which courts analyze defamation in fiction cases undermines this nation's First Amendment jurisprudence.[18]

The purposes of this Comment are to investigate the current laws regarding defamation in fiction; describe the legal and business morass created by doctrinal inconsistencies; and offer a new, uniform standard by which courts can adjudicate such claims. Part II provides a brief overview of the process by which authors create characters. In order to understand the legal implications of defamation in fiction, one must appreciate the sources of artistic inspiration and how these sources influence the writing process. Part III outlines the confused state of jurisprudence in this area, emphasizing the contradictions among different courts and the attendant ramifications on authors, publishers, and the public. Part IV offers a new judicial standard for defamation in fiction based on the proposals of three other scholars. Part V concludes that unlike the current legal standard, the proposed legal standard for defamation in fiction would provide both the adequate "breathing space"[19] for authors and the constitutionally mandated First Amendment protection for entertainment speech.

II. INSPIRATION AND DEFAMATION: THE BIRTH OF CHARACTERS AND THE CREATIVE WRITING PROCESS

Although there is no universally accepted manual on how to craft fiction, there are widely recognized truisms concerning the roots of narrative. William Faulkner asserted that all authors require three things: experience, observation, and imagination.[20] That writers utilize real settings, events, and people as sources of inspiration is beyond dispute;[21] "[l]ife has been described as 'the raw material of fiction.'"[22]

---

[16] *See infra* notes 226-228 and accompanying text.

[17] *See infra* notes 229-238 and accompanying text.

[18] *See infra* notes 239-243 and accompanying text.

[19] New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

[20] Rosen & Babcock, *supra* note 11, at 226 (citing WRITERS AT WORK 133 (M. Cowley ed. 1958)).

[21] *See* WILLIAM AMOS, THE ORIGINALS: AN A-Z OF FICTION'S REAL LIFE CHARACTERS (1985) (detailing over 3,000 interesting and easily identifiable examples of characters who were inspired by real people).

[22] Heidi Stam, Comment, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U. L. REV. 571, 580 n.59 (1980) (quoting Borden, *Personal Experience*

Before discussing the creation of characters, it is important to distinguish between character and characterization. Robert McKee defines the latter as:

> [T]he sum of all observable qualities of a human being, everything knowable through careful scrutiny: age and IQ; sex and sexuality; style of speech and gesture; choice of home, car, and dress; education and occupation; personality and nervosity; values and attitudes – all aspects of humanity we could know by taking notes on someone day in and day out.[23]

In other words, characterization is the assembly of a person's traits. True character, however, is "revealed in the choices a human being makes under pressure – the greater the pressure, the deeper the revelation, the truer the choice to the character's essential nature."[24]

McKee asserts that modeling a character after a single, real person is a mistake because few individuals exhibit the complexity or delineation required to be a compelling character:[25]

> [L]ike Dr. Frankenstein, we build characters out of parts found. A writer takes the analytical mind of his sister and pieces it together with the comic wit of a friend, adds to that the cunning cruelty of a cat and the blind persistence of King Lear. We borrow bits and pieces of humanity, raw chunks of imagination and observation from wherever they're found, assemble them into dimensions of contradiction, then round them into the creatures we call characters.[26]

Other authors share this disdain for characterizations that resemble a real person too closely[27] and acknowledge that the most compelling characterizations are created by molding various traits from a number of different people.[28] Thus, characterization generally is not a

---

and the Art of Fiction, in ESSAYS BY DIVERS HANDS, TRANSACTIONS OF THE ROYAL SOCIETY OF LITERATURE 87 (E.V. Rieu ed. 1958)).

[23] MCKEE, *supra* note 1, at 100.

[24] *Id.* at 101.

[25] *Id.* at 386.

[26] *Id.*

[27] *See, e.g.*, DAVIS, *supra* note 1, at 8-9:

> By modelling [sic] my characters so firmly upon friends and family I had stunted their development, reined in the use of my imagination and constrained what ought to have been a process of organic growth within the script writing, which would have allowed the characters to develop *through the writing*.

[28] *See, e.g., id.* at 10:

> So, we don't have to take whole people or even large chunks of people. Instead, we can create characters by putting together a set of character traits . . . secure that, when it comes to turning these traits into an active character, we will be able to call upon all our experience of human interaction to make the character live and breathe, though not necessarily resemble any one person we have ever met.

See also STEPHEN KING, ON WRITING 189-195 (2000) (advancing a more organic approach to creation where character traits are accumulated from real people, but the fictional characters themselves emerge from the style and structure of the story).

direct depiction of a single real person, but is an amalgamation of character traits that the author has observed in various individuals. As such, a fictional character typically is not a portrayal of an actual person; rather, a character is a product of the author's imagination that may have similarities to many different individuals.[29] Furthermore, McKee argues that authors cannot and do not create true characters by simply conveying observable characterizations of real people.[30] Instead, authors can only achieve a deep creative understanding and create fascinating characters by imparting their own penetrating self-knowledge to their fictional works.[31]

Despite these admonitions that authors should not base their characters primarily upon one real person,[32] there are several literary and ideological reasons why an author might still desire to do so.[33] First, in order to present their views realistically and convincingly, authors need the "resources of real life . . . ."[34] Second, writers "intentionally use real people in a fictional context to mark the time, heighten interest, or interpret a character, process, or era."[35] Third, in instances where an author's creativity fails, real characters can fill in the gaps because "reality is often so bizarre that it extends beyond the scope of human imagination."[36] Finally, the portrayal of a familiar person may be essential in order to create the desired impact and resonance with an audience.[37]

The process of conceptualizing and crafting fiction, along with these practical and literary considerations, virtually guarantee parallels between fictional characters and real people upon whom the characters may or may not be based.[38] Writers consciously and unconsciously draw upon their own experiences as creative sources for inspiration.[39] Occasionally, however, authors may conjure a character out of thin air that happens to resemble a real person.[40] The current law of libel does

---

[29] *See* Rosen & Babcock, *supra* note 11, at 229 ("Once transported into a work of fiction, the real person undergoes a metamorphosis and a character emerges."); MCKEE, *supra* note 1, at 375 ("A character is no more a human being than the Venus de Milo is a real woman. A character is a work of art, a metaphor for human nature.").

[30] MCKEE, *supra* note 1, at 386.

[31] *Id.* at 386-87.

[32] The warnings from these commentators concern the creative ramifications of patterning a character upon one person. The legal ramifications will be discussed in Part II, *infra.*

[33] Stam, *supra* note 22, at 580-81.

[34] *Id.* at 580

[35] *Id.*

[36] *Id.* at 581.

[37] *Id.*

[38] Rosen & Babcock, *supra* note 11, at 233.

[39] *Id.*

[40] *Id.*

not differentiate between unintentional and intentional similarities, meaning that authors can be held responsible in either scenario.[41] Thus, writers are faced with a dilemma between "inspiration and potential litigation for libel."[42]

III. A Legal Morass: The Current Law of Defamation in Fiction

A. *The Law of Defamation*

Defamation is defined as "[t]he act of harming the reputation of another by making a false statement to a third person."[43] To succeed in a defamation suit, a plaintiff must prove that the defendant published[44] a false,[45] defamatory[46] statement "of and concerning" the plaintiff[47] with a certain degree of fault.[48] Under the common law and prior to 1964, however, there was no fault standard for defamation.[49]

---

[41] *Id.* Prior to England's adoption of the Defamation Act of 1952, which reduced the likelihood of liability for unintentional defamation, a London firm specialized in cross-checking the names of fictional characters with records in the London telephone directory. *See* Amos, *supra* note 21, at xv.

[42] Rosen & Babcock, *supra* note 11, at 222.

[43] Black's Law Dictionary 183 (2d pocket ed. 2001).

[44] "Publication is a term of art in libel law. In the legal sense, publication is the intentional or negligent communication of defamatory statements to a person other than the one defamed." Givens v. Quinn, 877 F. Supp. 485, 491 (W.D. Mo. 1994).

[45] Some courts had expressly held that there was a constitutional defamation defense for opinions. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984) (en banc). The Supreme Court rejected such logic, however, averring:

> [W]e do not think this passage . . . was intended to create a wholesale defamation exemption for anything that might be labeled "opinion. . . ." Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990). The Court held, instead, that if a statement were "sufficiently factual to be susceptible of being proved true or false," it could be actionable. *Id.* at 21-22.

[46] "A defamatory statement is one that is false and 'injurious to the reputation of another' or exposes another person to 'hatred, contempt or ridicule' or subjects another person to 'a loss of the good will and confidence' in which he or she is held by others." Romaine v. Kallinger, 109 N.J. 282, 289 (1988) (citations omitted).

[47] The "of and concerning" requirement asks "whether 'the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant.'" Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2nd Cir. 1966) (quoting Miller v. Maxwell, 16 Wend. 9, 18 (N.Y. Sup. Ct. 1836)). Although seemingly a straightforward question, this inquiry becomes muddled because different courts apply different standards. *See infra* notes 95-204 and accompanying text.

[48] The applicable fault standard depends on whether the plaintiff is a public or private person. *See infra* notes 51-56 and accompanying text.

[49] Mary Frances Prechtel, Comment, *Classical Malice: A New Fault Standard for Defamation in Fiction*, 55 Ohio St. L.J. 187, 190-91 (1994).

In *New York Times Co. v. Sullivan*,[50] the Supreme Court rejected this common law approach as being too restrictive of free speech and instead constitutionalized a new fault standard for public officials:

> The constitutional guarantees [of the First and Fourteenth Amendments] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[51]

Subsequently, the Court extended the actual malice standard of *Sullivan* to "public figures,"[52] but permitted states to define their own fault standard in defamation suits brought by private persons, "so long as . . . [the states] do not impose liability without fault."[53] Although most states have adopted a negligence standard for private plaintiff defamation claims,[54] some require proof of actual malice.[55] Clearly, then, whether a plaintiff is regarded as a public or private person is significant in the law of defamation, and courts have struggled to distinguish between the two categories.[56]

B. *The Actual Malice Standard as Applied to Fictional Works*

The actual malice standard enunciated in *Sullivan* has established a constitutional law of defamation that focuses on defendants' awareness as to the truth or falsity of their statements.[57] Fiction, which by design is factually false,[58] is in a precarious position with respect to ostensibly inconsistent judicial goals. The Supreme Court has repeatedly held, though not in the context of defamation, that entertainment speech is entitled to First Amendment protection.[59] Conversely, the Supreme

---

[50] 376 U.S. 254 (1964).

[51] *Id.* at 279-80.

[52] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[53] Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

[54] Daniel Smirlock, Note, *"Clear and Convincing" Libel: Fiction and the Law of Defamation*, 92 YALE L.J. 520, 522 (1983).

[55] *See, e.g.*, Jour nal-Gazette Co. v. Bandito's, Inc., 712 N.E.2d 446 (Ind. 1999).

[56] Smirlock, *supra* note 54, at 522. In actual practice, courts have utilized additional classifications to determine the status of a plaintiff. *See* Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287 (D.C. Cir. 1980) (employing a general-purpose public figure definition); WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568 (Tex. 1998) (using a limited purpose public figure test); Dameron v. Wash. Magazine, Inc. 779 F.2d 736 (D.C. Cir. 1985) (applying an involuntary limited purpose public figure standard).

[57] Smirlock, *supra* note 54, at 521.

[58] *See* Rosen & Babcock, *supra* note 11, at 242; Prechtel, *supra* note 49, at 193; Smirlock, *supra* note 54, at 526; Stam, *supra* note 22, at 582.

