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INTRODUCTION: LITERATURE, LIFE, AND THE LAW

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If a man were permitted to make all the ballads, he need not care who should make the laws of a nation.¹

The currents of law and literature that met in this Symposium and brought together prominent academic commentators, practicing attorneys, and well-known authors had a rather unusual genesis: a nude group therapy session in California. A defamation suit was brought by the psychologist who conducted the session against an author who had attended it and who thereafter wrote a novel that described a similar nude encounter session in an unflattering way. In a footnote to its 1979 opinion, *Bindrim v. Mitchell*,² the California appellate court observed: "The fact that 'Touching' was a novel does not necessarily insulate Mitchell [the author] from liability for libel, if all the elements of libel are otherwise present."³ The court went on to hold that the author was properly found liable for defaming the psychologist.

The decision in *Bindrim* sent a mild tremor through the legal community. The decision was unusual for two reasons. First, a claim of defamation against the author of a fictional work was atypical. Traditional defamation and privacy actions against media defendants ordinarily involve purportedly factual publications. Second, because the defamation arose from a purportedly nonfactual publication, a finding of liability based on an intentional or reckless disregard for the truth was inherently paradoxical. The judicial outcome is somewhat less surprising when one considers that the author, prior to attending the therapy session,

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¹ Remark attributed to Andrew Fletcher of Saltoun, *Conversation Concerning a Right Regulation of Government for the Common Good of Mankind* (1703) (unpublished manuscript), quoted in *THE OXFORD DICTIONARY OF QUOTATIONS* 208 (2d ed. 1953).

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

³ *Id.* at 73 n.2, 155 Cal. Rptr. at 35 n.2.

had expressly disclaimed any intention to write about it and had stipulated that what transpired in the session would remain confidential. These facts, however, made the result seem no less threatening to the literary community.⁴ When the Supreme Court, in a widely publicized order, declined to review the judgment,⁵ and the Justices sympathetic to media concerns dissented,⁶ it seemed that a new danger to literary freedom had been let loose.

Soon after the *Bindrim* ruling, the United States Court of Appeals for the Second Circuit, in *Geisler v. Petrocelli*,⁷ similarly held that a young woman, whose name was identical to the female transsexual "heroine" of a potboiler novel, could sue the book's author for defamation.⁸ The fact that the plaintiff and the author had worked together briefly in a small publishing firm before the novel was written — reminiscent of the prior encounter in *Bindrim* — made the result seem less startling. Once again, however, an author of fiction had paradoxically been found to have brushed too close to, yet veered too far from, reality.

The following year, a contestant in the Miss America Pageant, a former baton-twirling Miss Wyoming, won a \$26,500,000 jury verdict in a defamation action against *Penthouse* magazine. The short story that gave rise to the action in *Pring v. Penthouse International, Inc.*⁹ portrayed a supposedly fictional baton-twirling Miss Wyoming who engaged in fantastic sexual exploits during a Pageant that was televised coast to coast.¹⁰ The outcome of the trial in *Pring* indicated that the new danger to literary freedom, only signaled by earlier defamation-in-fiction cases, had emerged as a full-blown first amendment problem.¹¹ Again, the apprehension felt by those concerned with literary

⁴ See generally Louis, *Libel in Fiction: A Chilling Decision for Authors*, 6 *ART & L.* 3-5 (1980) (reviewing *Bindrim v. Mitchell*).

⁵ 444 U.S. 984 (1979).

⁶ *Id.* Justices Brennan, Stewart, and Marshall voted to grant certiorari.

⁷ 616 F.2d 636 (2d Cir. 1980).

⁸ *Id.* at 639 (allegations that reasonable person could associate plaintiff with fictional character having identical name and physical description determined to be sufficient to withstand motion to dismiss).

⁹ 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 3112 (1983).

¹⁰ *Id.* at 440-41.

¹¹ Or "Problem," as Professor Schauer skeptically put it. See Schauer, *Liars, Novelists, and the Law of Defamation*, 51 *BROOKLYN L. REV.* 233, 235 (1985).

freedom was not ameliorated by the fact that the defendant-author had actually attended the Miss America Pageant at which the real Miss Wyoming performed, nor by the fact that the appellate court ultimately overturned the judgment by a two-to-one vote on the ground that the story was too fantastic to have reasonably been taken as "true."¹² Such a "mega-verdict," coupled with the narrow reversal on appeal, is the stuff of which a "chilling effect"¹³ is created.

