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ENTERTAINMENT & SPORTS LAW JOURNAL

DEFAMATION IN FICTION: THE NEED FOR A CLEAR "OF AND CONCERNING" STANDARD*

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I. INTRODUCTION

Fiction has been variously defined as being the "conscious antithesis of truth"¹ as well as a "genre that, by definition, is factually false."² Having been so characterized it is difficult to comprehend how such a literary form could spawn so many defamation suits. The common law elements of defamation³ appear, at first glance, to defy application to fictional works. Indeed, an art form which by definition contains false statements of fantasy seems inapposite to a defamation action.

The difficulty does not arise in the area of pure fantasy, but rather when the author mixes fact with fiction. It is true that most fictional works have some basis in fact, whether it is something the author has actually experienced or merely something he has heard.⁴

It is equally true that when a person purchases a novel he expects to read fiction and not facts. An author may, however, be put in the position of defending a defamation suit if he uses sufficient

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1. *Sphan v. Julian Messner, Inc.*, 21 N.Y.2d 124, 131, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967) (Bergan, J., dissenting).

2. Comment, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U.L. REV. 571, 582 (1980).

3. See *infra* note 11 and accompanying text.

4. See *People v. Charles Scribner's Sons*, 205 Misc. 818, 130 N.Y.S.2d 514 (1959).

facts to allow a reasonable reader to understand that the fictional work is "of and concerning" the plaintiff.⁵

Applying the law of defamation to the genre of fiction has proven to be a difficult task for the courts, with the resulting decisions merely obscuring the issues. Two recent decisions, *Bindrim v. Mitchell*⁶ and *Pring v. Penthouse International, Ltd.*,⁷ have served only to inject further confusion into the application of a defamation cause of action to fiction. This confusion has led one commentator to proffer the idea that fiction should be afforded absolute first amendment protection.⁸ Yet other writers believe that absolute protection is inappropriate and propose, rather, that the constitutional requirement of "fault" be added to the common law elements of defamation.⁹

The scope of this article is limited.¹⁰ The first section of this article discusses the application of the law of defamation to the genre of fiction and is offered in order to familiarize the reader with this area of the law. The second section of this article consists of a detailed analysis of the various *of and concerning* standards developed by courts through the years. The third portion undertakes a critical examination of *Bindrim* and *Pring* to illustrate the need for a clearly delineated judicial standard. Finally, this article will propose such a standard by harmonizing the variety of tests that have been proposed.

II. DEFAMATION AND FICTION

The elements of a *prima facie* case of defamation are: (1) a false and defamatory statement of fact; (2) of and concerning the plaintiff; (3) which is communicated to a third party, either negligently or intentionally, by the defendant; and (4) which injures the

5. One commentator has written: "Once readers perceive that a writer has mingled some facts with fiction, there is a risk that they will see mingling where none was intended. The more subtle or ambiguous the intentional mingling becomes, the greater the risk that readers will make this mistake." Anderson, *Avoiding Defamation Problems in Fiction*, 51 BROOKLYN L. REV. 383, 392-93 (1985). See *Middlebrooks v. Curtis Publishing Co.*, 413 F.2d 141 (4th Cir. 1969).

6. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, cert. denied, 444 U.S. 984 (1979). Justices Brennan, Stewart and Marshall dissented from the denial of certiorari, 444 U.S. 984 (1979).

7. 695 F.2d 438 (10th Cir. 1982) rev'g No. C79-251 (D. Wyo. Feb. 20, 1981), cert. denied, 462 U.S. 1132 (1983).

8. See Comment, *supra* note 2, at 572.

9. Franklin & Trager, *Literature and Libel*, 4 COM./ENT. 205, 233 (1982).

10. The scope of this article is strictly limited to a discussion of the *of and concerning* requirement of defamation actions based upon fictional works. Other articles have devoted a considerable amount of time analyzing the various other factors involved in this area of the law.

plaintiff's reputation.¹¹ Although a plaintiff is required to prove each of these elements, in cases involving fictional works the central issue is whether the plaintiff can be identified with the fictional character.¹² This crucial element is known synonymously as the *identification* element and the *of and concerning* element.¹³ In works of fiction this issue is often the most difficult to establish "because the author has stated explicitly that the material is fictitious or because the context suggests that it should not be taken literally."¹⁴ However, it is generally recognized in defamation cases involving fictional works that once a plaintiff has shown that the defamatory language is "*of and concerning him*," the outcome is all but predetermined in favor of the plaintiff.¹⁵

The infusion of constitutional law into the area of defamation has had a dramatic impact. This development, however, has little application to fictional works.¹⁶ In fact, one commentator has gone so far as to write that *New York Times Co. v. Sullivan*,¹⁷ and its progeny, have been "misapplied to works of fiction."¹⁸ As a result,

11. See generally RESTATEMENT (SECOND) OF TORTS § 558; Wilson, *The Law of Libel and the Art of Fiction*, 44 LAW & CONTEMP. PROBS. 27, 32-33 (1981).

12. Franklin & Trager, *supra* note 9, at 208.

13. W. PROSSER, PROSSER ON TORTS § 111, at 749 (4th ed. 1971).

14. Franklin & Trager, *supra* note 9, at 208-09.

15. Comment, *supra* note 2, at 578, n.49; see Comment, *Defamation in Fiction: With Malice Toward None and Punitive Damages for All*, 16 LOY. L.A. L. REV. 99, 103 (1983).

16. For a detailed discussion of the constitutional infusion into the area of defamation, see Franklin, *Fiction, Libel, and the First Amendment*, 51 BROOKLYN L. REV. 269 (1985); Silver, *Libel, the "Higher Truths" of Art, and the First Amendment*, 126 U. PA. L. REV. 1065 (1978); Zimmerman, *Real People in Fiction: Cautionary Words About Troublesome Old Torts Poured Into New Jugs*, 51 BROOKLYN L. REV. 355 (1985); Comment, "*Clear and Convincing*" Libel: *Fiction and the Law of Defamation*, 18 YALE L. J. 520 (1983); Wilson, *supra* note 11; Comment, *supra* note 2.

17. 376 U.S. 254 (1964).

18. Comment, *supra* note 16, at 526, wherein the author stated:

The Supreme Court has suggested, although not in the context of libel litigation, that works of art and entertainment are entitled to First Amendment protection. The Court has also stated, however, that "calculated falsehood," "the lie, knowingly and deliberately published," deserves no such protection. The two statements seem inconsistent, for works of fiction, while not purporting to be factually true and therefore not precisely "lies," surely are calculated fabrications. Because the constitutional law of libel has evolved chiefly in cases concerning the news media and thus, has dealt with statements purportedly true but actually false, the Court's pronouncements on the calculated falsehoods that arise in more typical libel cases have been misapplied to works of fiction. As a result, such works now enjoy only very limited First Amendment protection.

The precise scope of the *Sullivan* rule, which assists the news media by giving them a limited constitutional privilege for erroneously defamatory statements, is meaningless when applied to works of fiction. Actual malice, as the *Bindrim* court observed, "concentrates solely on defendants' attitude toward the truth or falsity of the material published . . . and not on malicious motives."

this article will not discuss the application, or misapplication, of the constitutional aspects of defamation laws to fictional works. The primary focus of this article is on how the *of and concerning* element may be satisfied and how and why this issue needs to be clarified.

III. THE EVOLUTION OF THE "OF AND CONCERNING" ELEMENT IN DEFAMATION CASES INVOLVING WORKS OF FICTION

Perhaps the first case to develop a standard to apply in defamation cases involving a work of fiction is the British case of *E. Hulston Co. v. Jones*.¹⁹ In *Jones*, the House of Lords addressed the issue of whether a plaintiff whose name was used in a fictional work could sue the publisher of the work for defamation. The name was the only similarity between the plaintiff and the fictional character. The test developed in *Jones* was based upon the reasonable perceptions of the audience rather than upon the intent of the author.²⁰ The House of Lords allowed the jury to determine whether reasonable readers would understand that the plaintiff was the intended object of the story.²¹ Thus, the *of and concerning* standard to be applied in defamation actions based upon fictional works, as first enunciated in 1910, was a "reasonable reader" standard.²²

The first American case to apply the reasonable reader standard to a work of fiction was *Corrigan v. Bobbs-Merrill, Co.*²³ *Corrigan* was a libel action brought by Joseph Corrigan, a magistrate

But because 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.

Id. (citations omitted) (original in emphasis).

19. [1909] 2 K.B. 44, *aff'd*, [1910] A.C. 20.

20. See 26 T.L.R. 128 (1909). See also, Smith, *Jones v. Hulston: Three Conflicting Judicial Views as to a Question of Defamation*, 60 U. PA. L. REV. 365 (1912).

One commentator has written that the *Jones* "reasonable reader test had two elements: (1) whether the reader believed that the story referred to a real person, or merely a literary type; and (2) whether the reader believed the story referred to the plaintiff." Comment, *Defamation in Fiction*, *supra* note 15, at 103.