[59] *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall

Court has also held that neither "calculated falsehoods"[60] nor knowingly or recklessly false statements[61] enjoy constitutional protection. Such a judicial stance is at odds with an author's paradoxical objective of expressing higher abstract truths "through the portrayal of lives and incidents that are factually untrue."[62] Although adopted to afford "breathing space"[63] for the free flow of ideas, the actual malice standard actually provides very limited First Amendment protection to works of fiction.[64]

The Supreme Court has never addressed what fault standard is appropriate for defamation in fiction cases,[65] leaving the decision to lower courts. The controversial case of *Bindrim v. Mitchell*[66] demonstrates the troubling results that follow when a court applies a literal analysis of the actual malice standard. Gwen Davis Mitchell, a successful writer, attempted to enroll in Dr. Paul Bindrim's "Nude Marathon" group therapy session, which was devised to help people "shed their psychological inhibitions."[67] Bindrim would not allow her to register for the session until Mitchell signed a consent form in which she promised, *inter alia*, not to write about her encounters.[68] Mitchell assured Bindrim that she had no intention of writing about the marathon, and she signed the consent form and enrolled.[69] Mitchell subsequently wrote and Doubleday published a novel entitled *Touching*, in which she depicts a nude session run by Dr. Simon Herford.[70] Bindrim, averring that he was libeled by the intimation that he used obscene language and

---

within the First Amendment guarantee."); Young v. American Mini Theaters, Inc., 427 U.S. 50, 77 (1976) ("Our cases reveal . . . that the central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or book might convey."); Superior Films v. Dep't. of Educ., 346 U.S. 587, 589 (1954) ("In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor."); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.").

[60] Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

[61] *Sullivan*, 376 U.S. at 279-80.

[62] Stam, *supra* note 22, at 576. Aristotle offered this famous axiom: "Poetry is a more philosophical and more serious thing than history; for poetry is chiefly conversant about universal truth, history about particular truth." John Hospers, *Truth and Fictional Characters*, 14 J. AESTHETIC EDUC. 5, 5 (July 1980) (quoting ARISTOTLE, POETICS, 1451-b.)

[63] *Sullivan*, 376 U.S. at 271.

[64] *See* Prechtel, *supra* note 49, at 193-94; Smirlock, *supra* note 544, at 526; Stam, *supra* note 22, at 582.

[65] Rosen & Babcock, *supra* note 11, at 224.

[66] 92 Cal. App. 3d 61 (1979), *cert. denied*, 444 U.S. 984 (1979).

[67] *Id.* at 69.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 69-70.

by the inaccurate portrayal of what actually transpired at his "Nude Marathon," alleged that the novel injured his professional reputation.[71] At trial, a jury returned verdicts against Mitchell and Doubleday on the libel claims, against Mitchell on a contract claim, and against Doubleday on a punitive damages claim.[72]

On appeal, Bindrim conceded that he was a public figure, so the court applied the actual malice test to determine if there were clear and convincing evidence that the defendants "entertained serious doubts as to the truth of . . . [their] publication."[73] In affirming the judgments for the plaintiff, the court held that Mitchell "entertained actual malice" because her "reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter. Since she attended the sessions, there can be no suggestion that she did not know the true facts."[74] The court found it irrelevant whether or not the author had malicious motives[75] and rejected any suggestion that the work's status as a novel entitled it to exemption from libel liability.[76]

If applied literally, as in *Bindrim*, the constitutional standards for defamation provide little protection for fictional works. Faced with a libel claim, authors and publishers must refute a charge of negligence or knowing or reckless falsity in order to prevail.[77] This appears to be a Herculean task because writers and publishers "are certain that the offensive statements were written with knowing falsity."[78] Furthermore, because it is nearly impossible to disprove the fault requirement,[79] the

---

[71] *Id.* at 71.

[72] *Id.* at 68-69.

[73] *Id.* at 71-72 (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

[74] *Id.* at 72-73.

[75] *Id.* "'[A]ctual malice' concentrates solely on defendants' attitude toward the truth or falsity of the material published . . . and not on malicious motives . . . ." *Id.* at 73 (internal citations omitted).

[76] *Id.* "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." *Id.* at 73 n.2.

[77] Stam, *supra* note 22, at 586.

[78] *Id.*

[79] Several defendants have pointed out the impossibility of refuting the actual malice charge in cases involving works of fiction. *See, e.g.*, Rosen & Babcock, *supra* note 11, at 236 (quoting Appellant's Brief at 30, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1983)) ("[I]n a case of fiction, the [*New York Times Co. v. Sullivan*] standard must be cast in different terms. Otherwise, publishers of fiction, who by definition know of [the story's] literal falsity will be strictly liable. . . ."); New Times, Inc. v. Isaacks, 91 S.W.3d 844, 860-61 (Tex. App. 2002) (The defendants argued that under the traditional test all parody and satire, due to their unique nature, would be regarded as intentionally false.).

test for defamation in fiction essentially collapses into a sole question of whether the statement was "of and concerning" the plaintiff.[80]

Such a judicial test is problematic for at least four reasons. First, although some courts and dissenting judges have considered the intentions of the writer when analyzing defamation in fiction claims,[81] most find motives to be irrelevant.[82] Due to its nature as the "conscious antithesis of truth,"[83] "[f]iction deserves a higher level of protection because the author . . . does not hold his or her work out to the public as an assertion of fact."[84] Second, because actual malice is a virtual certainty in this context,[85] writers and publishers of fiction receive less First Amendment protections than other speakers, who enjoy the shield *Sullivan* was intended to offer.

Third, aside from failing as a shield for the defendant, the actual malice standard acts as a sword for the plaintiff in defamation in fiction cases. According to the Supreme Court, plaintiffs must prove actual

---

[80] Although the plaintiff would still have to prove that the defendant published a false, defamatory statement, these requirements are generally easier to prove than the "of and concerning" test or the applicable fault standard. *See supra* notes 44-48 and accompanying text.

[81] *See, e.g.*, Clare v. Farrell, 70 F. Supp. 276, 278 (D. Minn. 1947) (emphasizing that "[t]here can be no doubt that, upon the basis of the undisputed facts appearing on this motion, defendant did not intend to write the book of plaintiff or intend to appropriate plaintiff's name to the story."); *Bindrim*, 92 Cal. App. 3d at 88 (Files, J.; dissenting) (rejecting the court's finding for the plaintiff because the "only apparent purpose of the defendants was to write and publish a novel. There is not the slightest evidence of any intent on the part of either to harm plaintiff. No purpose for wanting to harm him has been suggested."); Frank v. Nat'l Broadcasting Co., Inc. 119 A.D.2d 252, 257 (N.Y. App. Div. 1986) (stating that the "principal factors distinguishing humorous remarks that are defamatory from those that are not appear to be whether the statements were intended to injure as well as amuse . . . ."); Spahn v. Julian Messner, Inc. 21 N.Y.2d 124, 131 (1967) (Bergan, J., dissenting) (arguing that New York's privacy statute "gives no protection against fictionalization not shown to hurt him and *not shown designed to hurt him.*") (emphasis added).

[82] *See, e.g.*, Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966) ("[T]hat the author had no intention of portraying the plaintiff is no defense; it is merely a bar to the imposition of punitive damages."); *Bindrim*, 92 Cal. App. 3d at 73 ("'[A]ctual malice' concentrates solely on defendants' attitude toward the truth or falsity of the material published . . . and not on malicious motives . . . .") (internal citations omitted); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63-64 (1920) ("The fact that the publisher has no actual intention to defame a particular man or indeed to injure any one, does not prevent recovery of compensatory damages . . . . The question is not so much who was aimed at, as who was hit.").

[83] *Spahn*, 21 N.Y.2d 124 at 131 (Bergan, J., dissenting).

[84] Prechtel, *supra* note 49, at 202. *See also Bindrim*, 92 Cal. App. 3d at 88 (Files, J.; dissenting) ("[W]hen the publication purports to be fiction, it is absurd to infer malice because the fiction is false.").

[85] "[B]ecause authors are generally in a position to know the truth or falsity of their own fictional material, a jury may — indeed, virtually *must* — find any allegedly defamatory work to be actually malicious." Smirlock, *supra* note 54, at 526.

malice in order to recover presumed or punitive damages.[86] If courts, such as the *Bindrim* Court, hold that the actual malice standard is satisfied simply by showing that a fictional statement is false, "all writers and publishers of fiction are potentially liable – and rendered so by the same actual malice standard that fails to furnish them with any protection during the initial determination of guilt."[87] Finally, because the Supreme Court has not heard a defamation in fiction case, there is no clear test for the "of and concerning" requirement,[88] and lower courts have applied different standards based entirely on the common law.[89] Since the "of and concerning" test is becoming the dispositive factor in defamation in fiction cases, the varied judicial approaches present problems and uncertainty not only for authors and publishers, but also for potential plaintiffs.

C. *The "Of and Concerning" Test as Applied to Fictional Works*

Most courts and the Restatement (Second) of Torts apply a "reasonable person" standard when analyzing whether a fictional portrayal was "of and concerning" the plaintiff.[90] This test asks "whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described."[91] Although the "of and concerning" issue is generally resolved by the trier of fact,[92] the court has this responsibility in cases involving summary judgment or motions to dismiss.[93] In either situation, evaluating this fundamental question requires a "determin[ation of] what sorts of similarities sufficiently identify a plaintiff with his al-

---

[86] *Gertz*, 418 U.S. at 349 ("[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.").

[87] Smirlock, *supra* note 54, at 527.

[88] *Id.* at 529.

[89] *Id.*

[90] *See, e.g.*, Middlebrooks v. Curtis Publ'g Co., 413 F.2d 141, 142 (4th Cir. 1969); Wheeler v. Dell Publ'g Co., 300 F.2d 372, 376 (7th Cir. 1962); *Bindrim*, 92 Cal. App. 3d at 78; RESTATEMENT (SECOND) OF TORTS § 564 cmt. d (1977). Compare these cases and the Restatement with Fetler, 364 F.2d at 651 (quoting Miller v. Maxwell,16 Wend. 9, 18 (N.Y. Sup. Ct. 1836)), which asks whether:

> [T]he libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant.

[91] *Bindrim*, 92 Cal. App. 3d at 78.

[92] Geisler v. Petrocelli, 616 F.2d 636, 640 (2nd Cir. 1980).

[93] *See, e.g.*, Welch v. Penguin Books USA, Inc., 1991 N.Y. Misc. LEXIS 225, at *4-5 (Sup. Ct. 1991).

leged fictional counterpart as well as the significance of differences between plaintiffs and characters who otherwise resemble each other."[94]

Although courts are essentially attempting to answer the same inquiry, they do not always ask the same questions and frequently differ as to the significance of various factors. Below is a brief summary of the different factors courts have examined when analyzing the identification test.

1. Similarity of Names

Courts ascribe different degrees of importance to the similarity between a plaintiff's name and that of the fictional character. For example, in *Bryson v. News America Publications*,[95] the plaintiff sued after a short story called *Bryson* was published in Seventeen magazine as part of its series, *New Voices in Fiction*.[96] In one passage, the story recounts the narrator's conflict with her classmate, Bryson, whom she refers to as a "slut."[97] The trial court dismissed the defamation claim for failure to state a cause of action, and the appellate court affirmed.[98]

In reversing the dismissal of the defamation claim, the Supreme Court of Illinois afforded considerable weight to the fact that the plaintiff and the character shared the same last name:

> The article at issue did, of course, use the plaintiff's last name. The name "Bryson" is not so common that we must find, as a matter of law, that no reasonable person would believe that the article was about the plaintiff. . . . The fact that the author used the plaintiff's actual name makes it reasonable that a third person would interpret the story as referring to the plaintiff, despite the fictional label.[99]

Geisler v. Petrocelli[100] offered a similar holding. In *Geisler*, the plaintiff sued an author and his publisher when they released the book *Match Set*, which concerned a transsexual tennis player competing on the women's professional circuit.[101] The district court dismissed the plaintiff's libel claim, ruling that the complaint did not demonstrate that

---

[94] *Id.* at *5.