To be sure, some of the chill might dissipate when one realizes that from a first amendment test case perspective, the facts in *Bindrim*, *Geisler*, and *Pring* were less than noble. Certainly, these are not the sort of cases that would directly threaten the publication of works by the likes of Hemingway. Moreover, the recent "rash" of defamation-in-fiction cases has indeed been small.¹⁴ However, the analytical and doctrinal difficulties posed for the courts by these few cases have been considerable. This result is understandable given the unsettled nature of contemporary defamation law and the difficulty of neatly fitting the defamation-in-fiction action into that structure.¹⁵

Current defamation law is predicated on two polar premises: first, opinion is protected under the first amendment because "there is no such thing as a false idea";¹⁶ but second, "there is no constitutional value in false statements of fact."¹⁷ A work of fiction, however, does not fit neatly into either the category of opinion or that of false speech. Fiction conveys and expands ideas, but it does not normally communicate the kind of opinion whose truth is best tested by "the competition of other ideas."¹⁸ At the same time, although fiction is usually rich in factual de-

¹² *Pring*, 695 F.2d at 443.

¹³ *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (penal statutes in first amendment area that are "susceptible of sweeping and improper application," *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963), may inhibit exercise of first amendment rights by those who seek to avoid prosecution; chilling effect may derive from "the fact of the prosecution, unaffected by the prospects of its success or failure").

¹⁴ See Franklin, *Fiction, Libel, and the First Amendment*, 51 *BROOKLYN L. REV.* 269, 270 & n.7 (1985).

¹⁵ For a complete discussion of these issues, see LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 *BROOKLYN L. REV.* 281 (1985). Cf. Zimmerman, *Real People in Fiction: Cautionary Words About Troublesome Old Torts Poured Into New Jugs*, 51 *BROOKLYN L. REV.* 355 (1985).

¹⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

¹⁷ *Id.* at 340.

¹⁸ *Id.*

tail, the very nature of the genre precludes characterizing a work of fiction as containing "statements of fact."

While false statements of fact are unprotected, modern libel law seeks to avoid the deadening hand of self-censorship by being anchored in the notion that journalists should not be required to publish at the peril of being held strictly liable for factual errors. Accordingly, the Supreme Court has determined that journalism requires strategic protection against such liability. Thus, it has fashioned the well-known requirements that false statements made by media defendants are actionable only if the statements are the product of "actual malice" — intentional or reckless falsity — when the plaintiff is a "public official"¹⁹ or "public figure"²⁰ or if the statements are, at a minimum, the product of negligence when the plaintiff is a "private" individual.²¹ The much-publicized, recent libel suits brought by Generals Sharon and Westmoreland provide classic, although cumbersome, examples of the way in which the safeguards of the actual malice requirements operate. But here too, as with the opinion/fact dichotomy, defamation in fiction does not fit comfortably into the "actual malice" construct.

To the contrary, bringing and defending such an action requires a kind of mutual "doublethink."²² 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.²³ The plaintiff's case thus becomes: "It's me, but it couldn't be me." Similarly, on the author's side, the defense must assert that a fictional portrayal — something that purports to convey no literal truth — was not knowingly, recklessly, or negligently untrue. Moreover, fitting defamation in fiction into the "actual malice" construct appears to defeat one of the important advances in libel law. Modern libel law shifts the inquiry from the writer's attitude toward the plaintiff — measured by common law "mal-

¹⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

²⁰ *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967).

²¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 & n.10 (1974).

²² "Doublethink means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them." G. ORWELL, 1984, at 176 (Signet ed. 1949).

²³ See, e.g., *Pring*, 695 F.2d at 442-43; text accompanying notes 9-10 *supra*.

ice," that is, the writer's ill will toward the plaintiff — to the writer's attitude toward the truth — measured by "actual malice," that is, the writer's knowing or reckless disregard for the truth.²⁴ The gist of the defamation-in-fiction tort, however, seems to invite a return to the treacherous problems of the old inquiry: Was the writer out to "get" the plaintiff?

It is not at all surprising, given these contradictions and anomalies, that the courts have been in a quandary over the issues raised by the need to measure defamation-in-fiction claims against a first amendment yardstick. Furthermore, although the litigated cases in this area have been few in number, their potential impact on doctrine and attitudes is great.