21. 26 T.L.R. 128, 129 [1909]. The holding in *Jones* was summarized by the court as:

Thus, although people who did not know the plaintiff would not reasonably believe that he was being described, and people who knew the plaintiff well would not so believe (because many of the facts ascribed to [Jones] were not true of the plaintiff), liability might nevertheless be found, as people who knew the plaintiff—but did not know him well—might have believed that he was the subject of the article.

Id.

22. 26 T.L.R. 128, 129 [1909].

23. 228 N.Y. 58, 126 N.E. 260 (1920).

of the Jefferson Market Court in New York City, against the author and publisher of the novel *God's Man*.²⁴ The novel depicted New York's underworld and contained a chapter in which the hero appeared before "Justice-ala Cornigan" of the Jefferson Market Court.²⁵ The inference derived from this chapter was that Justice "Cornigan's" decisions were somehow influenced by political considerations. The court determined "unmistakably that the author . . . intended . . . deliberately and with personal malice to vilify the plaintiff."²⁶

The defendants in *Corrigan* argued that the work was completely fictitious and was therefore not written about an existing person or persons. The defendants also argued that they could not be liable because they did not know the plaintiff and had no intent to injure him.²⁷ In response to the defendant's second argument, the court simply stated "[t]he question is not so much who was aimed at as who was hit."²⁸

The cases decided since *Corrigan* have been inconsistent in their rationales, failing to clearly delineate an *of and concerning* standard to be applied in defamation actions involving fictional works. As a general proposition, most courts have used some variation of the reasonable reader standard when determining the *of and concerning* element of defamation in cases involving works of fiction.²⁹

In *Wright v. R.K.O. Radio Pictures, Inc.*,³⁰ the court formulated the *of and concerning* requirement in terms of "whether or not a considerable and respectable class in the communities where the defendant's picture was shown would identify the characters as these two plaintiffs."³¹ The requirement that the statements be defamatory was couched in similar terms; *i.e.*, whether or not the work "would tend to discredit the plaintiffs in the view of a consid-

24. *Id.*

25. *Id.*

26. *Id.* It would appear that the court in *Corrigan* imposed an intent standard in their analysis. Compare the *Corrigan* court's finding with defendant's argument that they did not know the plaintiff and had no intent to injure him. *Id.* at 59, 126 N.E. at 262.

27. *Id.* at 59, 126 N.E. at 212.

28. *Id.* It is interesting to note that the two earliest cases in this area both employed standards that focused on whether the plaintiff was an intended victim. See *supra* notes 21 and 26 and accompanying texts.

29. See Comment, "Hey, That's Me!"—*The Conundrum of Identification in Libel and Fiction*, 18 CAL. W. L. REV. 442, 452 (1982).

30. 55 F. Supp. 639 (D. Mass. 1944).

31. *Id.* at 640.

erable and respectable class in the community."³² The *Wright* court dismissed the plaintiffs' action because there was no evidence that anyone, though they would have had to presumably been members of a considerable and respectable class in the community, identified the plaintiffs with their fictional characters.³³

The *Wright* decision illustrates the unfortunate results of attempting to define the *of and concerning* element in terms of a considerable and respectable class in the community. Because the reasonable reader standard is primarily viewed by the understanding of those to whom the statement is addressed, a court should delineate the factors involved in determining who a reasonable reader is before it injects vague terms such as "respectable" or "considerable" into the analysis.

Four years after *Wright*, the District Court for the District of Massachusetts adopted a similar standard. The court in *Kelly v. Loew's, Inc.*,³⁴ stated that "[i]n deciding whether a statement is defamatory, the rule is to determine what its effect is upon any respectable, substantial part of the community to which the statement was addressed."³⁵ The peculiar factual setting in *Kelly* led the court to add the requirement that a court look to the "community to which the statement was addressed."³⁶

Kelly was a libel action brought by a commander in the United States Navy against the producer of the motion picture *They Were Expendable*. The movie, and the book upon which it was based, involved the deeds of Commander Robert Kelly during World War II. The book used Commander Kelly's name repeatedly. However, the movie, which incorporated the standard disclaimer,³⁷ portrayed the exploits of "Rusty Ryan."³⁸

Ryan appeared to the general viewing audience as having tremendous virtues. He was a gallant, generous and kind officer with

32. *Id.*

33. *Id.* at 641.

34. 76 F. Supp. 473 (D. Mass. 1948).

35. *Id.* at 486.

36. *Id.*

37. *Id.* at 485. An example of a standard disclaimer is: "The persons and events depicted in this movie are fictitious and any similarity to actual persons living or dead is purely coincidental." The court in *Kelly* labeled this type of disclaimer as a "disingenuous legend" which would have been ignored by the average viewer.

It has been written that the standard disclaimer "has never been sanctioned in any reported decision as a successful technique to avoid liability." See Comment, *Defamation in Fiction*, *supra* note 15, at 116.

38. *Kelly*, 76 F. Supp. at 485. This distinction had no impact on the court's decision since the "defendant plainly asked the audience to believe—and . . . many of them did believe—that Ryan in the movie was substantially like Kelly in life." *Id.*

an "impetuous eagerness for action."³⁹ However to an audience of Naval officers, Ryan appeared to be "headstrong, undisciplined [and] resistant to orders."⁴⁰ Because the plaintiff was a member of a professional group, the court reformulated the *of and concerning* standard to take into account the inevitable divergence in the understandings of different audiences.⁴¹ On appeal, the First Circuit defined the identity issue to be "whether to permanent officers of the United States Navy the portrayal of plaintiff as resembling Ryan would tend to lower his reputation."⁴²

The court of appeals in *Kelly* utilized an *of and concerning* standard similar to that used in *Wright v. R.K.O. Radio Pictures, Inc.* Although leaving undefined such terms as *respectable* and *substantial*, the *Kelly* court did narrow the scope of "community" to the "community to which the statement was addressed." More specifically, the appeals court narrowed community to the community of which the plaintiff was a member.

In 1951 the Court of Appeals for the Eighth Circuit offered a new formulation of the standard to be used when determining whether the *of and concerning* element has been satisfied.⁴³ In *Davis v. R.K.O. Radio Pictures, Inc.*,⁴⁴ the court phrased the test as "whether persons who knew or knew of the plaintiff could *reasonably* have understood the exhibited picture to refer to him."⁴⁵ Although the *Davis* court altered the *of and concerning* standard to include only those persons who "knew or knew of the plaintiff," identification was still required to be made by reasonable readers. In fact, the court stated that a cause of action could not be established merely by showing that "someone said he understood that the character depicted [in the fictional work] referred to plaintiff."⁴⁶ A version of the *Davis* test was applied by the court in *Wheeler v. Dell Publishing Co.*⁴⁷

Wheeler was an action for libel and invasion of privacy based

39. *Id.* at 481.

40. *Id.* at 475.

41. As stated above, a non-military audience would applaud the exploits of Rusty Ryan, while an audience of Naval Officers would not approve of Ryan's antics. By limiting the *of and concerning* standard to the perceptions of Commander Kelly's peers, the court implicitly found the work to be defamatory only if Commander Kelly's reputation as a Naval Officer was tarnished as a result of this portrayal.

42. *Id.* at 486.

43. *Davis v. R.K.O. Radio Pictures, Inc.*, 191 F.2d 901 (8th Cir. 1951).

44. *Id.*

45. *Id.* at 904 (original emphasis).

46. *Id.*

47. 300 F.2d 372 (7th Cir. 1962).

upon the novel and motion picture *Anatomy of a Murder*. The work was a fictionalized account of the actual murder trial of Lieutenant Petterson.⁴⁸ Petterson had shot and killed Maurice Chenoweth for the alleged rape of Petterson's wife. Although the novel and movie were based upon the actual Petterson trial, the names of the participants and some of their descriptions were altered.⁴⁹ The novel and movie involved the shooting of Barney Quill by Lieutenant Manion for the rape of Manion's wife.

The plaintiffs in *Wheeler* included Hazel Wheeler and Terry Ann Chenoweth, the widow and surviving daughter respectively of Maurice Chenoweth.⁵⁰ Hazel Wheeler alleged that she had been defamed by and identified with the "unsavory characteristics" of Janice Quill, the wife of the victim in *Anatomy of a Murder*.⁵¹ The fictional characters were quite different physically from their real life counterparts. Janice Quill, for example, was described as "that dame with the dyed red hair and livid scar on her right cheek who had sworn at him in everything but Arabian . . ."⁵² The plaintiff Hazel Wheeler did not look anything like Janice Quill, nor did Ms. Wheeler use bad language.

Using a version of the *Davis* test, the *Wheeler* court affirmed the trial court's grant of summary judgment in favor of the defendants. On appeal the summary judgment was affirmed, even though the appellate court noted that the events and locale depicted in the fictional works might suggest to those who knew the Chenoweth family that Hazel and Janice were one in the same.⁵³ As the court stated, however, "suggestion is not identification."⁵⁴

48. *Id.* at 374.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 376. Terry Ann Chenoweth alleged that she had been identified with "Mary Pilant," the illegitimate daughter of Barney Quill in the book. However, Ms. Chenoweth differed greatly from her fictional counterpart. For example, Terry Ann was only nine years old at the time of the actual trial while Mary was sixteen. In addition, Mary played an inconspicuous role in both the novel and the movie. These differences between Terry Ann and Mary led the court to conclude that no cause of action had been stated as to Terry Ann. *Id.* at 376.