[95] 174 Ill. 2d 77 (1996).

[96] *Id.* at 83-84.

[97] *Id.* at 85.

[98] *Id.* at 84.

[99] *Id.* at 97. The majority did note in passing that the setting, events, and fact that the author resided in the same general area as the plaintiff also affected its decision. *Id.* at 97-98. The majority did not address the fact that the plaintiff did not raise any of these issues in her complaint, but relied on her answer to interrogatories. *Id.* at 113 (McMorrow, J., dissenting).

[100] 616 F.2d 636 (2d Cir. 1980).

[101] *Id.* at 638.

the work was "of and concerning" her.[102] The United States Court of Appeals for the Second Circuit vacated the dismissal, however, finding that "the appellant's averments are sufficient to withstand the motion to dismiss."[103] In so holding, the Second Circuit emphasized that the "central character bears the precise name, 'Melanie Geisler'" as the plaintiff.[104]

The results of both *Bryson* and *Geisler* appear at odds with several other defamation in fiction cases. For example, in *Allen v. Gordon*,[105] a New York appellate court affirmed the dismissal of a libel claim in which the plaintiff alleged that a fictional doctor with the same last name depicted him.[106] The court stressed, *inter alia*, that the name Allen is common and that the author selected it at random and only used the last name.[107] Similarly, in *Polydoros v. Twentieth Century Fox Film Co.*,[108] a California court of appeals affirmed the grant of summary judgment in favor of the defendants.[109] The plaintiff, a former schoolmate of the defendant writer/director of *The Sandlot*, alleged that the character Michael Palledorous, a.k.a. "Squints," defamed him.[110] In affirming the summary judgment for the defendants, the court highlighted that there were no parallels between the plaintiff and "Squints" aside from the "similarity in names and attire . . . ."[111]

Other cases have held that the "of and concerning" standard was not satisfied even when there were other resemblances between the plaintiff and the fictional character in addition to name. In *Aguilar v. Universal City Studios, Inc.*,[112] the plaintiff alleged that she was libeled by the portrayal of an unchaste character in the motion picture *Zoot Suit*.[113] The plaintiff reasoned that the depiction was "of and concerning" her because she not only shared the same name with the character, but also participated in the same "zoot suit" riots upon which the movie was based.[114] A California appellate court affirmed the grant of sum-

---

[102] *Id.* at 637.

[103] *Id.* at 639.

[104] *Id.* at 638. The court also briefly mentioned that the plaintiff and the central character shared some general physical characteristics and that the author and the plaintiff were casually acquainted. *Id.*

[105] 86 A.D.2d 514 (N.Y. App. Div. 1982).

[106] *Id.* at 515.

[107] *Id.*

[108] 79 Cal. Rptr. 2d 207 (Ct. App. 1997).

[109] *Id.* at 212.

[110] *Id.* at 208.

[111] *Id.*

[112] 219 Cal. Rptr. 891 (Ct. App. 1985).

[113] *Id.* at 892.

[114] *Id.*

mary judgment to the defendants on the grounds that similarity of name alone is insufficient to state a cause of action. The plaintiff and the character of Bertha were of different ages and appearances, and the plaintiff's involvement in the real riots bore no resemblance to that of the fictional character.[115] Concerning the identicalness of the names, the court stated: "as a matter of law, mere similarity or even identity of names is insufficient to establish a work of fiction is of and concerning a real person."[116]

In *Davis v. R.K.O. Radio Pictures, Inc.*,[117] the plaintiff appealed a jury verdict, which had found that he was not libeled by the distribution and exhibition of an allegedly defamatory motion picture.[118] In addition to sharing the same name, Matt Davis, the plaintiff and the character were the same age and of very similar backgrounds.[119] Notwithstanding these strong similarities, the court affirmed the dismissal of the plaintiff's libel action, finding that the trial court did not err in denying hearsay testimony and that the jury charges were fair.[120] Finally, in *Clare v. Farrell*,[121] a district court of Minnesota granted summary judgment to an author and his publisher, despite the fact that the plaintiff and the title character shared the same name, profession, and appearance.[122] In so holding, the court stated: "At least some latitude must be given authors in their selection of names for characters so that the production of fictional literature may continue, and the mean, the base, and the good of the characters therein fearlessly portrayed."[123]

In sum, although courts do consider the names of the character and plaintiff in concert with other indicia of identity, it is generally the case that "[m]ere similarity of name alone is not enough" to satisfy the "of and concerning" standard.[124] Cases such as *Aguilar*, *Davis*, and *Clare* also demonstrate that even where there are other similarities, equivalent names may not be sufficient to tip the balance in the plaintiff's favor. As such, both *Bryson* and *Geisler*, which placed an inordinate weight on the name issue, appear to be anomalies.[125]

---

[115] *Id.* at 892-95.

[116] *Id.* at 892.

[117] 191 F.2d 901 (8th Cir. 1951).

[118] *Id.* at 901-02.

[119] *Id.* at 902. For example, both the plaintiff and the character were 13-year-old boys, residing at Father Dunne's Newsboys' Home in St. Louis, Missouri. *Id.*

[120] *Id.* at 904-05.

[121] 70 F. Supp. 276 (D. Minn. 1947).

[122] *Id.* at 277, 281.

[123] *Id.* at 279.

[124] RESTATEMENT (SECOND) OF TORTS § 564 cmt. d.

[125] Sandra Baron, the Executive Director of the Media Law Resource Center, believes that the *Bryson* decision is more destructive than *Bindrim*. Telephone Interview with Sandra

2. Similarity and Dissimilarity of Characteristics and Background

In addition to examining the similarity of name, courts consider similarity of characteristics and background, though the courts do not employ a uniform approach. As one commentator has noted: "Courts differ over what sorts of similarities serve to identify a plaintiff with his alleged fictional counterpart and over the significance of dissimilarities between plaintiffs and characters who otherwise resemble each other."[126]

Two circuit courts have emphasized the importance of an age differential between the plaintiff and the character. In *Wheeler v. Dell Publishing, Co.*,[127] the plaintiff and her daughter sued the publisher and motion picture studio that created *Anatomy of a Murder*, a fictionalized account of the Chenoweth trial.[128] In affirming summary judgment for the defendants regarding the daughter's libel claim, the United States Court of Appeals for the Seventh Circuit gave considerable weight to the seven-year age difference between the daughter and her alleged fictional counterpart.[129] The United States Court of Appeals for the Fourth Circuit employed a comparable analysis in *Middlebrooks v. Curtis Publishing, Co.*[130] when it affirmed the dismissal of the plaintiff's libel complaint due, in large part, to the marked dissimilarity in ages between the plaintiff and the fictional character.[131] The court concluded that such a disparity tended to "support [a] . . . finding against the reasonableness of an identification of the two."[132]

Baron, Executive Director, Media Law Resource Center (Mar. 17, 2004). Baron states: "The holding in *Bryson* puts at risk almost any writer of fiction who has had a real experience in this world. It expands the possible universe of plaintiffs to those who have merely crossed paths with a writer." *Id.*

[126] Smirlock, *supra* note 54, at 530.

[127] 300 F.2d 372 (7th Cir. 1962).

[128] *Id.* at 374. The Chenoweth trial involved a Lieutenant Peterson shooting and killing the plaintiff's husband for the "rape" of Peterson's wife. *Id.* Peterson, who was tried for murder, was acquitted by a jury based on his insanity defense. *Id.*

[129] *Id.* at 376.

[130] 413 F.2d 141 (4th Cir. 1969). In *Middlebrooks*, the plaintiff, Larry Esco Middlebrooks, and the author had grown up together. *Id.* at 142. In his first book, the author used the name Esco Middlebrooks for one of his main characters. *Id.* After learning that the author planned to use his name in a new fictional article, the plaintiff sent the author a telegram stating: "Do not use my name in any other books or stories. No hard feelings." *Id.* After consulting with the newspaper's fiction editor, the author changed the character's name to Esco Brooks and informed the plaintiff. *Id.* Upon publication of the story, the plaintiff sued for libel and invasion of privacy. *Id.* at 141-42

[131] *Id.* at 143.

[132] *Id.*

In analyzing the "of and concerning" requirement in many defamation in fiction cases, courts examine the physical, ethnic, and background characteristics of both the plaintiff and the character. For example, in *Geisler*,[133] the court emphasized that the novel's central character shared the same physical attributes as those of the plaintiff, namely, both were "young, attractive, and honey blonde" with firm, compact bodies.[134] The court held that these superficial physical similarities, along with a common name, were sufficient to reverse the dismissal of the plaintiff's libel claim.[135] Interestingly, the court did not address the foremost difference between the two: the plaintiff was not a transsexual. Similarly, in *Fetler v. Houghton Mifflin Co.*,[136] the United States Court of Appeals for the Second Circuit reversed a summary judgment for the defendants, holding that similar family compositions, ethnicities, and personal histories outweighed the numerous differences between the plaintiff and the character.[137]

In several cases, courts have highlighted such physical and background similarities, yet still found for the defendants when there were other significant dissimilarities. In *Springer v. Viking Press*,[138] the plaintiff and a fictional character in the novel *State of Grace* had many commonalities: they shared the same first name, both had similar physical attributes and graduated from college, and the character had once lived on the same street on which the plaintiff lived at the time the book was written.[139] Additionally, the novel's author and the plaintiff had been in a "close personal relationship," and the author had admitted to the plaintiff that he "patterned the relationship between the hero . . . and the heroine . . . on the relationship between them."[140] After a rancorous termination of their friendship, the author published his book through Viking Press.[141] The plaintiff, averring that the character was based on her, claimed that the depiction of the character as a "'whore' who engage[d] in various types of abnormal sexual activity"

---

[133] For a description of the facts in *Geisler*, see *supra* notes 100-104 and accompanying text.

[134] *Geisler*, 616 F.2d at 638.

[135] *Id.* at 639.

[136] 364 F.2d 650 (2nd Cir. 1966).

[137] *Id.* at 651-52, 654. The court stated: "It is obvious that there are few, if any, other families with a minister father and thirteen children in which the third, fourth and eight are girls and the eldest a son with great responsibility, who toured Europe in a bus in the 1930's giving family concerts." *Id.* at 651.

[138] 90 A.D.2d 315 (N.Y. App. Div. 1982).

[139] *Id.* at 316, 319.

[140] *Id.* at 316.