In doctrinal terms, given the primacy of the first amendment, important questions are raised whenever a mode of expression is sought to be regulated on the basis that it causes unacceptable harm to individual or social interests. In some instances, these questions, once resolved, do not linger. This phenomenon is well-illustrated by the Supreme Court's holding that a state, in the interest of protecting children, can regulate the distribution of pornography that depicts children.²⁵ Such relatively bright line doctrines, however, have not been formulated to resolve with finality the questions that have surrounded defamation law since it was first constitutionalized by the Supreme Court in *New York Times Co. v. Sullivan*²⁶ — a decision that embodies "the central meaning of the first amendment" and that has been hailed as perhaps "the best and most important [opinion the Court] has ever produced in the realm of freedom of speech."²⁷ In this area of the law, the continuing effort to

²⁴ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971) (ill will toward plaintiff not an element of "actual malice"); see also *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 10 (1970) (judge erred in defining malice as "spite, hostility or deliberate intention to harm"); *Garrison v. Louisiana*, 379 U.S. 64, 71-75 (1964) (truth defense not negated by defendant's intent to inflict harm).

²⁵ *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, the Supreme Court held that states could ban the distribution of nonobscene child pornography because the first amendment value in such a mode of expression is "exceedingly modest, if not *de minimus*." *Id.* at 762. A state's compelling interest in preventing the sexual exploitation and abuse of children, therefore, was found powerful enough to place materials showing children engaged in sexual activity basically outside the scope of the first amendment. *Id.* at 763-64.

²⁶ 376 U.S. 254 (1964).

²⁷ Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 194.

fashion rules to accommodate both expression and reputation is, indeed, a worthwhile enterprise. Moreover, to the extent that the rules that courts tentatively and haltingly try to formulate seem to provide awkward and inadequate protection for either individual worth or literary freedom, there is even greater reason to pursue this enterprise.

As many of the participants in the Symposium indicated, the handful of defamation-in-fiction cases seem to have had, in practical terms, a palpable effect on authors and their counsel. Professor Schauer, in his provocative reference to "The Dog That Didn't Bark,"²⁸ suggests that despite the perceptions of authors and their counsel, the law is not being used to suppress worthwhile expression or penalize unwitting misrepresentation. After careful analysis, he concludes with a corollary principle: Let sleeping dogs, or at least those that don't bark, lie. Other participants in the Symposium take sharp issue with this assessment. As stated by Victor Kovner, the dog barks not only whenever suit is filed, but whenever an editor alters or deletes portions of the text of an author's manuscript for fear of litigation.²⁹ An increase in defamation-in-fiction litigation certainly may chill the publication of traditional fiction, particularly the *roman à clef*, as well as the newer forms of fiction referred to variously as "docudrama" or "faction."³⁰

Finally, these doctrinal and practical questions must be evaluated against the much larger and more profound issue of the contribution of fiction and literature to our very understanding of the world. The law will undoubtedly continue to wrestle with whether individuals apparently harmed by fictional portrayals should be able to invoke defamation theory or alternative tort theories to redress the hurt allegedly caused by creators and publishers of fiction. The effort to balance the concerns of these individuals, however, against the need to protect creators of fiction, by providing the first amendment "breathing space"³¹ nec-

²⁸ See Schauer, *supra* note 11, at 241.

²⁹ Remarks of Victor Kovner at the Brooklyn Law School Symposium on *Defamation in Fiction* (Oct. 20, 1984).

³⁰ These different genres are described in Anderson, *Avoiding Defamation Problems in Fiction*, 51 BROOKLYN L. REV. 383, 393 nn.56-57 (1985).

³¹ *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973) (any restrictions on first amendment rights must be narrowly drawn to prevent burdening of constitutionally protected speech).

essary to the practice of their craft, surely will proceed from a premise, whether stated or silent, that is based on assessments about the worth of fiction itself. Most of the participants in this Symposium make their arguments against the background of such value judgments. Indeed, first amendment adjudication inevitably involves such judgments. *New York Times Co. v. Sullivan*,³² for example, is predicated on the sense that citizen criticism of government is so important that it merits extensive, though not absolute, first amendment protection.³³

Whether creators of fiction or faction can credibly make a similar claim for their works, thereby entitling such works to a comparable level of protection, depends, at least in part, on ad hoc determinations. To make such judgments, courts inevitably must address questions such as how much Harriet Beecher Stowe contributed to our understanding of slavery, Charles Dickens to our understanding of capitalism, Edwin O'Connor to our understanding of northern politics, Robert Penn Warren to our understanding of southern politics, John Steinbeck to our understanding of the depression, Alexander Solzhenitsyn to our understanding of totalitarianism, and William Styron to our understanding of tyranny.

Ultimately, of course, such judgments are made by history. Meanwhile, however, judges, lawyers, and commentators confronted with real claims and defenses must, at least tentatively, reach conclusions about harm and value and protection in order to dispose of the respective business at hand. This Symposium makes a significant and meaningful contribution to those efforts.

³² 376 U.S. 254 (1964).

³³ See *id.* at 270 (stating that debate on public issues must be "uninhibited, robust, and wide-open").