53. *Id.*

54. *Id.* *Wheeler* involved a "fictionalized account" of an actual murder trial. As a result, it may be fair to assume that anyone familiar with the real Petterson trial could not help but identify Lieutenant Manion in the novel with Lieutenant Petterson in real life; Barney Quill with Maurice Chenoweth; Mary Pilant with Terry Ann Chenoweth; and Janice Quill with Hazel Wheeler. Accordingly, if a reasonable reader who knew or knew of the Petterson trial identified one of these fictional characters with their real life counterparts, the *of an concerning* element should have been satisfied here. It was not. The court seemed content to hold "suggestion is not identification." *Id.* at 376.

The court further noted that Hazel denied having any of the "unsavory characteristics" of Janice. As a result, those who knew or knew of Hazel "could not [have] reasonably identif[ied] her with Janice Quill."⁵⁵ The *Wheeler* court ultimately concluded that "any reasonable person who read the book and was in a position to identify Hazel Wheeler with Janice Quill would more likely conclude that the author created the latter in an ugly way so that none would identify with Hazel Wheeler."⁵⁶ The *Wheeler* court emphasized the dissimilarities between the plaintiffs and their fictional counterparts and sought to determine how a reasonable person who knew the plaintiffs would interpret those differences.

In *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*,⁵⁷ the court focused its attention on how rational viewers would view the farcical aspects of a fictional work.⁵⁸ In *Notre Dame*, a university and its president brought an action based upon unfair competition and invasion of privacy to enjoin the release and distribution of a motion picture entitled *John Goldfarb, Please Come Home*.⁵⁹ Both the movie and the book upon which it was based related the events surrounding the arrangement and playing of a collegiate football game.⁶⁰ The game was played in the mythical Arab country of Fawzia and pitted the University of Notre Dame against Fawz U.⁶¹ The trial court granted the injunction.

55. *Id.* at 376.

56. *Id.* The issue is whether an author escapes liability by creating a fictional character who is physically and emotionally "uglier" than the identifiable real life person upon whom the characterization is based. In discussing the holding in *Wheeler*, one writer commented: "the suggestion that because of the uncomplimentary portrayal no one who knew the real widow could reasonably identify her with the fictional widow, only affirms the conclusion that the depiction is defamatory and does not negative the element of identification." See Comment, *Defamation in Fiction*, *supra* note 15, at 112. If the author in *Bindrim* would have created a fictional character who was physically and emotionally "uglier" than the identifiable real life person upon whom the characterization was based, he would not have been held liable. See *infra* notes 125-127 and accompanying texts.

57. 22 A.D.2d 452, 256 N.Y.S.2d 301 (1965). *Notre Dame* was an invasion of privacy action brought under §§ 50 and 51 of the New York Civil Rights Act.

58. *Id.* at 456, 256 N.Y.S.2d at 304.

59. *Id.* at 455, 256 N.Y.S.2d at 304.

60. The events surrounding the arrangement of the game began when the Moslem King of Fawzia sent his son to a Catholic college in the United States. When his son was cut from Notre Dame's football team the King formed his own team at Fawz U. To coach his team, the King procured the services of a former football star—"Wrong-Way Goldfarb." Goldfarb was an American pilot who was employed by the Central Intelligence Agency (CIA) to fly a mission over Russia but had mistakenly landed in Fawzia. The King then demanded that the United States arrange a football game between Notre Dame and Fawz U. as the price for allowing the United States to lease an air base in Fawzia. *Id.* at 455, 256 N.Y.S.2d at 303.

61. The night before the game, the Notre Dame players were dined by the King and

On appeal, the court formulated the issue as whether "there [is] any basis for any inference on the part of rational readers or viewers that the antics engaging their attention are anything more than fiction" ⁶² Although the name Notre Dame was used frequently in both the movie and the book, the court concluded that a rational audience "know[s] they are not seeing or reading about real Notre Dame happenings or actual Notre Dame characters Nobody is deceived. Nobody is confused[,] and plainly nobody was intended to be." ⁶³ Therefore, the court lifted the injunction and dismissed the complaint. ⁶⁴

Most of the cases discussed herein have highlighted the dissimilarities between the plaintiff and the fictional character. ⁶⁵ In *Fetler v. Houghton Mifflin, Co.*, ⁶⁶ the court found the similarities to be dispositive. ⁶⁷ Daniel Fetler brought a libel action against the publisher of the novel *The Travelers*. ⁶⁸ Fetler alleged that the main character, Maxim, was actually "of and concerning himself." The portrayal of Maxim was alleged to be libelous because it depicted the character as willingly cooperating with the Nazis. ⁶⁹

The trial court granted a summary judgment in favor of the defendant publisher and Fetler appealed. In reviewing whether the grant of summary judgment was appropriate, the Court of Appeals for the Second Circuit emphasized the fact that "the ruling below deprived plaintiff of the opportunity to prove to a jury that the alleged libel was 'of and concerning' him" ⁷⁰ The issue on ap-

"witness[ed] an orgiastic entertainment provided by dancing girls from the royal harem. The culinary *piece de resistance* [was] spiced mongoose, renowned for its devastating effect on even more sophisticated digestive systems than those of American football players." *Id.* at 455, 256 N.Y.S.2d at 303-04.

In addition to all of the other antics, one of the referees of the game was the Chief of the CIA. However, perhaps the most incredible incidents depicted in the movie occurred during the final minutes of the football game. At that moment, an American female reporter entered the game for Fawz U. and scored the winning touchdown when she was carried over the goal line by a "preposterous oil gusher which erupt[ed] on the football field." *Id.* at 455, 256 N.Y.S.2d at 304.

62. *Id.* at 456, 256 N.Y.S.2d at 304.

63. *Id.* 456, 256 N.Y.S.2d at 305.

64. The position taken by the court in *Notre Dame*, that the fictional work was too ludicrous to be believed, is similar to the position taken by the court in *Pring v. Penthouse International, Ltd.*

65. See *Wheeler*, 300 F.2d 372; *Davis*, 191 F.2d 901; *Kelly*, 76 F. Supp. 463; *Wright*, 55 F. Supp. 639.

66. 364 F.2d 650 (2d Cir. 1966).

67. *Id.* at 651.

68. *Id.* at 650. It is interesting to note that the author of the novel was in reality the plaintiff's brother.

69. *Id.* at 650.

70. *Id.* at 651.

peal therefore was whether a jury, on the undisputed facts, "could not reasonably conclude" that the fictional character was a portrayal of the plaintiff.⁷¹

The *Fetler* court paid deference to an extensive list of similarities offered by the plaintiff between Fetler and Maxim.⁷² In addition to these similarities, Fetler, in an affidavit opposing the summary judgment motion, stated that his brother had told him the novel "was about our father, the family concerts and me."⁷³ In light of both the affidavit and the list of similarities, the Second Circuit concluded that "it was difficult to see how a jury could be characterized as unreasonable if it found that Maxim could reasonably be understood as a portrayal of plaintiff Daniel Fetler."⁷⁴

The defendant in *Fetler* argued that the many dissimilarities between the plaintiff and Maxim, rather than the less numerous similarities, should be controlling.⁷⁵ However, because the order below was a grant of summary judgment, the dissimilarities merely raised an issue of fact as to identification, thereby defeating the trial court's ruling. In addition, the plaintiff submitted four affidavits from readers who identified him from the novel,⁷⁶ as well as another affidavit which stated that at least twelve of the plaintiff's students had asked him whether *The Travelers* was about his family.⁷⁷

The *Fetler* decision appears to be a break from the defamation in fiction cases decided before it. This is because the focus of the court was on the similarities between the fictional work and the plaintiff, rather than merely noting a string of dissimilarities and then ruling that the *of and concerning* element had not been satis-

71. *Id.*

72. The court noted the following similarities:

The novel depicts events in the life of the Solovyov family, composed of a father, mother, and thirteen children of whom ten are boys and the third, fourth and eighth are girls. This is the exact composition of the Fetler family. In the novel, Maxim is the eldest child and is twenty-three years old in 1938; in life, the same is true of plaintiff. In the novel, Maxim is a Latvian by birth; in fact, plaintiff although born in Leningrad, was a Latvian citizen at the time the events in the novel occurred. In the novel, the father is an itinerant Russian Protestant minister whose wife and children perform as a band and choir where the father preaches. Maxim is generally responsible for their temporal needs and to that end dominates them.

364 F.2d at 651.

73. *Id.*

74. *Id.*

75. *Id.* at 653.