[141] *Id.*

was defamatory.[142] Despite these similarities, the prior relationship of the author and the plaintiff, and the author's acknowledgment that he based the character on the plaintiff, the court dismissed the plaintiff's libel claim holding:

> While the similarities adverted to are in large part superficial, the dissimilarities both in manner of living and in outlook are so profound that it is virtually impossible to see how one who has read the book and who knew Lisa Springer could attribute to Springer the life-style of Blake.[143]

In *Welch v. Penguin Books USA, Inc.*,[144] a New York trial court granted the defendants' motion to dismiss the libel claim despite the existence of several physical, personal, historical, and relational similarities between the plaintiff and Franklin Swift, a fictional character in the novel *Disappearing Acts*.[145] The court addressed the numerous resemblances in the opening of the opinion:

> Leonard Welch and Franklin Swift have a lot in common. They are physically similar; both have dark complexions, dark hair and carry approximately 225 pounds on a six foot four inch frame. The two men dropped out of high school but subsequently obtained equivalency diplomas. They share the same avocational interests; they both enjoy carpentry and a good game of scrabble. Their vocational history is also identical; Leonard Welch and Franklin Swift have both been employed as construction workers. Each owns a fish tank, favors a bowl of Wheatena in the morning, drip dries after a shower, has a trick knee, and is the only son in a family with three children. Their romantic relationships are also alike. Both men met their girlfriends while rendering carpentry services at their respective apartments, and in addition, both couples apparently have had identical vacations, dates and arguments.[146]

---

[142] *Id.*

[143] *Id.* at 319. A New York trial court employed a similar analysis in *Carter-Clark v. Random House, Inc.*, 768 N.Y.S.2d 290 (Sup. Ct. 2003). In *Carter-Clark*, the plaintiff filed a complaint against the author and publisher of the book, *Primary Colors*, alleging that she was libeled by the portrayal of her fictional counterpart, Ms. Baum, having an affair with a fictionalized version of Bill Clinton. *Id.* at 291-92. The plaintiff and Ms. Baum shared "some" physical similarities and both worked in a library in Harlem. *Id.* at 292. In addition, the book's author admitted that he based his novel on the first presidential primary campaign of Bill Clinton, who had visited the library where the plaintiff worked. *Id.* Notwithstanding these similarities, the court granted the defendants' motion for summary judgment, finding the dissimilarities outweighed any resemblances. *Id.* at 294. Specifically, the court emphasized that the plaintiff's name was different than the fictional character's and that the library jobs and union involvements were different. *Id.*

[144] 1991 N.Y. Misc. LEXIS 225 (Sup. Ct. 1991).

[145] *Id.* at *1, *10.

[146] *Id.* at *1.

After articulating this laundry list of similarities, the court noted that the plaintiff and Franklin Swift were also "very different."[147] Such variations included Swift's alcoholism, rape of his girlfriend, use of drugs, laziness, hostility, racism, homophobia, emotional imbalance, hate of his parents, and wrongful discharge from the Navy.[148] In spite of the numerous similarities, the court dismissed the libel claim because the "defamatory statements create[d] such a profound, characterological alteration of plaintiff such that a reasonable reader could not possibly attribute the defamatory aspects of the character to plaintiff . . . ."[149]

In *Randall v. DeMille*,[150] another New York trial court granted the defendants' motion to dismiss a libel claim because the dissimilarities between the fictional character and the plaintiff outweighed any similarities. There, the plaintiff alleged that she was defamed by the portrayal of the immoral and unfaithful Susan Sutter in the best-selling novel, *The Gold Coast*.[151] Both the plaintiff and her alleged fictional counterpart were "redheads and accomplished painters of 'Gold Coast' mansions and ruins."[152] The plaintiff also claimed that she frequented the same clubs as the fictional character, and that, like Susan Sutter, she owned a white horse, which she rode among the coastal ruins.[153] Notwithstanding these similarities, the court dismissed the case citing the numerous differences between the two women, including name, marital status, financial status, and general personality.[154]

That there is no discernible, uniform standard across jurisdictions by which to evaluate the "of and concerning" requirement is demonstrated by the holding of *Bindrim*.[155] In *Bindrim*, a California appellate court found, in a rather conclusory analysis, that despite many disparities, there was "overwhelming evidence that plaintiff and [the fictional character] were one."[156] First, the court acknowledged that the two had different physical appearances.[157] In the novel, the author de-

---

147 *Id.*

148 *Id.* at *1-*2.

149 *Id.* at *10.

150 21 MEDIA L. REP. (BNA) 1362 (N.Y. Sup. Ct. 1992).

151 *Id.* at 1362-64.

152 *Id.* at 1365.

153 *Id.*

154 *Id.* For another case in which the court dismissed a libel complaint due to the dissimilarities outweighing the similarities, see Polsby v. Spruill, 25 MEDIA L. REP. (BNA) 2259 (D.D.C. 1997), *aff'd*, 1998 U.S. App. LEXIS 7908 (D.C. Cir. 1998).

155 For a description of the facts and the procedural history of *Bindrim*, see *supra* notes 666-76 and accompanying text.

156 92 Cal. App. 3d at 76.

157 *Id.* at 75.

scribed the disputed character as a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms . . . ."[158] The plaintiff, on the other hand, was "clean shaven and had short hair."[159] Second, the plaintiff's name, Dr. Paul Bindrim, was different from the character's name, Dr. Simon Herford.[160] Third, the two men did not share the same occupation; the plaintiff was a clinical psychologist, and the character was a psychiatrist.[161] Finally, the dissent accentuated the aforementioned differences and noted that the plaintiff's age and personality were also different from those of the character.[162] Indeed, the only characteristic that the plaintiff and Dr. Hertford had in common was the practice of nude therapy, which other professionals performed as well.[163]

The dissent cautioned that the majority's opinion "resurrected the spurious logic" advocated by the plaintiff in *New York Times Co. v. Sullivan*:

> There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place . . . .[164]

3. Disclaimers/Nature of Fiction/Impossibility of Events

In evaluating the identification inquiry, many courts have examined the legal effects of the standard disclaimer frequently contained in a fictional work.[165] Unfortunately, the jurisprudence in this area is also quite mixed. Although there are several cases in which courts have either upheld the validity of a legal disclaimer or at least considered it in theie analyses,[166] there are just as many cases that either discount its

---

[158] *Id.*

[159] *Id.*

[160] *Id.* at 68, 70.

[161] *Id.* at 75.

[162] 92 Cal. App. 3d at 86 (Files, J., dissenting).

[163] *Id.* (Files, J., dissenting).

[164] *Id.* at 86-87 (Files, J., dissenting) (quoting Harry Kalven, Jr., *The New York Times Case: A Note on the "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 199 (1964)).

[165] For a humorous and insightful examination of the legal disclaimer in fiction, see Bill McDonald, *The Literary Disclaimer: Law, Fiction, and the Real*, The Fortnightly Club, *at* http://www.redlandsfortnightly.org/mcdonald01.htm (March 15, 2001).

[166] *See, e.g.*, Middlebrooks v. Curtis Publ'g Co., 413 F.2d 141, 143 (4th Cir. 1969) (emphasizing that the article was "listed in the fiction section of the Post index, was labeled fiction, and was illustrated by cartoons."); Davis v. Costa-Gavras, 654 F. Supp. 653, 657 (S.D.N.Y. 1987):

significance or reject its application entirely.[167] To complicate matters further, the Restatement assumes a middle position:

> The fact that the author or producer states that his work is exclusively one of fiction and in no sense applicable to living persons is not decisive if readers actually and reasonably understand otherwise. Such a statement, however, is a factor to be considered by the jury in determining whether readers did so understand it, or, if so, whether the understanding was reasonable.[168]

There is also a discrepancy among courts as to whether and to what degree they should consider the nature of the work or the plausibility of the events described therein.[169] In *Dauer & Fittipaldi, Inc. v. Twenty First Century Communications, Inc.*,[170] a New York appellate court seemed to afford a *National Lampoon* magazine article absolute protection from a libel claim because the nature of the work was clearly fictional.[171] The plaintiff corporation alleged libel when the name of its

---

> It should be made clear that "Missing" is not a documentary, but a dramatization . . . . The film does not purport to depict a chronology of the events precisely as they actually occurred; it opens with a prologue: "This film is *based on* a true story. The incidents and facts are documented. Some of the names have been changed to protect the innocent and also to protect the film."

See also Smith v. Huntington Publ'g Co., 410 F. Supp. 1270, 1272-74 (S.D. Ohio 1975) (*Smith* concerned a non-fiction newspaper article in which the author changed the subjects' names to protect their privacy. Coincidently, the author happened to select the plaintiffs' names. Despite this remarkable chance occurrence, the court held that "no reasonable person could have reasonably believed that the article pointed to the plaintiff in the light of a clear statement by the author in boldface print that the names were fictitious."); Allen v. Gordon, 86 A.D.2d 514, 515 (N.Y. App. Div. 1982) (stressing that there was a "disclaimer prominently displayed immediately prior to the first page of the text which indicated that all names used, other than defendant Gordon's, were fictitious."); Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 724 (N.Y. App. Div. 1980); Carter-Clark v. Random House, Inc., 768 N.Y.S.2d 290, 293 (Sup. Ct. 2003) ("Though not necessarily determinative, "Primary Colors" styled itself as a work of fiction. So says its subtitle . . . and rear inside jacket flap . . . ."); New Times, Inc. v. Isaacks, 91 S.W.3d 844, 859 (Tex. App. 2002) (affirming the denial of defendants' motion for summary judgment because, *inter alia*, "the *Dallas Observer* fail[ed] to provide any kind of disclaimer or note to the reader that the article was a parody or satire.").

[167] *See, e.g.*, Fetler v. Houghton Mifflin Co., 364 F.2d 650, 653-54 (2d Cir. 1966) ("[T]here was no justification for any reliance by the district judge 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."); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 78 (1979), *cert. denied*, 444 U.S. 984 (1979) (asserting that novel's "fiction" label did not preclude finding of identification); Bryson v. News Am. Publ'n, 174 Ill. 2d 77, 97 (1996) (rejecting the article's "fiction" label entirely).

[168] RESTATEMENT (SECOND) OF TORTS § 564 cmt. d.

[169] Although this inquiry does not relate directly to the "of and concerning" test, it is still a significant factor in deciding "whether the story must reasonably be understood as describing actual facts or events about plaintiff or actual conduct of the plaintiff." Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 439 (10th Cir. 1983).

[170] 43 A.D.2d 178 (N.Y. App. Div. 1973).

[171] *Id.* at 179.

bar and grill appeared in two photographs accompanying a fictional article entitled *The Case of the Loquacious Rapist.*[172] The court held:

> The article, *viewed in its context of fiction and deliberate humor*, cannot reasonably be susceptible of a libelous meaning intending to harm the plaintiff; it does not purport to relate to actual events or depict real persons or places, nor does it impute to the plaintiff corporation that it knowingly permitted its restaurant to be a gathering place of low and unsavory characters.[173]

Similarly, in *Flip Side, Inc. v. Chicago Tribune Co.*,[174] an Illinois appellate court affirmed the dismissal of a libel claim in which the plaintiff corporation and its employees alleged that the defendants' comic strip contained false and defamatory statements.[175] The court found for the defendants because "it is readily apparent that the Flipside episode is all fanciful adventure and does not purport to be factual. It is simply impossible to believe that a reader would not have understood that the entire episode is pure fiction and nothing else."[176] Other courts have emphasized that the fictional nature of the work either precludes a finding of libel or weighs heavily against the plaintiff.[177]

Some courts have employed a similar, yet slightly different approach. In *Pring v. Penthouse International, Ltd.*,[178] the United States Court of Appeals for the Tenth Circuit framed their analysis around

---

[172] *Id.* at 178-79.

[173] *Id.* (emphasis added). Although such works of humor, satire, and parody often receive broad judicial protection, there is no categorical rule precluding a finding of libel. *Compare* Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (reversing intentional infliction of emotional distress award for the plaintiff because the disputed ad parody was protected by the First Amendment); Frank v. Nat'l Broadcasting Co., Inc. 119 A.D.2d 252 (N.Y. App. Div. 1986) (affirming dismissal of plaintiff's libel claim regarding a comedy sketch); and *Dauer & Fittipaldi, Inc.*, 43 A.D.2d 178 (reversing denial of defendants' summary judgment motion and dismissing libel complaint due to disputed article's humorous nature), *with* New Times, Inc. v. Isaacks, 91 S.W.3d 844, 856 (Tex. App. 2002) ("We hold that satire or parody that conveys a substantially false and defamatory impression is not protected under the First Amendment as mere opinion or rhetorical hyperbole, but instead is subject to scrutiny as to whether it makes a statement of fact under defamation case law.").

[174] 564 N.E.2d 1244 (Ill. App. Ct. 1990).

[175] *Id.* at 1246, 1254.

[176] *Id.* at 1253.

[177] *See, e.g.*, Miss Am. Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280,1287 (D. N.J. 1981); Polydoros v. Twentieth Century Fox Film Co., 79 Cal. Rptr. 2d 207, 212 (Ct. App. 1997); *Frank*, 119 A.D.2d at 261 ("The contested statements here were so extremely nonsensical and silly that there is no possibility that any person hearing them could take them seriously."); Carter-Clark v. Random House, Inc., 768 N.Y.S.2d 290, 293 (Sup. Ct. 2003) ("An author of a book of fiction should not be held to the same investigatory standards as a writer of a nonfiction. Although fiction writers often ground their works in part on people and experiences from their own lives, the essence of what they write is by definition fictional.").

[178] 695 F.2d 438 (10th Cir. 1983).

two fundamental questions.[179] The first inquiry was the "of and concerning" requirement, which the court found was sufficiently developed in the trial record to support the jury's determination that the fictional character identified the plaintiff.[180] The second question, which became the only issue on appeal, was not "whether the story is or is not characterized as 'fiction,' 'humor,' or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated."[181]

The plaintiff, a former Miss Wyoming, sued Penthouse for libel, alleging that an article concerning a Miss Wyoming's sexual exploits at a Miss America contest defamed her.[182] Specifically, the article described the fictional Miss Wyoming as having the ability to levitate men by performing fellatio on them.[183] The article also depicted such levitation at various events, including a Miss America competition.[184] At trial, the court instructed the jury only on the first question of identity and did not submit the "reasonably understood" issue.[185] On appeal, the Tenth Circuit reversed the judgment of the trial court, set aside the jury's verdict for the plaintiff, and dismissed the action.[186] For the Tenth Circuit, the dispositive issue was the sheer impossibility of the events and setting of the story:

> Here, the underlying event described was the Miss America Pageant, but it was readily apparent . . . that it was all fanciful and did not purport to be a factual account. . . . We have impossibility and fantasy within a fanciful story. . . . The charged portions of the story described something physically impossible in an impossible setting. . . . It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged were impossible. The setting was impossible.[187]

Notwithstanding Penthouse's request for the adoption of a revised actual malice standard for fictional works,[188] the Tenth Circuit never

---

[179] *Id.* at 439.
[180] *Id.*
[181] *Id.* at 442.
[182] *Id.* at 440-41.
[183] *Id.* at 441.
[184] 695 F.2d at 441.
[185] *Id.* at 442.
[186] *Id.* at 443.
[187] *Id.* at 441-43.
[188] Penthouse contended that the actual malice standard be recast to require clear and convincing evidence that the defendant "publishes with subjective awareness that the work will be understood as conveying a statement of fact." Rosen & Babcock, *supra* note 11, at 236-37 (quoting Appellant's Brief at 30, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th

addressed the applicable fault requirement in its opinion. Rather, the court crafted a narrow ruling, basing its decision entirely upon the implausibility of the story's events and setting. Although such reasoning affords authors protection in the fiction as fantasy genre,[189] it provides little or no defense in other types of fiction where the plots and settings are more believable.[190]

Bryson illustrates the dangers of applying *Pring's* reasoning to other types of fiction.[191] Although the Supreme Court of Illinois did not cite *Pring* when it reversed the dismissal of the plaintiff's libel claim, it seemed to employ a similar analysis. First, the court did not address the applicable fault standard in considering the issue of liability; it discussed malice only in the context of punitive damages.[192] Second, the court placed considerable significance on the possibility of the fictional events: "Here, although the story *Bryson* is labeled as fiction, the story itself is not so fanciful or ridiculous that no reasonable person would interpret it as describing actual persons or events."[193] The logic of *Bryson* therefore affords authors and publishers little "breathing space" to borrow ideas from real life. By relying too much on the plausibility of the portrayed events and settings, *Bryson* incentivizes the creation and distribution of fiction that is as unrealistic and fantastic as possible in order to avoid litigation.

4. Importance of the Character and Plaintiff's Relationship with Author

In addition to the aforementioned factors, several courts have also assessed the importance of the fictional character and the plaintiff's relationship with the author in their analysis of the "of and concerning"

Cir. 1983)). Other defendants have proposed revisions to the actual malice standard for works of fiction. *See* New Times, Inc. v. Isaacks, 91 S.W.3d 844, 861 (Tex. App. 2002). In *New Times*, the defendants argued that because satire and parody are intentionally false, neither literary device could withstand the traditional actual malice test. *Id.* The defendants claimed that the court should not ask whether the statement was made with knowledge or recklessness, but whether the "defendant subjectively intended for readers to believe that the fiction was fact . . . ." *Id.* The court rejected such reasoning, however, and applied the conventional actual malice standard articulated in *Sullivan*. *Id.*

[189] Rosen & Babcock, *supra* note 11, at 237.

[190] This is not a criticism of the Tenth Circuit's reasoning, particularly if one subscribes to Cass Sunstein's philosophy of "judicial minimalism" and deciding controversies "one case at a time." *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001). It is, however, a recognition that the Tenth Circuit's standard may not be applicable to other genres of fiction.

[191] For a description of the facts and procedural history of *Bryson*, see *supra* notes 955-99 and accompanying text.

[192] Bryson v. News Am. Publ'n, 174 Ill. 2d 77, 109-11 (1996).

[193] *Id.* at 102..

test. Regarding the former consideration, at least two circuit courts have expressly noted the significance of a character's value to the underlying story.[194] In *Wheeler*,[195] the United States Court of Appeals for the Seventh Circuit affirmed summary judgment for the defendants, noting that the disputed character played only an "'inconspicuous part' in the novel 'Anatomy of a Murder' [such that n]o average reader of the book would remember the very minor subplot . . . ."[196] By contrast, in *Fetler*,[197] the United States Court of Appeals for the Second Circuit reversed summary judgment for the defendant finding, *inter alia*, that "unlike the situation in *Wheeler* . . . , Maxim is a prominent character throughout the novel . . . ."[198]

Although courts generally do not expressly emphasize the importance of the plaintiff's relationship with the author, at least two cases indicate that this may be an important factor. In *Allen v. Gordon*,[199] the court affirmed the dismissal of a doctor's libel claim against a book's author, relying largely on the fact that the plaintiff had never treated the defendant.[200] In *Smith v. Huntington Publishing Co.*,[201] a federal district court in Ohio dismissed a libel complaint against a newspaper upon finding that the reporter had changed the actual names of the individuals to protect their privacy, but had coincidently selected the plaintiffs' names instead.[202] The court stressed that the author did not know either plaintiff, and the selection of the "fictitious" names was purely a chance occurrence.[203] Other courts have considered the relationship of the plaintiff and the author, but have not ascribed the same importance to it as in *Allen* or *Smith*.[204]

---

[194] At least one trial court has raised this issue as well, although the court did not find the character's lack of importance dispositive. *See* Carter-Clark v. Random House, Inc., 768 N.Y.S.2d 290, 292 (Sup. Ct. 2003) ("Ms. Baum is a minor character who only appears in nine pages of the book.").

[195] For a brief description of the facts in *Wheeler*, see *supra* notes 127-129 and accompanying text.

[196] Wheeler v. Dell Publ'g, 300 F.2d 372, 376 (7th Cir. 1962) (citing Levey v. Warner Bros. Pictures, 57 F. Supp. 40, 41 (S.D.N.Y. 1944)).

[197] For a brief description of the facts in *Fetler*, see *supra* notes 1366-137 and accompanying text.

[198] Fetler v. Houghton Mifflin Co., 364 F.2d 650, 652 (2d Cir. 1966).

[199] 86 A.D.2d 514 (N.Y. App. Div. 1982).

[200] *Id.* at 515.

[201] 410 F. Supp. 1270 (S.D. Ohio 1975). Although *Smith* is not a defamation in fiction case, its reasoning is applicable here because it concerns the coincidental selection of a real name and not the nature of the underlying work.

[202] *Id.* at 1272, 1274.

[203] *Id.* at 1272.

[204] *See, e.g.*, Geisler v. Petrocelli, 616 F.2d 636, 638 (2d Cir. 1980) (stating that the plaintiff and author were "acquainted, apparently on a casual business basis."); Fetler v. Houghton Mifflin Co., 364 F.2d 650, 650 (2d Cir. 1966) (noting in the first paragraph of the opinion that

IV. OXYMORONS, PARADOXES, AND UNCERTAINTY: THE NEED FOR A NEW STANDARD IN DEFAMATION IN FICTION CASES

A. *Problems with the Current Standards*

The very notion of defamation in fiction appears oxymoronic. As noted, defamation is "[t]he act of harming the reputation of another by making a false statement to a third person."[205] Fiction, on the other hand, is the "conscious antithesis of truth;"[206] it does not purport to be factually accurate.[207] Because most works of fiction announce themselves as factually untrue, readers should not interpret a novel, movie, television show, or other entertainment vehicle as depicting reality.[208] At least one commentator believes that "there seems to be something absurd about permitting liability for fictional works."[209]

As applied, the defamation in fiction doctrine also produces a paradox for plaintiffs who claim identification with a fictional character, yet disavow all of that character's objectionable qualities.[210] As one court has correctly pointed out:

> Bringing . . . such an action requires a kind of 'doublethink'. On the one hand, the plaintiff must assert simultaneously that the story or novel is 'about' him or her to the extent that there are similarities between the plaintiff and the fictional character but 'could not be about' the plaintiff because, in real life, he or she would never do the scandalous things ascribed to the character. The plaintiff's case thus becomes "It's me, but it couldn't be me."[211]

The current law of defamation in fiction offers an unworkable solution to a deceptively complex problem. On the one hand, the Supreme Court has held that entertainment speech is entitled to First Amendment protection.[212] On the other hand, the Court has also de-

---

the plaintiff was the author's brother); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 69 (1979), *cert. denied*, 444 U.S. 984 (1979) (describing author's attendance at plaintiff's nude therapy sessions).

[205] BLACK'S LAW DICTIONARY 183 (2d pocket ed. 2001).

[206] Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 131 (N.Y. 1967) (Bergan, J., dissenting).

[207] *See supra* notes 58, 77-78 and accompanying text.

[208] Smirlock, *supra* note 54, at 531. As Sandra Baron claims: "People appreciate the difference between statements of fact purporting to be true and works of fiction." Telephone Interview with Sandra Baron, *supra* note 125.

[209] Smirlock, *supra* note 54, at 531.