76. *Id.*

77. *Id.* at n.8.

fied.⁷⁸ In essence, the *Fetler* court held that since there are extensive similarities as well as numerous dissimilarities between the plaintiff and his fictional counterpart, the court would allow the jury to weigh the evidence and reach a decision. Rather than determining on summary judgment whether a reasonable reader, or a substantial and respectable part of the community, would identify Daniel Fetler with Maxim, the court in *Fetler* left that for the jury to decide.

In *Middlebrooks v. Curtis Publishing Co.*,⁷⁹ the court once again highlighted the dissimilar aspects between the plaintiff and a fictional character. In *Middlebrooks*, the court applied a "pure" reasonable reader test to a fictional short story that had appeared in the *Saturday Evening Post*. The short story featured two teenage boys living in Columbia, South Carolina. The boys stole a number of automobile parts to repair their own car.⁸⁰ One of the teenagers in the story was named Esco Brooks.

The plaintiff, Larry Esco Middlebrooks, was a childhood friend of the author. The two had grown up together in Columbia, South Carolina.⁸¹ Even though the plaintiff produced many witnesses who testified that they believed fictional character Esco Brooks was in fact modeled on the plaintiff, both the district court and the Fourth Circuit entered judgment in favor of the defendants.⁸²

The Fourth Circuit in *Middlebrooks* used the traditional test of "whether [the fictional character] could reasonably be understood as a portrayal of the plaintiff,"⁸³ to determine whether the identification issue had been satisfied. Noting that the short story was obviously a fictional work, the Fourth Circuit held that "[t]he context in which the name appears is important because '[n]ames of characters portrayed in . . . obvious works of fiction

78. The decision in *Fetler* should be compared to that reached by the court in *Wheeler*, 300 F.2d at 375. There was evidence presented in both actions that the fictional work was based upon actual happenings and yet the two cases were decided differently. The court in *Wheeler*, emphasizing all of the dissimilarities between the plaintiffs and their fictional counterparts, held that reasonable readers would not identify the characters with the plaintiffs. In contrast, the court in *Fetler*, highlighting all of the similarities, reversed a grant of summary judgment and concluded that the issue of identification was a jury question.

79. 413 F.2d 141 (4th Cir. 1969).

80. *Id.* at 142.

81. *Id.*

82. *Id.* Note the "many witnesses" produced in *Middlebrooks* as compared to the three witnesses introduced in *Bindrim*.

83. 413 F.2d at 142 (citations omitted).

are normally understood by all reasonable men as not intended to depict or refer to any actual person.'"⁸⁴

The short story did not "parallel the plaintiff's life in any significant manner" and yet the court did not base its holding on the fact that all of the dissimilarities would cause a reader not to identify the plaintiff with the fictional character.⁸⁵ Rather, the court in *Middlebrooks* based its decision upon the fact that the reasonable understanding of most readers is that fictional works are not factual accounts.⁸⁶

The *of and concerning* test set-forth in *Middlebrooks* is wrought with difficulties. First, the court failed to define what constitutes an "obvious work of fiction." This shortcoming enables judges to base their decision on no more than a "gut reaction," rather than on a tailored legal definition.⁸⁷ Second, by basing its decision on the fact that reasonable readers understand obvious works of fiction to be fictitious, the court in *Middlebrooks* essentially held that "fiction is fiction" and as such, cannot give rise to defamation actions. Apparently this is because reasonable readers who read obvious works of fiction presumably realize that the characters depicted therein do not portray actual people no matter how closely they resemble them.⁸⁸ Therefore, under the rationale in *Middlebrooks*, the *of and concerning* element of defamation would *never* be satisfied by obvious works of fiction.

It is true that a person who purchases a novel probably does not "take its words as referring literally to the real world."⁸⁹ Yet,

84. *Id.* at 143 (citations omitted). This holding is in complete contrast to the "many witnesses who testified that they believed Esco Brooks was in fact the plaintiff . . ." See *supra* note 82 and accompanying text.

In discussing the contextual reliance by the court in *Middlebrooks*, one commentator has written:

When the allegedly defamatory work of fiction appears in a short story, magazine, or collection of short stories (as opposed to a novel or a feature length film), some courts have looked to a fictional or humorous context to avoid liability on the theory that the context vitiates the defamatory import of the work.

See Comment, *Defamation in Fiction*, *supra* note 15, at 117.

85. 413 F.2d at 143.

86. *Id.* This "fiction is fiction" ruling is similar to the rationale employed by the courts in *Notre Dame* and *Pring*.

87. This situation is analogous to Justice Stewart's definition of "hard core" pornography in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), wherein he stated: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not." 378 U.S. at 197 (Stewart, J., concurring) (emphasis added).

88. See *supra* note 66 and accompanying text.

89. Comment, *supra* note 16, at 531. See Comment, *Fiction Based on Fact: Writers'*

as one writer relates: "despite the common understanding of the term 'fiction' and the standard disclaimer of resemblance to real people and events that prefaces many fictional works, many readers seem nonetheless inclined to take fiction, or aspects of fiction, as the literal truth."⁹⁰ As a result, neither the classification of a work as fiction nor the presence of a disclaimer should be dispositive.⁹¹

Perhaps the best formulation of a standard to determine the *of and concerning* element of defamation was set forth in *Geisler v. Petrocelli*.⁹² *Geisler* was an action for libel and invasion of privacy against the author of a book entitled *Match Set*. The work was about a female transsexual tennis player in the so-called corrupt world of professional tennis.⁹³ The novel's main character bore the same name as the plaintiff.

The book purported to be a work of fiction and its jacket contained the standard disclaimer.⁹⁴ The court formulated the *of and concerning* test to be that a "reasonable reader must rationally suspect that the protagonist is in fact the plaintiff, notwithstanding the author's and publisher's assurances that the work is fictional."⁹⁵ In discussing the burden of proof which a plaintiff must bear in a defamation action, the Second Circuit stated that a plaintiff must demonstrate that:

[T]he libel designates the plaintiff in such a way as to let those who knew [her] understand that [she] was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that [she] is the person meant.⁹⁶

Under these standards, the *Geisler* court concluded that plaintiff's pleadings were sufficient and that she was entitled to present evidence in support of her claims.⁹⁷

Three years after *Geisler* the New York Court of Appeals de-

Liability for Libel and Invasion of Privacy, 14 U. CAL. D. L. REV. 1029, 1040 (1981).

90. See Comment, *supra* note 16, at 532.

91. Indeed, the court in *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650 (2d Cir. 1966) held that "there was no justification for any reliance by the district judge upon . . . the usual disclaimer . . ." 364 F.2d at 653-54. See also Comment, *Defamation by Fiction*, 42 Md. L. Rev. 405, 407 (1974).

92. 616 F.2d 636 (2d Cir. 1980).

93. *Id.* at 638.

94. *Id.* See also *supra* text accompanying notes 37 and 91.

95. 616 F.2d at 639.

96. *Id.*

97. *Id.*

cided *Springer v. Viking Press*.⁹⁸ *Springer* involved a libel action based upon a novel entitled *State of Grace*.⁹⁹ The plaintiff Lisa Springer alleged that she had been defamed by chapter ten of the novel. *State of Grace* concerned the political and financial worlds of the Vatican.¹⁰⁰ Chapter ten depicted the "origin of one evening in the relationship between [an] Italian industrialist . . . and his mistress, Lisa Blake."¹⁰¹ The chapter, which was only ten and one-half pages long, explicitly depicted the sexual activities of the industrialist and his mistress.¹⁰²

The plaintiff and her fictional counterpart shared a common first name as well as some physical similarities.¹⁰³ Accordingly, Ms. Springer asserted that the portrayal of Lisa Blake in the novel was "of and concerning" herself. Ms. Springer also contended that "a number of persons . . . knew and understood Blake and plaintiff to be one and the same person."¹⁰⁴

The *Springer* court phrased the issue on appeal as "whether a fictional depiction of a person contained in a single chapter of a novel is so closely related to plaintiff in the minds of people to whom she is known as to give rise to a cause of action in defamation."¹⁰⁵ To resolve this issue, the court undertook a comparison of

98. 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983), *aff'g* 90 A.D.2d 315, 457 N.Y.S.2d 246 (1982). For a detailed analysis of the *Springer* decision see Garbus & Kurnit, *Libel Claims Based On Fiction Should Be Lightly Dismissed*, 51 BROOKLYN L. REV. 401, 405-10 (1985). The authors of the article are partners in the law firm that represented the defendants in *Springer*. The Court of Appeals decision is merely a two paragraph affirmation of the decision of the Appellate Division of the New York Supreme Court.

99. *Springer*, 60 N.Y.2d at 919, 470 N.Y.S.2d at 580.

100. *Springer*, 90 A.D.2d at 315, 457 N.Y.S.2d at 246.

101. *Id.* The Court of Appeals was a bit more direct in its characterization of Lisa Blake's role in the novel. The Court of Appeals stated:

We agree with the Appellate Division that whether the complaint sufficiently alleges that the Lisa Blake, portrayed in that chapter as a whore, refers to plaintiff is a matter for the court, and that the similarity of given name, physical height, weight and build, incidental grooming habits and recreational activities of plaintiff and Lisa Blake, a minor character in a work of fiction, are insufficient to establish that the publication was "of and concerning" plaintiff.