[210] Welch v. Penguin Books USA, Inc., 1991 N.Y. Misc. LEXIS 225, at *6 (Sup. Ct. 1991). Such a scenario occurred in Wheeler, where the plaintiff claimed that a fictional character identified her, yet she denied having any of the "unsavory characteristics" of her alleged fictional counterpart. Wheeler v. Dell Publ'g Co., 300 F.2d 372, 376 (7th Cir. 1962). The court rightly refused to permit the plaintiff to have it both ways, and rejected her identification claim based on the marked dissimilarities. *Id.*

[211] *Welch*, 1991 N.Y. Misc. LEXIS 225, at *6.

[212] *See supra* note 59 and accompanying text.

termined that "calculated falsehoods"[213] and knowingly or recklessly false statements enjoy no constitutional protection.[214] These goals seem to be at odds with each other, and the jurisprudence that has attempted to resolve this apparent contradiction is illogical in some cases and confused in most.

Many commentators,[215] courts,[216] and dissenting judges[217] have exposed the incongruity of applying the actual malice standard of *Sullivan* to works of fiction. As the Supreme Court of California stated in dicta:

> [I]n defamation cases, the concern is with defamatory lies masquerading as truth. In contrast, the author who denotes his work as fiction proclaims his literary license and indifference to "the facts." There is no pretense. All fiction, by definition, eschews an obligation to be faithful to historical truth. Every fiction writer knows his creation is in some sense "false." That is the nature of the art. Therefore, where fiction is the medium . . . it is meaningless to charge that the author "knew" his work was false.[218]

Similarly, at least one court[219] and many commentators[220] have noted the inconsistencies among various courts in their analyses of the "of and concerning" test. As noted, in evaluating the identification standard, courts have examined the following list of factors: first and last names; the similarity and dissimilarity of physical characteristics, background, ethnicity, and employment; disclaimers; the nature of fic-

---

[213] *See supra* note 60 and accompanying text.

[214] *See supra* note 61 and accompanying text.

[215] Rick Kurnit, an entertainment attorney who represented the publishers and authors in both the *Welch* and *Springer* cases, deems the application of the actual malice fault standard to fictional works as "silly." Telephone Interview with Rick Kurnit, Partner, Frankfurt, Kurnit, Klein & Selz (Mar. 16, 2004). Instead, Kurnit believes that courts should ask whether the statement was published "with reckless disregard that the person would be recognized." *Id. See also*, Rosen & Babcock, *supra* note 11, at 246-47; Prechtel, *supra* note 4949, at 193-96; Smirlock, *supra* note 54, at 526-28; Stam, *supra* note 22, at 582-85.

[216] *See, e.g.*, Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 461 (Cal. 1979) (Bird, C.J., concurring) (rejecting appellant's contention that the actual malice standard should be applied to fictional works in context of a right of publicity claim); Leopold v. Levin, 259 N.E.2d 250, 256 (Ill. 1970) (refusing to apply the actual malice standard to work of fiction in invasion of privacy context).

[217] *See, e.g.*, Bindrim v. Mitchell, 92 Cal. App. 3d 61, 88 (1979), *cert. denied*, 444 U.S. 984 (1979) (Files, J.; dissenting):

> The majority opinion adopts the position that actual malice may be inferred from the fact that the book was "false." That inference is permissible against a defendant who has purported to state the truth. But when the publication purports to be fiction, it is absurd to infer malice because the fiction is false.

[218] *Guglielmi*, 603 P.2d at 461 (Bird, C.J., concurring).

[219] *See, e.g.*, *Welch*, 1991 N.Y. Misc. LEXIS 225, at *5 ("Courts have failed to carve out a clear standard as to how similar or how different the [plaintiff and the fictional character] must be.").

[220] *See, e.g.*, Rosen & Babcock, *supra* note 11, at 242-45; Smirlock, *supra* note 54, at 528-34; Stam, *supra* note 222, at 578-82.

tion; the impossibility of the fictional events; the literary importance of the character; and the plaintiff's relationship with the author.[221] Courts do not always consider the same factors and oftentimes differ as to the significance of the issues they do evaluate, which has resulted in inconsistent and uncertain outcomes for both plaintiffs and defendants.[222] One commentator summarized the current doctrinal disarray as follows:

> The standards invoked by various courts for their "of and concerning" requirements yield no particular principles on which litigants can rely. Authors and publishers simply cannot tell which aspects of a portrayal will be considered significant in comparing plaintiffs and characters. They cannot tell whether a fictional description's "ugliness" serves to preclude identification or whether it constitutes false and libelous matter. They will be unsure whether even their best efforts will shield them from libel, or whether a mere disclaimer will suffice. They will be uncertain what liberties they may take with historical characters and events. And even if they are confident of prevailing, they will be unsure, in an era of enormous litigation costs, of what stage in the litigation will bring them success. These same uncertainties also confront a plaintiff who believes himself libeled by a work of fiction.[223]

Although there have been relatively few defamation in fiction cases in the United States,[224] Sandra Baron, the Executive Director of the Media Law Resource Center, notes that these concerns are more than academic or theoretical considerations.[225] The mere threat or uncertainty of litigation imposes costs not only on the producers and distributors of fiction, but also on the consuming public.[226] First, creators

---

[221] *See supra* notes 95-204 and accompanying text.

[222] *Compare Bindrim*, 92 Cal. App. 3d 61 (affirming libel judgment for the plaintiff even though the plaintiff and fictional character had different names, physical appearances, ages, professions, and personalities) *with Welch*, 1991 N.Y. Misc. LEXIS 225, at *1, *10 (dismissing the plaintiff's claim even though the plaintiff and his alleged fictional counterpart shared similar physical characteristics, educational backgrounds, interests, employment, grooming habits, family compositions, and romantic relationships). For additional judicial inconsistencies, see *supra* notes 95-204 and accompanying text.

[223] Smirlock, *supra* note 54, at 531.

[224] *But see* note 15 and accompanying text. Kurnit believes that the paucity of defamation in fiction cases can be attributed to at least three things. Telephone Interview with Rick Kurnit, *supra* note 215. First, the increased "vetting," i.e., clearing of rights, of manuscripts, screenplays, movies, and programs has decreased the likelihood that libelous material will be published. *Id.* Second, the increased consolidation in the entertainment industry has resulted in fewer, large companies that possess sophisticated legal departments staffed with attorneys who are diligent in "vetting" creative content. *Id.* Finally, because courts have been quick to dismiss defamation in fiction claims, potential plaintiffs and their attorneys hesitate before bringing this type of suit. *Id.*

[225] Telephone Interview with Sandra Baron, *supra* note 125.

[226] *Id.*

of "realistic fiction are forced to censor their own manuscripts. The result is a serious chilling effect on the publication of realistic novels."[227] In such cases, the authors and publishers clearly suffer, and the public is deprived of a work, which may have important entertainment, social, or political value.[228]

Second, prior to the publication of a book,[229] the distribution of a movie,[230] or the broadcast of a television show,[231] creators are "subject

---

[227] Stam, *supra* note 22, at 581-82. Kurnit, who often counsels the creative community, acknowledges that he has advised many authors to differentiate widely the fictional characters from the real people upon whom they are based. Telephone Interview with Rick Kurnit, *supra* note 215. In one instance, Kurnit recalls an author assuming such a cautious stance that he altered the character to have "bright, flaming red hair and only one leg." *Id.* Kurnit has also counseled clients to mask characters that appear in a non-fictional setting if the character is a victim of circumstances, and his or her identity is not essential to the story being told. *Id.* Baron also notes that authors are often asked to change their material to avoid potential libel claims. Telephone Interview with Sandra Baron, *supra* note 125.

[228] Stam, *supra* note 22, at 582 n.67:

> Publishers often weigh the potential for liability and the estimated costs of defending a law suit against the projected profits and the social or public significance of the manuscript. Due to the exorbitant costs of defending a libel suit, many books that are expected to rank low in mass appeal are denied publication even though they express important social or political ideas.

See also AMOS, *supra* note 211, at xvi (stating that the mere intimation of a libel suit might stop a book's publication).

[229] *Id.* at 586. For a discussion of the clearance procedures that publishers follow, see *id.* at 586 n.96. A treatise on publishing provides the following "Checklist For Works of Fiction or Faction" that authors and publishers should consider:

> — Has the writer or publisher received any claim or threat of action prior to publication that a "character" in a work of faction or fiction is based on a real person who considers the treatment defamatory or an invasion of privacy?
>
> — Have all such claims been satisfactorily resolved as to either the truth of the reference or its obvious nonapplicability to the claimant?
>
> — Has the writer violated any promises of confidentiality to anyone identifiable in the work?
>
> — If a reasonable reader could identify a subject in a work of fiction, does the work imply the existence of false and defamatory acts that could reasonably be ascribed to the subject, such as adultery or dishonesty?
>
> — Has the writer or publisher considered adding a preface or foreword prominently identifying references to potentially recognizable or real persons that are not substantially true?

MARK A. FISCHER, E. GABRIEL PERLE, & JOHN TAYLOR WILLIAMS, PERLE & WILLIAMS ON PUBLISHING LAW § 5.05[A] (3d ed. Supp. 2003).

[230] Distributors encourage filmmakers to monitor the film continually at all stages of the production process, "from inception through final cut, with the objective of *eliminating* material that could rise to a claim." AtomShockwave Corp., *Clearance Procedures*, *at* http://www.atomshockwave.com/clearance_procedures.html (last visited Mar. 2, 2004) (emphasis added). Distributors also ask producers to seek the assistance of attorneys and script clearing companies to ensure that the underlying work has no defamatory material. *Id.* The fear of litigation is evident among smaller distributors:

> The script . . . should be read and thoroughly reviewed prior to commencement of the Film to eliminate matter which, with reference to a particular individual or a small or

to an elaborate inquisition as to the sources of the material"[232] for their work.[233] Such comprehensive clearance procedures are costly, particularly for independent creators; time consuming; and an inefficient, yet necessary – due to the current state of the law – use of scarce resources.[234] Third, publishers generally procure costly libel insurance to limit their own and their authors' exposure to liability from defamation suits.[235] Similarly, distributors typically will not release a motion picture until the producers secure Errors and Omission (E&O) insurance.[236] Because premiums for such insurances are calculated based on the risks of litigation, the lack of clear principles in the defamation in fiction arena increases these costs, which are often prohibitive for inde-

---

moderate size group of individuals that are real (e.g., whether living or dead), or an existing business or other entity, is *arguably false or fictional*, injurious to reputation, offensive, or revelatory of facts not generally known by the public.

Id. (emphasis added). This clearance procedure requires filmmakers to remove from a *fictional* script any references to individuals, small groups, or existing businesses that are "arguably false or fictional." Clearly, such a policy is overly restrictive. Unfortunately, it is the product of the ambiguous legal state of defamation in fiction, which has engendered fear among the creative community.

Similarly, most major film festivals require contestants to certify that their submissions do not defame any person living or dead and to indemnify the festival against any such claims. *See, e.g.*, Austin Film Festival, 2004 Film Competition Entry Form, *available at* http://www.austinfilmfestival.com/filmreg.php (last visited Mar. 5, 2004).

[231] Telephone Interview with Rick Kurnit, *supra* note 215. The networks all have legal departments that "vet" the television shows prior to their broadcast. "Vetting" is the process of reviewing the program and determining whether any material violates the rights of third parties or any other law. *Id.* Libel and invasions of privacy are among the many potential causes of action that network attorneys investigate in their "vetting" procedures. *Id.*

[232] Stam, *supra* note 22, at 586.

[233] Such clearance procedures address other issues besides defamation. Telephone Interview with Rick Kurnit, *supra* note 215. "Vetting" material also uncovers possible copyright and trademark violations, invasions of privacy, unfair competition, misappropriations of a person's right of publicity, and a host of other potential causes of action. *Id.*

[234] Kurnit argues that although such clearance procedures are costly, they are "congruent with protecting the interests of real people." *Id.* In addition to protecting the legal and financial interests of the creative community, "rigorous vetting is a courtesy to people and a matter of common decency. Reputations cannot be tarnished with impunity." *Id.* Kurnit asserts that the real costs to content creators and the public are the expenses associated with defending frivolous claims. *Id.*

[235] William E. Carlson, Comment, *Defamation by Fiction*, 42 MD. L. REV. 387, 387 (1983).

[236] Matthew Bender & Co., Entertainment Industry Contracts Form 27-1: Negative Pickup Distribution Agreement, ¶11 (2003) [hereinafter Negative Pickup Distribution Agreement]. Similarly, television broadcasters must obtain E&O insurance and comply with all clearance procedures required by the insurance underwriter. Matthew Bender & Co., Entertainment Industry Contracts Form 88.02: Errors and Omissions Insurance (2003).

pendent filmmakers.[237] These increased costs are then passed on to consumers in the form of higher prices.[238]

Finally, although the Supreme Court crafted the actual malice standard to afford "breathing space" to certain forms of speech,[239] the rule, if applied literally as it was in *Bindrim*, provides entertainment speech with less protection than other forms of speech.[240] Such a result undermines our First Amendment jurisprudence, which mandates that "works of fiction are constitutionally protected in the same manner as political treatises and topical news stories."[241] Although many courts[242] and judges[243] have noted the importance of First Amendment protection for fiction in the context of defamation lawsuits, the current legal environment does not protect entertainment speech adequately. Therefore, it must be changed.

---

[237] Negative Pickup Distribution Agreement, *supra* note 236. "In the last two years, the cost of insurance, especially errors and omissions ("E & O") coverage, has risen, and the availability of such insurance has become a difficult question for independent production companies." *Id.*

[238] Interview with Scott Shagin, Esq. in Newark, NJ (Mar. 9, 2004). Shagin, a practicing entertainment, media, and intellectual property attorney, has served as an advisor to the Harvard Negotiation Project, is the past Chair of the Entertainment and Arts Law Section of the New Jersey State Bar Association, and currently serves on the Entertainment Law Committee of the Association of the Bar of the City of New York.

[239] *See supra* note 63 and accompanying text.

[240] *See supra* note 77-78 and accompanying text.

[241] Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 459 (Cal. 1979) (Bird, C.J., concurring).

[242] *See, e.g.*, Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987) (dismissing a libel complaint brought against the creators of a docudrama because the "First Amendment protects such dramatizations and does not demand literal truth in every episode depicted . . . ."); Polydoros v. Twentieth Century Fox Film Co., 79 Cal. Rptr. 2d 207, 212 (Cal. Ct. App. 1997) (affirming the grant of summary judgment to the defendants because, *inter alia*, "[r]hetorical hyperbole and vigorous epithets are not defamatory, and to label them so would subvert the right to free speech."); Flip Side, Inc. v. Chicago Tribune Co., 564 N.E.2d 1244, 1253 (Ill. App. Ct. 1990) ("[t]he breathing space that [is] required for first amendment fredoms [sic], however, will not allow a defamation action to be maintained merely because there is a similarity of names and business between plaintiff and the subject in the publications."); Welch v. Penguin Books USA, Inc., 1991 N.Y. Misc. LEXIS 225, at *9-10 (N.Y. Sup. Ct. 1991) ("[g]iven the obvious and implied constitutional repercussions of a libel-in-fiction claim . . . it must be a requirement of an action for defamation that the reader be totally convinced that the book in all its aspects as far as the plaintiff is concerned is not fiction at all.").

[243] *See, e.g.*, Bryson v. News Am. Publ'n, 174 Ill. 2d 77, 112 (1996) (McMorrow, J., dissenting) ("I believe that the majority's decision turns defamation law on its head. Today's decision has serious ramifications with respect to our first amendment right of free speech, for it may pave the way for frivolous lawsuits whenever something is caustic is written, even in a fictional story.").

B. *A New Standard for Defamation in Fiction*

Several commentators have proposed solutions to the defamation in fiction quandary,[244] including extending absolute First Amendment protection to authors and publishers[245] and creating a new tort for offensive fictional depictions.[246] Because fiction plays such a vital role in our individual and collective lives,[247] any proposed revision should incorporate the following sentiments of the Supreme Court of California:

> Contemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality.[248]

Likewise, any new standard must bear in mind that "[r]eputations may not be traduced with impunity, whether under the literary forms of a work of fiction, or in jest . . . ."[249]

The revised standards offered here seek to broaden the actual malice standard of *Sullivan* and define the "of and concerning" requirement of the common law.[250] The solution is both derivative and distinct. It is derivative in that it is based squarely upon the previous scholarship of Dan Rosen, Charles L. Babcock, and Daniel Smirlock. It is distinct in that it is the first proposal to combine a heightened fault standard with a heightened identification test, and it seeks to delineate and incorporate all of the factors evaluated in previous "of and concerning" inquiries.

---

[244] *See, e.g.*, Martin Garbus & Richard Kurnit, *Libel Claims Based on Fiction Should be Lightly Dismissed*, 51 BROOK. L. REV. 401 (1985); Robert Asa Crook, Note, *Welcome to the Nineties, Bindrim v. Mitchell: Now Drop Dead*, 12 HASTINGS COMM. & ENT. L.J. 517, 533-34 (1990).

[245] Stam, *supra* note 22.

[246] Paul A. LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOK. L. REV. 281, 299-338 (1985).

[247] *See generally* Stam, *supra* note 22, at 572-74.

[248] Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 460 (Cal. 1979) (Bird, C.J., concurring).

[249] Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 65 (N.Y. 1920).

[250] Plaintiffs would still have to prove that the published statements were false and defamatory. The revisions proposed here address only the "of and concerning" test and the fault standard.

1. A New Fault Standard for Fiction: Abandon Actual Malice and Employ Classical Malice

First, in order to address the inherent nature of fiction, the actual malice fault standard of *Sullivan* should be jettisoned and replaced with the classical malice standard. As Rosen and Babcock aver:

> [I]f the first amendment interests at stake are to be properly balanced, the "fault" standard must be redefined to require the plaintiff to prove by clear and convincing evidence that: (1) the defendant intentionally used the fiction device as a subterfuge to defame the plaintiff *and* (2) did so with malice, that is, hatred, ill-will, or spite.[251]

As noted throughout this Comment, the actual malice standard of *Sullivan* is wholly unsuitable for works of fiction.[252] Furthermore, several courts have already adjudicated libel cases based on the intent of the author.[253] Adoption of Rosen's and Babcock's fault standard will not only afford authors and publishers adequate "breathing space" to create compelling works of fiction, but also punish those who pervert the fiction label in order to defame others intentionally. Such subterfuge should not be protected.

Rick Kurnit, an entertainment attorney who represented the publishers and authors in *Springer*, *Welch*, and *Randall*, contends that this revised fault standard alone will not provide the creative community with enough protection.[254] Kurnit argues that even if an author's intentions are malicious, the resulting work may not sufficiently describe the plaintiff to cause a "reasonable reader to understand the statement to be of and concerning the plaintiff."[255] As such, the proposed standard for defamation in fiction must also fashion a clear and certain "of and concerning" test.

2. A New Identification Test for Fiction

Second, in order to yield more predictable results upon which authors, publishers, and plaintiffs can rely, the haphazard and inconsistent judicial treatment regarding the "of and concerning" inquiry should be clarified and applied uniformly. Daniel Smirlock has offered the most logical and comprehensive proposal for a revised identification test.[256] Smirlock advocates a tripartite test to determine if the evidence demonstrates that the fictional character identifies the plaintiff:

---

[251] Rosen & Babcock, *supra* note 11, at 225.
[252] *See supra* notes 588-644, 777-89 and accompanying text.
[253] *See supra* note 81.
[254] Telephone Interview with Rick Kurnit, *supra* note 215.
[255] *Id.*
[256] Smirlock, *supra* note 54.

> Such evidence first of all should show *unmistakability*: The statement in question must refer to the plaintiff and to no one else. Second, it should show *individuality*: The statement must refer specifically and personally to the plaintiff, rather than to a broad group or general undertaking. These requirements together assure *clarity* of reference to the plaintiff. Finally, the evidence should indicate that the statement could prompt *conviction* in the reader: The alleged defamatory description must inspire belief of its audience before it can create legally compensable damage to reputation.[257]

Smirlock's two-part test for "clarity" resembles the typical "of and concerning" test, yet its requirements of "unmistakability" and "individuality" demand a higher burden of proof than most courts currently require. The former component, Smirlock contends, protects authors who derive their inspiration for characters from multiple sources.[258] This security is significant, as authors generally base each character on a variety of individuals.[259] Smirlock also claims that the "individuality" requirement affords authors the same rights as political or social critics to debunk general groups, professions, or pursuits and might have obviated the curious result in *Bindrim*.[260]

The "conviction" component of Smirlock's analysis approximates the "reasonably understood" test enumerated in both *Pring*[261] and *Bryson*.[262] Again, however, Smirlock's requirement is more demanding than the traditional "reasonably understood" test because it mandates not only plausibility of events, but also proof of audience conviction: "Only when the immediate context of the allegedly defamatory statement convinces the reader of the statement's literal truth – when, that is, it ceases to be merely imaginable or plausible and begins to be believed – do damages to reputation, and thus liability, become possible."[263]

Smirlock's "conviction" requirement is absolutely essential to protect authors who employ obviously real people in hypothetical contexts. He cites as an example Robert Coover's novel, *The Public Burning*, in which Richard Nixon attempts to seduce the imprisoned Ethel Rosenberg.[264] Under a traditional "reasonably understood" analysis, Coover

---

[257] *Id.* at 521 (emphases added).

[258] *Id.* at 539.

[259] *See supra* notes 266-29 and accompanying text.

[260] Smirlock, *supra* note 54, at 540. "Only when a work of fiction can be found to refer individually to *this* nude marathon therapist or *this* politician should recovery be permitted." *Id.* at 541.

[261] *See supra* notes 178-187 and accompanying text.

[262] *See supra* notes 191-193 and accompanying text.

[263] Smirlock, *supra* note 54, at 541.

[264] *Id.*

would have to claim that no one could reasonably believe that Nixon actually tried to seduce Ethel Rosenberg. Although the event is unlikely, it is not impossible; in fact, it is much more plausible than levitation-inducing fellatio. Under the "conviction" test, however, Smirlock declares that Coover would be protected because the reader would recognize that the statement's truth is not literal, but merely symbolic.[265] In other words, Smirlock's analysis transforms the "reasonably understood" test from one that asks if a reader could *reasonably* believe the statements to be true to one that asks if readers *actually* believe them to be true.[266] This distinction is significant, as it affords writers more creative license to employ real characters in their fictional works.

Although Smirlock creates a solid framework from which courts should base their "of and concerning" analyses, he does not offer specific criteria for courts to consider when evaluating the "unmistakability" or "individuality" components. Based on the existing case law, courts should consider, at a minimum, the following issues: the first and last names of the plaintiff and character; the similarity and dissimilarity of their physical characteristics, background, ethnicity, familial compositions, relationships, sexuality, and employment; disclaimers; the plausibility of the depicted events; the character's literary importance; and the plaintiff's relationship with the author.[267] Because defamation in fiction cases are so fact intensive, the trier of fact must exercise its own discretion regarding the relative importance of each factor, with the provisos that it does so within the context of this heightened identification test and that no single element be dispositive.