Springer, 60 N.Y.2d at 918, 458 N.E.2d at 1257, 470 N.Y.S.2d at 580.

102. *Id.*

103. See Garbus & Kurnit, *supra* note 98, at 406, n.30.

104. *Springer*, 90 A.D.2d at 312, 457 N.Y.S.2d at 247. The plaintiff and author (Tine) were close personal friends up until completion of the draft of *State of Grace* in 1978. Ms. Springer and Tine had attended Columbia University together from 1974 until 1978. The plaintiff and the author discussed the novel's plot during its "hatching stage" and, at Tine's request, Ms. Springer even reviewed the novel for editorial purposes. In fact, Tine told the plaintiff that he had "loosely patterned" portions of the book on the relationship between the two. The persons who identified Springer with Blake also knew both Tine and the plaintiff and the relationship between them.

105. *Springer*, 90 A.D.2d at 317, 457 N.Y.S.2d at 247.

the similarities *and* dissimilarities between the allegedly defamatory work and the plaintiff.¹⁰⁶

The similarities which the plaintiff emphasized included: the physical attributes of Springer and Blake; the fact that both had graduated from college; and that Blake had once lived on a street where Springer now lived.¹⁰⁷ There was, however, a marked difference between the lifestyles of the plaintiff and Blake. Blake drove a BMW automobile, earned seventy-five thousand dollars a year and owned a co-op apartment on Fifth Avenue in New York.¹⁰⁸ Springer, on the other hand, was only a college tutor. The court inferred that as a tutor, Springer's manner of living was substantially different than Blake's.¹⁰⁹

After comparing the similarities and dissimilarities between the plaintiff and Blake, the court dismissed the defamation cause of action. The court ultimately concluded that although the similarities were "in large part superficial, the dissimilarities both in manner of living and in outlook [were] 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 lifestyle of Blake."¹¹⁰

The importance of the *Springer* decision lies not in its formulation of the *of and concerning* element,¹¹¹ but in its method of determining whether the allegedly defamatory work was *of and concerning* the plaintiff. The court did not base its decision only on a review of the similarities or dissimilarities. Indeed, the *Springer* court looked to both aspects and undertook a comparison. Only after comparing and weighing these attitudes did the court make its determination.

IV. *Bindrim* AND *Pring*: MORE CONFUSION

As stated previously, two recent cases, *Bindrim v. Mitchell*¹¹² and *Pring v. Penthouse International, Ltd.*,¹¹³ have injected fur-

106. *Id.* at 318, 467 N.Y.S.2d at 247.

107. See Garbus & Kurnit, *supra* note 98, at 406, n.31.

108. *Id.* at 407-08.

109. *Id.*

110. *Springer*, 90 A.D.2d at 320, 457 N.Y.S.2d at 249.

111. The court in *Springer* noted: "for a defamatory statement or statements made about a character in a fictional work to be actionable the description of the fictional character must be so closely akin to the person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two." *Springer*, 90 A.D.2d at 230, 247 N.Y.S.2d at 249.

112. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, cert. denied, 444 U.S. 984 (1979).

113. 695 F.2d 438 (10th Cir. 1982), rev'g No. C79-251 (D. Wyo. Feb. 20, 1981), cert.

ther confusion into defamation cases based upon fictional works and the appropriate *of and concerning* test to be applied thereto. This section will offer a critical examination of these two decisions in an effort to develop a new standard which will avoid the pitfalls inherent in these two cases.

A. Bindrim: *Indentification Through Therapy Techniques*'

*Bindrim v. Mitchell*¹¹⁴ was a libel action brought by Dr. Paul Bindrim, a psychologist, against Gwen Davis Mitchell, an author, and her publisher for the publication of a novel entitled *Touching*. Dr. Bindrim utilized a group therapy technique known as the "Nude Marathon," wherein patients shed their inhibitions along with their clothes.¹¹⁵ Ms. Mitchell had attended one of Dr. Bindrim's sessions. Before the session, Ms. Mitchell signed an agreement not to write about her experiences.¹¹⁶ Two months later, Mitchell signed a contract with Doubleday to write *Touching*.¹¹⁷

The novel was based upon a nude psychiatric encounter session led by Dr. Simon Herford, a fictional character. Dr. Herford was a psychiatrist¹¹⁸ who was described as being a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms."¹¹⁹ Not only were Dr. Bindrim and Dr. Herford members of different professions, Dr. Bindrim was "clean shaven" with "short hair."¹²⁰

However, the evidence produced at trial revealed parallels between the actual session which Ms. Mitchell attended and those which she wrote about in her novel.¹²¹ In one incident, the novel presented Dr. Herford's conduct as being "unprofessional."¹²² The incident which Ms. Mitchell witnessed, however, revealed that Dr. Bindrim's actions during the episode were cordial, respectable and

denied, 462 U.S. 1132 (1983).

114. 92 Cal. App. 3d 61, 155 Cal. Rptr, 29, cert. denied, 444 U.S. 984 (1979).

115. 92 Cal. App. 3d at 69, 155 Cal. Rptr. at 33.

116. *Id.* at 33-34, 155 Cal. Rptr. at 2.

117. *Id.*

118. Dr. Bindrim was a psychologist. *Id.*

119. 92 Cal. App. 3d at 69, 155 Cal. Rptr. at 37.

120. *Id.* This is in contrast to Dr. Herford's grooming preferences.

121. *Id.* Dr. Bindrim produced a tape recording of the actual session that Ms. Mitchell attended and the court compared the transcript of the tape with the contents of the novel. The parallels found between the session and those which Ms. Mitchell wrote about should be compared to the fictionalized account of the real trial of Lieutenant Petterson. See *supra* notes 45-56 and accompanying text.

122. Again, this should be compared to the characterization of Hazel Wheeler. See *supra* note 52 and accompanying text.

professional in every way.¹²³ The plaintiff alleged that he was defamed because of Mitchell's "inaccurate portrayal of what actually happened at the marathon."¹²⁴ The trial court entered judgment in favor of the plaintiff.¹²⁵

The defendants in *Bindrim* argued on appeal that even if there were untrue statements in the novel, there had been no showing in court that the plaintiff was identified with Dr. Herford. In support of this argument, the defendants emphasized the differences in the name, age, personality,¹²⁶ physical appearance and occupations between Dr. Herford and the plaintiff.¹²⁷ The physical dissimilarities were overwhelming and yet the court was not persuaded.

Although recognizing the existence of these differences, the court in *Bindrim* simply stated that "otherwise the character Simon Herford was very similar to the actual plaintiff."¹²⁸ However, the decision is devoid of any factual evidence illustrating any similarities. In fact, Dr. Herford and the plaintiff shared no similar characteristics besides the fact that "[b]oth (1) were male; (2) offered Nude Marathon group therapy (as did at least ten others in California at that time); and (3) shared a few speech mannerisms."¹²⁹

123. 92 Cal. App. 3d at 77, 155 Cal. Rptr. at 37. The opinion sets out excerpts from the novel and the tape to illustrate the incident in question.

124. 92 Cal. App. 3d at 71, 155 Cal. Rptr. at 35. Since *Touching* was a novel it never professed to be an accurate portrayal of what had transpired in the nude marathon session Ms. Mitchell attended.

125. On appeal, the court did not begin its analysis by determining either whether the novel was *of and concerning* the plaintiff or whether the statements in question were false statements of fact. Rather, the first analytical approach taken by the court in *Bindrim* involved a discussion of the presence of "actual malice" on the part of the defendants. 92 Cal. App. 3d at 71, 155 Cal. Rptr. at 33. The use of this rather unique analytical focal point was apparently fostered by the finding that Dr. Bindrim was a public figure. 92 Cal. App. 3d at 71, n.1, 155 Cal. Rptr. at 35, n.1.

Utilizing the test enunciated in *New York Times Co. v. Sullivan*, the court in *Bindrim* held that plaintiff had to show that the novel was written with knowledge that it was false or with reckless disregard of whether it was false or not. 92 Cal. App. 3d at 71-72, 155 Cal. Rptr. at 34-35. As in *Sullivan*, the *Bindrim* court required that actual malice be shown by clear and convincing evidence.

The *Bindrim* court had little difficulty finding the presence of actual malice. Relying on the fact that the author had attended a session, and therefore knew the true facts, the court states: "Mitchell's reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter and [its differences from] the literary portrayal of the encounter." *Id.* at 72-73, 155 Cal. Rptr. at 35.

126. See Wilson, *supra* note 11, at 47.

127. 92 Cal. App. 3d at 75-76, 155 Cal. Rptr. at 37-38.

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

129. See Comment, *supra* note 91, at 421.

In support of its finding that Dr. Herford was "of and concerning" the plaintiff, the court alluded to the fact that there was "overwhelming evidence that plaintiff and 'Herford' were one."¹³⁰ This so-called overwhelming evidence was comprised solely of the testimony of only three witnesses, all of whom had participated in or observed one of Bindrim's sessions.¹³¹ The only identifying characteristic between Herford and Bindrim to which these three witnesses all testified was that the therapeutic techniques practiced by the plaintiff and the fictional character were similar.¹³² However, as the dissent pointed out, testimony also revealed that at least ten other professionals used encounter therapy which was similar to the plaintiff's Nude Marathon sessions at the time in California.¹³³

The majority opinion speaks of the "many similarities" between the plaintiff and Herford.¹³⁴ However, the court fails to delineate these similarities. Rather, the majority seems content to merely state that "apart from some of those episodes allegedly constituting the libelous matter itself, and apart from the physical differences and the fact that plaintiff had a Ph.D., and not an M.D., the similarities between Herford and Bindrim are clear. . . ."¹³⁵ The court based its entire identification holding on the parallels it found between the novel and the actual session Mitchell attended.¹³⁶ In essence, the *Bindrim* decision stands for the proposition that in order to avoid liability, a fictional author may not relate identifiable personal experiences.¹³⁷ Not only must an author sufficiently disguise all of the physical characteristics of her fictional characters she must also sufficiently conceal the underlying events as well.

Perhaps the most disturbing aspect of the *Bindrim* decision is the lack of evidence which the plaintiff produced at trial. The *of and concerning* element in *Bindrim* was satisfied by the testimony

130. 92 Cal. App. 3d at 76, 55 Cal. Rptr. at 38.

131. In *Bindrim* the court found the testimony of three friends of the plaintiff to be dispositive of the identification issue. This should be contrasted with the holding in *Springer* where, even though the author told the plaintiff that he had "loosely patterned" portions of the book on the close friendship between the two, the court granted summary judgment in favor of the defendants. *But see supra* note 104 and accompanying text.

132. 92 Cal. App. 3d at 86, 155 Cal. Rptr. at 43-44.

133. *Id.*, 155 Cal. Rptr. at 44.

134. *Id.* at 76, 155 Cal. Rptr. at 37.

135. *Id.*

136. *Id.* See also text accompanying note 78 *supra*.

137. *But see supra* notes 72 and 78 and accompanying texts.

of three friends of the plaintiff and nothing more.¹³⁸ It is not the number of witnesses that is disturbing, but rather it is the fact that the identification requirement was satisfied by testimony which only revealed that the plaintiff and Herford practiced similar techniques¹³⁹ even though there was also evidence that up to twenty-four other therapists in California at that time practiced similar therapeutic techniques.

B. Difficulties With *Bindrim*

There are two major difficulties with the *Bindrim* decision: (1) it opens the door for a multiplicity of suits based upon a single fictional work, and (2) its application of an actual malice standard to a fictional work was improper.¹⁴⁰ First, by allowing the identification requirement to be satisfied by the testimony of three personal friends of the plaintiff, all of whom based their opinions merely upon the similarity in therapy practices, the court in *Bindrim* opened up the proverbial floodgates. Under *Bindrim*, a fictional character could conceivably be identified with several plaintiffs.¹⁴¹ Testimony in *Bindrim* revealed that there were possibly two dozen therapists who all practiced therapeutic techniques similar to those of the fictional Dr. Herford. Theoretically, the novel *Touching* could have been of and concerning over twenty different persons. Such a situation would be possible so long as each of these other therapists were able to produce two or three witnesses who could identify them with the fictional character merely because of

138. See Wilson, *supra* note 11, at 29, n.24. See also *supra* note 131 and accompanying text.

It is interesting to note that although the plaintiff in *Pring* had been identified with the fictional character, recovery was denied in part because friends of the plaintiff testified that the story could not have been about Ms. Pring since she would not have performed the acts described in the article. See *infra* note 168 and accompanying text. In contrast, Dr. Bindrim was allowed to recover against the defendants after three friends of the plaintiff testified that the fictional character was "of and concerning" the plaintiff even though the court found that Dr. Bindrim would not have acted as the fictional Dr. Herford did. See *supra* notes 122-25 and accompanying texts.

139. See Comment, *supra* note 2, at 577, n.43. The fact that the plaintiff and Dr. Herford practiced similar types of therapy should not have been sufficient for liability to attach. If the author had used an acceptable archetypal literary device in *Touching* there is little doubt that she could have escaped liability. See *infra* note 159 and accompanying text. This is especially true since Dr. Bindrim was found to be a public figure. See *supra* text accompanying note 125.

140. See *supra* text accompanying note 125.

141. Additionally, if the decision in *Bindrim* was based upon the inconsistencies between the novel and the actual session that the author had attended, the holding in *Wheeler* would have been reversed if decided after *Bindrim*. See *supra* text accompanying note 54.

the similarities in therapy styles.

Second, the *Bindrim* court's reliance upon *New York Times, Co. v. Sullivan* is misplaced.¹⁴² *Touching* did not purport to be a factual account of a nude marathon session. The novel was simply that, a novel. *Touching* was a fictionalized account of an experience Ms. Mitchell had.¹⁴³ Fiction is of necessity false. Indeed, simply by virtue of its format a novel purports to be factually untrue.¹⁴⁴ Yet, in a footnote, the court stated "[t]he fact that 'Touching' was a novel does not necessarily insulate Mitchell from liability for libel. . . ."¹⁴⁵ The proposition cited in the footnote is correct, however, it fails to explain the disturbing use of the *Sullivan* test, which is couched in terms of an author's knowledge or reckless disregard for the truth, to a work which by definition is untrue. Indeed, it has been written that the actual malice standard of *Sullivan* is "meaningless when applied to works of fiction."¹⁴⁶

C. Pring: "I Will Know It When I See It"¹⁴⁷

*Pring v. Penthouse International, Ltd.*¹⁴⁸ was a defamation action based upon a fanciful article entitled "Miss Wyoming Saves the World . . . But She Blew the Contest with Her Talent,"¹⁴⁹ which appeared in an issue of *Penthouse* magazine. The article was a bawdy satire featuring the unique "talents" of Charlene, a con-

142. See Comment, *supra* note 16, at 521; see Comment, *supra* note 2, at 578.

The brief submitted by the plaintiff in *Bindrim* divided Dr. Herford's practices into two categories: (1) those which were similar were classified as "identifying," and (2) those which were dissimilar were alleged to be libelous because they were false. Stated differently, the similarities between the plaintiff and the fictional character were said to satisfy the *of and concerning* requirement while the dissimilarities were deemed to be defamatory.

143. See *supra* note 124. But see *supra* note 78.

144. See Comment, *supra* note 29, at 446-47.

145. 92 Cal. App. 3d at 73, n.2, 115 Cal. Rptr. 29 at 35, n.2.

146. See, Comment, *supra* note 16, at 526.

147. I have taken the liberty of paraphrasing somewhat, Justice Stewart's oft-cited quotation from *Jacobellis*. See *supra* note 87.

"I Will Know It When I See It" is used as a heading for the section of this Article, which analyzes *Pring*, for several reasons. First of all, the court in *Pring* failed to delineate how to determine whether a fictional work is "fanciful" enough to avoid liability. Second, in so failing to develop a clear and simple standard, the court in *Pring* may be said to have engaged in nothing more than an "I will know it when I see it" analysis.

148. 695 F.2d 438 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983).

149. Cioffari, *Miss America Saves the World . . . But She Blew the Contest With Her Talent*, *Penthouse*, Aug., 1979 at 155.

The article was written by Dr. Phillip Cioffari, a university professor with a Ph.D. in English. It is interesting to note that Dr. Cioffari "had actually attended the Miss America Pageant at which the real Miss Wyoming performed . . ." Gora, *Introduction: Literature, Life, and the Law*, 51 BROOKLYN L. REV. 225, 227 (1985).

testant in the Miss America pageant.¹⁵⁰ Charlene was the reigning Miss Wyoming and her talent in the contest was twirling a baton.

The article described Miss Wyoming's thoughts as she was about to perform her baton routine during the talent portion of the pageant. Before going onstage, Charlene remembers an incident in high school where she performed fellatio on a football player at her school, causing him to levitate.¹⁵¹ Two other incidents regarding Miss Wyoming's sexual "talents" were also described in the article. First, Charlene stopped the band by performing a fellatio-like act on her baton while on stage. The other episode occurred at the end of the stage while the finalists were center stage. There, before a nationally televised audience,¹⁵² Miss Wyoming performed fellatio on her coach causing him to levitate as well.

The reigning Miss Wyoming at the time the article was published, Kimberli Jayne Pring, brought an action for defamation against *Penthouse* and the author. Ms. Pring, who had become the "brunt of many jokes,"¹⁵³ alleged that the article created the impression that she actually performed the acts related therein.¹⁵⁴ The trial court awarded Ms. Pring fourteen million dollars in damages against *Penthouse* and thirty-five thousand dollars against the author.¹⁵⁵

On appeal, the Tenth Circuit formulated the issues as: (1) "whether the publication was about the plaintiff, that is, whether it was of and concerning her as a matter of identify," and (2) "whether the story must reasonably be understood as describing actual facts or events about the plaintiff or actual conduct of the plaintiff."¹⁵⁶ The duality of these issues ultimately collapsed into a single inquiry of whether the article presented false statements of fact. This is because the jury had determined that the article was in fact "of and concerning" Ms. Pring, and the weight of the evidence presented at trial left the Tenth Circuit with no choice but to affirm that determination.¹⁵⁷ Consequently, the central issue on appeal was "whether the story must reasonably be understood as describing actual facts or events about the plaintiff or actual con-

150. The satirical aspect of the article was the suggestion that Charlene might "'save the world' with her real talents . . . [as] an ambassador of love and peace." 695 F.2d at 441.