3. No Trouble with Grey

Although fiction has always been based on real people, places, and events, it is becoming increasingly difficult to discern where reality ends and fiction begins.[268] The utility of the proposed approach, which combines the standard of Rosen and Babock with that of Smirlock, is that it can address cases concerning not only works purely fictional in nature,[269] but also the roman a clef,[270] faction,[271] and the docudrama.[272]

---

[265] *Id.*

[266] Smirlock does not address how a plaintiff would prove the "clarity" requirement. Two possible solutions include witness testimony and survey evidence. Survey evidence has been used to prove a likelihood of confusion in trademark litigation and can be applied in a defamation context as well. *See, e.g.*, Henri's Food Products Co. v. Kraft, Inc., 717 F.2d 352 (7th Cir. 1983).

[267] *See supra* note 221 and accompanying text.

[268] Telephone Interview with Scott Shagin, Esq. (Mar. 2, 2004).

[269] Admittedly, pure fiction is a near impossibility, as authors invariably borrow plots, characters, and setting from the real world. *See supra* note 11 and accompanying text. Com-

For cases involving characters that are not *clearly* based on a real person, the identification test will be the more significant component, although the fault standard will still apply. Examples of such cases include *Bindrim*, *Bryson*, *Geisler*, *Pring*, and *Springer*. The more rigorous identification test outlined here should preclude the dubious holdings of *Bindrim*, *Bryson*, and *Geisler*.

For cases concerning characters that *are* clearly patterned on real people, the classical malice requirement affords authors the legal latitude to use reality as the "raw material" for their fiction.[273] Docudramas provide the perfect testing ground for the proposed framework. In *Davis v. Costa-Gavras*,[274] the plaintiff, Ray Davis, sued the director and studio responsible for the docudrama *Missing*, alleging that their negative portrayal of Ray Tower constituted actual malice.[275] The Southern District Court of New York dismissed the plaintiff's libel claim, holding that Ray Tower was simply a "symbolic fictional composite" and that in docudramas "minor fictionalization cannot be considered evidence or support for the requirement of actual malice."[276]

Although the court achieved the proper result, its misplaced reliance on the actual malice standard and focus on the extent of fictionalization are problematic for several reasons. First, even though the court emphasized that *Missing* was a protectable work of fictional dramatization, which entitled the author to employ his creative license, it circumscribed such artistic freedom: "[I]f alterations of fact in scenes portrayed are not made with serious doubts of truth of the essence of the telescoped composite, such scenes do not ground a charge of actual

---

mentators have acknowledged the inherent difficulty in classifying works of fiction, but have offered their own suggestions, nonetheless. *See* LeBel, *supra* note 246, at 320-23; Prechtel, *supra* note 49, at 204. For example, LeBel analogizes pure fiction to what Samuel Coleridge termed "poetic faith," which involved the "willing suspension of disbelief for the moment." LeBel, *supra* note 246, at 321 (citing S. Coleridge, *II Biographia Literaria 6*, *in* 7: II COLLECTED WORKS OF SAMUEL TAYLOR COLERIDGE 6 (1983)). Similarly, Prechtel notes that pure fiction "connotes fiction that is capable of successfully suspending a reader's view of reality in favor of an escape to the fictional medium." Prechtel, *supra* note 49, at 204.

[270] A roman a clef is a "novel that represents historical events and characters under the guise of fiction." Prechtel, *supra* note 49, at 208 (citation omitted). "The author of the roman a clef models his characters after real persons, but protects their identities by giving the characters fictitious names." *Id.*

[271] Faction is an "amalgamation of facts and fiction" that "uses real names and the persons they represent to depict specific conduct." *Id.* at 210.

[272] A docudrama adds "fictional dialogue to a biographical treatment of a celebrity's life story." *Id.* at 212.

[273] *See supra* notes 211-222 and accompanying text.

[274] 654 F. Supp. 653 (S.D.N.Y. 1987).

[275] *Id.* at 654-55.

[276] *Id.* at 655, 658.

malice."[277] This language implies that the converse is also true. Thus, if an author creates fiction based on a true story and entertains serious doubts about its truth, such doubt can be used as evidence of actual malice. Second, the court's emphasis on permissible "minor fictionalization" has prompted one commentator to argue that the holding "leaves open the possibility that the author could be subject to liability under the constitutional malice fault standard if he or she crosses this threshold of minor fictionalization."[278] Admittedly, the court's reasoning that minor fictionalization does not constitute actual malice does not necessarily mean that substantial fictionalization evidences actual malice. However, given the court's emphasis on allowable "minor fictionalization" and its circumscription of an author's creative license, such a conclusion seems reasonable. Third, although the court did discuss the plaintiff's specific allegations of actual malice in an appendix,[279] it offered no general guidance or broad rule as to what constituted permissible "minor fictionalization." As such, creators and plaintiffs have no useful benchmarks upon which they can rely. Finally, the application of the actual malice fault standard to works of fiction is basically worthless and arguably counterproductive, as authors clearly know that their fiction is false to a certain degree, regardless if it is pure fiction, a docudrama, faction, or a roman a clef.[280]

Assuming, *arguendo*, that Davis proved the heightened identification test described here, the classical malice standard would have afforded a more sensible and principled analysis. Requiring Davis to prove that the defendants intentionally created Ray Tower as a subterfuge to defame him and that they did so with ill-will would provide future authors with sufficient freedom, as mandated by our nation's First Amendment jurisprudence,[281] to create compelling works of fiction based on real world people and events. It is certainly a rigorous test, but the First Amendment demands nothing less.

Judicial adoption of the standard proposed here would not grant authors and publishers an absolute privilege to defame individuals under the guise of fiction. *Corrigan v. The Bobbs-Merrill Co.*[282] is an example of a case in which the plaintiff would probably recover under the new test. In *Corrigan*, Joseph Corrigan, a New York City magistrate, sued the publisher of *God's Man* for its critical depiction of a

---

[277] *Id.* at 658.

[278] Prechtel, *supra* note 49, at 213.

[279] Davis v. Costa-Gavras, 654 F. Supp. 653, 659 (S.D.N.Y. 1987).

[280] *See supra* notes 577-644, 777-89, 215-218 and accompanying text.

[281] *See supra* notes 59-644, 855, 212-214, 241-243 and accompanying text.

[282] Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58 (N.Y. 1920).

magistrate named Cornigan.[283] The facts indicate that the portrayal of Cornigan identified Corrigan. First, the names were almost identical.[284] Second, both the plaintiff and the fictional character were New York City magistrates.[285] Third, both men presided over the same vicinage, Jefferson Market Court.[286] Finally, the novel's author had appeared before the plaintiff as a defendant; so, they had a personal connection to each other.[287] These specific similarities sufficiently demonstrate Smirlock's "unmistakability" and "individuality" components. Similarly, the novel's description of Cornigan was such that it could inspire a belief in the audience that the statements were a true depiction of Corrigan.[288] Although the plaintiff would need to demonstrate that people actually began to believe such statements in order to satisfy Smirlock's "conviction" component,[289] it seems probable that he would meet such a burden. It is a fair assumption that Corrigan would also satisfy the revised "of and concerning" test.

In order to recover under the standard proposed here, however, Corrigan would also need to prove that the defendant "intentionally used the fiction device as a subterfuge to defame the plaintiff and . . . did so with malice, that is, hatred, ill-will, or spite."[290] The record in *Corrigan* illustrates that the plaintiff would likely have no difficulty in proving this fault standard. First, the novel's author appeared before Corrigan as a defendant in a criminal case and had an unpleasant experience.[291] Second, witnesses testified that the author was "getting even with plaintiff by means of his book . . . ."[292] These damning facts led the court to conclude that the author intended "deliberately and with actual malice to vilify plaintiff . . . ."[293]

Although the test proposed here will restrict only a small number of publications, it creates a fair and appropriate balance between an author's First Amendment rights, the public's appetite for realistic fic-

---

[283] *Id.* at 62-63. The main issue in *Corrigan* was whether the author's knowledge of the novel's defamatory nature could be imputed to his publishing company. *Id.* at 65. For the purposes of this analysis, the issue is solely whether the author libeled Corrigan.

[284] *Id.* at 62.

[285] *Id.*

[286] *Id.*

[287] *Id.* at 68.

[288] Cornigan was portrayed as being "ignorant, brutal, hypocritical, corrupt, shunned by his fellows, bestial of countenance, unjust, dominated by political influences in making decisions and grossly unfit for his place." *Id.* at 63.

[289] *See supra* note 263 and accompanying text.

[290] *See supra* note 251 and accompanying text.

[291] *Corrigan*, 228 N.Y. at 68.

[292] *Id.*

[293] *Id.* at 62.

tion, and a plaintiff's reputation. One critic of the current defamation regime has framed the issue as a choice between mutually exclusive goals: "Where defamation poses a major threat to free expression, including fiction, it is better to favor the interests of free speech and the public good rather than defamation and private interests."[294] The proposed standard does not ask us to make such an either-or decision; instead, it asks the courts to *balance* competing interests and afford fictional works their proper degree of constitutional protection.

V. CONCLUSION

Many of the world's greatest authors based their fictional characters on real people.[295] Goethe, Dickens, Conrad, Tolstoy, Hawthorne, and Hemingway are just some of the celebrated writers known to borrow from their own experiences.[296] Although contemporary authors, fearful of a libel suit, often disclaim drawing characters from real life,[297] it is undeniable that real individuals cannot be divorced from literature and entertainment.[298]

Despite the paucity of defamation in fiction lawsuits in the United States, the current law in this area imposes unnecessary economic and social costs on authors, publishers, distributors, plaintiffs, and the public.[299] The application of the actual malice standard to fiction is an unworkable fault standard,[300] and courts have analyzed the "of and concerning" test inconsistently.[301] With the exploding popularity of docudramas and the increased convergence of fact and fiction,[302] the time is ripe for courts to employ a new standard. Such a standard must balance the First Amendment rights and creative liberties of authors with the protection of individuals' reputations. The choice is not mutually exclusive; we can safeguard literary freedoms and simultaneously protect reputations. In a society such as ours that values entertainment speech as highly as political speech,[303] we must demand that a plaintiff prove by convincing evidence the heightened fault standard[304] and

---

[294] Stam, *supra* note 22, at 591.

[295] *See* AMOS, *supra* note 21.

[296] *Id.* at xiii-xvii.

[297] Several authors or their attorneys declined offers to discuss their sources of inspiration, citing an apprehension of potential defamation claims.

[298] *Id.* at xix.

[299] *See supra* notes 224-243 and accompanying text.

[300] *See supra* notes 577-644, 777-89, 215-218, 280 and accompanying text.

[301] *See supra* notes 955-204 and accompanying text.

[302] Telephone Interview with Scott Shagin, *supra* note 268.

[303] *See supra* note 241 and accompanying text

[304] *See supra* notes 251-253 and accompanying text.

identification test[305] enumerated here. Such a standard will provide adequate "breathing space" for the free flow of ideas, as mandated by *Sullivan*,[306] and benefit society because "[p]roviding breathing space for writers results in broader reading space for all of us."[307]

[305] *See supra* notes 256-267and accompanying text.
[306] *See supra* note 633 and accompanying text.
[307] Rosen & Babcock, *supra* note 11, at 262.