151. *Id.*

152. The court noted that the "television cameras were not on the new Miss America but 'remained' on Charlene and her coach who was then rising into the air" *Id.*

153. See Comment, *supra* note 91, at 424.

154. 695 F.2d at 441.

155. See Comment, *supra* note 91, at 423, n.195.

156. 695 F.2d at 439.

157. *Id.* at 442. See Comment, *supra* note 16, at 541-42, n.86.

duct of the plaintiff."¹⁵⁸ The court expressed this in terms of a "reasonably understood" element.

One writer has criticized *Pring* because of the appellate court's failure to re-analyze the *of and concerning* element.¹⁵⁹ Indeed, it has been suggested that the author merely used an acceptable archetypal literary device and therefore, the article was not "of and concerning" the plaintiff, regardless of what the jury found.¹⁶⁰ The similarities between the plaintiff and Charlene were that both had coaches named Corky, both were baton twirlers, both wore blue outfits during the talent competition and both held the title of Miss Wyoming.¹⁶¹ There were, however, also many dissimilarities. They included: the fact that their names were different; they had attended different high schools; their high school friends had different names; the year of their reign was different; and the style of their costumes was different.¹⁶² The appellate decision failed to address the identification element at all, choosing instead to merely affirm the district court's finding that the article was indeed "of and concerning" the plaintiff.

The lower court's judgment and award of damages in favor of Ms. Pring was reversed on appeal. The reversal was based primarily upon what the Tenth Circuit viewed as the utter unbelievability of the incidents depicted in the article. The defendants argued that the article was "complete fantasy which could not be taken literally."¹⁶³ The court correctly noted that, by itself, the characterization of a work as fiction is not dispositive, and formulated the test as: "Whether the charged portions [when read] in context could be reasonably understood as describing actual facts about the plaintiff of actual events in which she participated. If it could not be so understood, the charged portions could not be taken literally."¹⁶⁴

Applying this test to the article in *Penthouse*, the court had little difficulty finding that the article could not reasonably be understood as describing actual facts or events. The court stated "it was readily apparent . . . that [the article] was all fanciful and did

158. 695 F.2d at 439.

159. See Comment, *supra* note 91, at 424.

160. *Id.*

161. *Id.* at 425.

162. *Id.* Rather than merely determining that the dissimilarities were controlling, the better approach is to examine and weigh both the similarities *and* the dissimilarities as the court did in *Springer*. See *supra* note 106 and accompanying text.

163. 695 F.2d at 439.

164. *Id.* at 442; see *supra* notes 89-91 and accompanying text.

not purport to be a factual account."¹⁶⁵ In short, the *Pring* court held that although all but the "charged portions" of the article were believable and allowed readers to identify the plaintiff as the fictional character, there was no liability since the author imputed the reputation of Ms. Pring in such a spectacular and unbelievable fashion.¹⁶⁶

Chief Judge Seth, writing for the majority, found three aspects of the article to be important. First, the court characterized the incidents of fellatio coupled with levitation as being "impossibility and fantasy within a fanciful story."¹⁶⁷ Second, Chief Judge Seth found it "significant" that the final incident of fellatio was nationally televised, stating "[t]his in itself would seem to provide a sufficient signal that the story could not be taken literally, [that is] could not be reasonably understood as a statement of fact."¹⁶⁸ Finally, the court buttressed its opinion by citing the testimony of members of the community who knew Ms. Pring and who all testified that the story could not possibly have been about her since she would not have performed the acts described in the article.¹⁶⁹ Viewing the article as a whole, the Tenth Circuit found that it was simply "impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else."¹⁷⁰ In sum, the court held "the incidents charged were impossible [and] [t]he setting was impossible."¹⁷¹

165. 695 F.2d at 441. Once again, since the article was a fictional work it would be readily apparent that it was not a "factual account." However, simply because a fictional work is not a factual account has not, by itself, precluded liability being established for defamatory statements found therein.

It is interesting to note that the Tenth Circuit found the *Penthouse* article to be a "gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants . . ." 695 F.2d at 443. Similarly, the court held that the story had "no redeeming features whatever." *Id.*

166. 695 F.2d at 441. It is this author's opinion that if a fictional work similar to the one involved in *Pring* had been written about the wife of a Tenth Circuit judge, liability would have been found regardless of the spectacular and unbelievable nature of the defamatory portions.

167. 695 F.2d at 441.

168. *Id.* This holding is similar to the position taken by the court in both *Notre Dame* and *Middlebrooks*.

169. 695 F.2d at 441-42. *But see supra* text accompanying note 138.

170. 695 F.2d at 443. Is it not possible that Ms. Pring was "defamed" by the imputation of promiscuity implicit within the *Penthouse* article regardless of the fact that her "talent" resulted in levitation? Indeed, the court noted that Ms. Pring had become the brunt of many jokes. So, is not the reputational harm caused by accusations of engaging in acts of fellatio and public exhibitionism sufficient to find the existence of libel?

171. 695 F.2d at 443.

D. *Difficulties With Pring*

The problems with the *Pring* decision are twofold: (1) it enables authors of fiction to avoid liability by sufficiently embellishing identifying elements of a work with fantastic or unbelievable acts;¹⁷² and (2) it places a virtuous plaintiff in the precarious position of having to show that those aspects of the article which are similar thereby identify her with the fictional character, while at the same time having to allege that the unflattering and dissimilar aspects of the article defamed her.¹⁷³

The dissent in *Pring* pointed out that the *Penthouse* article was not pure fantasy, but rather it combined both fact and fiction. As Judge Breitenstein so poignantly stated: "I consider levitation, dreams, and public performance as fiction. Fellatio is not."¹⁷⁴ Indeed, it is the imputation of promiscuity attendant fellatio which is defamatory, not the act of levitation. The fact that the author chose to combine the two does not make the defamation any less. As the dissent further noted "Penthouse cannot escape liability by relying on the fantasy used to embellish the fact Responsibility for an irresponsible and reckless statement of fact, fellatio, may not be avoided by the gratuitous addition of fantasy."¹⁷⁵

The *Pring* decision amply illustrates that an author need only embellish the story with fantastic or impossible feats to avoid liability, regardless of how damaging the facts in the story are to the plaintiff's reputation. Thus, while a fictional character may be readily identifiable with a real life person, simply because that character has engaged in some impossible activity, the plaintiff will be denied recovery even though her reputation has been injured.

Yet another disturbing aspect of the *Pring* decision is that the jury found that the article was in fact "of and concerning" the

172. One writer has noted that the broad holding of *Pring* enables a "mischievous fictionist to escape liability for defamation merely by presenting impossible feats in bizarre settings." Comment, *supra* note 91, at 423.

173. This situation has led one commentator to write:

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."

Gora, *supra* note 149, at 228 (citation omitted).

174. 659 F.2d at 443 (Breitenstein, J., dissenting).

175. *Id.* at 444. Judge Breitenstein's comment that "Penthouse cannot escape liability by relying on the fantasy used to embellish the fact" is similar to the statement in *Corrigan* that an author cannot escape liability by the "varnish of fiction." See *Corrigan*, 228 N.Y. at 72, 126 N.E. at 263.

plaintiff.¹⁷⁶ However, simply because the witnesses who identified Charlene with Ms. Pring testified that the plaintiff would not engage in public exhibitionism, Ms. Pring was denied recovery. Such a situation has been described as a "disturbing irony."¹⁷⁷ On the one hand, a plaintiff is required to prove that the fictional character was "of and concerning" the plaintiff. To accomplish this, the plaintiff establishes the similarities between the two people. Concurrently, however, the plaintiff must also show that the fictional work contains false statements of fact which defamed the plaintiff, *i.e.*, prove that the dissimilarities have harmed her reputation. This irony led the court in *Geisler v. Petrocelli* to note:

The more virtuous the victim of the libel the less likely it will be that she will be able to establish this essential confusion in the mind of the third party. Thus, the more deserving the plaintiff of recompense for the tarnishing of a spotless reputation, the less likely will be any actual recovery.¹⁷⁸

V. THE NEED FOR A CLEAR "Of And Concerning" Standard

It is readily apparent that the *of and concerning* standards enunciated by the various courts have been anything but consistent. This situation has been described as a "fully grown Problem-In-Need-Of-A-Solution, replete with numerous suggestions on how the Problem ought to be solved."¹⁷⁹ The earliest cases looked to whether the plaintiff was the intended object of the fictional work, thereby implicitly embracing an intent element.¹⁸⁰ The standards developed by subsequent cases fall into one of two categories: (1) a version of the "reasonable reader" standard;¹⁸¹ or (2) a "fiction is fiction" standard.¹⁸² In the first group of decisions, the court's fo-

176. See *supra* note 156. Traditionally, such a finding necessarily meant judgment in favor of the plaintiff. See *supra* note 15 and accompanying text.

177. See Comment, *supra* note 16, at 532.

178. *Geisler v. Petrocelli*, 616 F.2d at 639.

179. Schauer, *Liars, Novelists, and the Law of Defamation*, 51 BROOKLYN L. REV. 233, 235 (1985).

180. In *Jones*, [1909] 2 K.B. 44, the court allowed the jury to determine whether reasonable readers would understand that the plaintiff was the intended object of the story. Similarly, the court in *Corrigan*, 29 T.L.R. at 129, held that the author of the fictional work "intended . . . deliberately and with personal malice to vilify the plaintiff." *Id.* See *supra* notes 19-29 and accompanying text.

181. See *Fetler, Geisler, Kelly, Davis, Wheeler and Springer*, all discussed above.

182. In *Notre Dame*, the court formulated the issue on appeal to be "whether there [is] any basis for any inference on the part of rational readers or viewers that the antics engaging their attention are anything more than fiction. . . ." 22 A.D.2d at 452, 256 N.Y.2d at 304. Although the court in *Middlebrooks* utilized a version of the reasonable reader test,

cus is upon whether reasonable readers would believe that the fictional character was a portrayal of the plaintiff.¹⁸³ In contrast, the attention of the courts in the second category of cases is primarily upon the work itself and whether reasonable readers would believe that the fictional and unbelievable aspects of the work described actual facts about the plaintiff or actual conduct of the plaintiff.¹⁸⁴

The decisions involving involving variations on the reasonable reader standard may be subdivided even further. Some cases employ a "pure" reasonable reader standard,¹⁸⁵ while others utilize a standard which includes such vague terms as a "considerable and respectable class in the community"¹⁸⁶ or a "respectable and substantial part of the community."¹⁸⁷ Still other courts require that persons who knew or knew of the plaintiff could reasonably identify the fictional character with the plaintiff.¹⁸⁸

Although courts applying a "fiction is fiction" standard speak of the perceptions of "rational readers,"¹⁸⁹ or the reasonable understanding of the audience,¹⁹⁰ the emphasis is clearly upon the work itself rather than upon the understanding of the readers. Such an emphasis is, however, somewhat uncertain. For example, the court in *Middlebrooks* referred to "obvious" works of fiction and how they are understood as such by readers.¹⁹¹ The fiction is fiction test is too subjective. It enables authors to escape liability merely by embellishing fact with fiction.¹⁹² Such a standard is unacceptable. Courts should not be allowed to make a "gut reaction"¹⁹³ on

they also noted: "obvious works of fiction are normally understood by all reasonable men as not intended to depict or refer to any actual person." 413 F.2d at 143. Finally, in *Pring*, the court inquired as to whether the fictional work could reasonably be understood as describing actual facts or events about the plaintiff or actual conduct of the plaintiff.

183. This characterization also encompasses, to a certain degree, *Jones and Corrigan*, even though those cases spoke of intent on the part of the author to portray or vilify the plaintiff.

184. See *supra* note 182.

185. See generally, *supra* notes 66-78 and 92-97 and accompany text.

186. See *Wright*, 55 F. Supp. at 640 (the communities where the movie was shown).

187. See *Kelly*, 76 F. Supp. at 474 (the community to which the statement was addressed).

188. See generally, *Davis*, 191 F.2d at 902; *Wheeler*, 300 F.2d at 373 and *Springer*, 60 N.Y.2d at 917, 458 N.E.2d at 1256, 470 N.Y.S. at 580. One author has stated that in order to eliminate "the possibility of liability in cases of accidental reference . . . it should be incumbent on the plaintiff to show that the defendant in fact drew upon knowledge about the plaintiff in writing the novel or other work of fiction." See Schauer, *supra* note 179, at 259.

189. *Notre Dame*, 22 A.D.2d at 452, 256 N.Y.2d at 301.

190. *Middlebrooks*, 413 F.2d at 141.

191. *Id.*

192. See *supra* note 173.

193. See *Fetler v. Houghton Mifflin, Co.*, 364 F.2d 650 (2d Cir. 1980).

whether they believe that a fictional work includes enough fantastic aspects to ensure that reasonable readers understand that the work is not intended to depict actual persons or happenings.¹⁹⁴

Numerous commentators have offered a variety of suggestions on how the *of and concerning* standard should be worded. One writer has proposed that the *of and concerning* requirement "should be subject to a 'clear and convincing' standard of proof."¹⁹⁵ Another author suggested that an element of "unmistakability" should be added to the standard.¹⁹⁶ Finally, Professor LeBel has gone so far as to propose the development of a new and distinct tort to handle injuries caused by works of fiction.¹⁹⁷ All of these suggestions, however, suffer from the same infirmity. By introducing new terms and new concepts into the *of and concerning* analysis, these proposals will only add to the already confused state of this area of the law. What is needed is a simpler and more pragmatic approach; an approach that will avoid adding vague terms to the standard, while at the same time keep the determination of identify "in the hands" of the jury.

The *of and concerning* standard proposed by this Article is twofold: (1) whether the fictional work, when read as a whole, could be understood by a reasonable reader as depicting an actual person or persons and/or actual events, despite assurances by the author and publisher to the contrary; and (2) whether the fictional character at issue could be understood by a reasonable reader as referring specifically to the named plaintiff.¹⁹⁸ This test involves two levels of inquiry. First, the trier of fact must determine whether the work, when read as a whole, could be understood as

194. *Id.*

195. See Schauer, *supra* note 179, at 259.

196. See Comment, *supra* note 16, at 538-39.

197. LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOKLYN L. REV. 281 (1985) Professor LeBel has suggested the establishment of a new tort for offensive fictional portrayals. *Id.* at 299-338. *Cf.*, Zimmerman, *Real People in Fiction: Cautionary Words About Troublesome Old Torts Poured Into New Jugs*, 51 BROOKLYN L. REV. 355 (1985).

Professor LeBel writes: "Rather than searching for a bright line indicator of identification to distinguish between meritorious and nonmeritorious claims, courts should approach this factor from a pragmatic perspective. Such an approach should focus on the purpose of the inquiry, namely, to determine whether the particular plaintiff is someone who ought to have access to relief for harm allegedly caused by the defendant's published work of fiction." See LeBel, *supra* note 197, at 308.

198. The standard proposed by this Comment represents a synthesis of the standard enunciated by the court in *E. Hulton Co. v. Jones* [1909] 2 K.B. 44, *aff'd*, [1910] A.C. 20, and the test set forth in *Geisler v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980). See also, Comment, *Defamation in Fiction*, *supra* note 15 at 103.

describing actual persons and events. Only after determining that the work could be so understood by a reasonable reader will an inquiry be conducted into whether the fictional character at issue refers specifically to the plaintiff.

Both prongs of the proposed test refer to the understandings and perceptions of a "reasonable reader." This unique animal is simply a variation of the "reasonable man" standard utilized in negligence cases.¹⁹⁹ In discussing the attributes of the reasonable man, Professor Prosser wrote:

He is not to be identified with any ordinary individual . . . he is a prudent and careful man, who is always up to standard. Nor is it proper to identify him even with any member of the very jury who are to apply the standard; he is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment.²⁰⁰

Since the reasonable reader standard is a community standard,²⁰¹ the introduction of such vague terms as a "considerable and respectable class in the community" or a "respectable and substantial part of the community" are redundant and therefore unnecessary.²⁰²

Specific reference in the proposed test to the understandings of a reasonable reader represents a return to a simpler and more pragmatic approach to the determination of whether a fictional work is "of and concerning" a real person. The proposed test employs a "pure" reasonable reader standard which does not encompass any qualifying terminology, nor does it require that persons who knew or knew of the plaintiff be able to identify the fictional character with the plaintiff. Indeed, under this new standard, the trier of fact need only determine the understandings and perceptions of a reasonable reader who has read the entire work.

The first prong of the proposed *of and concerning* standard is similar to the "fiction is fiction" test employed by various courts.²⁰³ However, the difficulties inherent in prior "fiction is fiction" standards²⁰⁴ are alleviated by the new test. First, the new standard

199. W. PROSSER, *supra* note 13, § 32 at 149-66. It has been written that "this excellent but odious character stands like a monument in our Courts of Justice vainly appealing to his fellow-citizens to order their lives after his own example." *Id.* at 150, n.21 (citation omitted).

200. *Id.* at 150 (citations omitted).

201. *Id.* § 33 at 166.

202. See *supra* note 188 and accompanying text.

203. See *supra* note 182 and accompanying text.

204. See *supra* notes 189-94 and accompanying text.

seeks to enlarge the scope of inquiry necessary to determine whether the work could be understood as describing actual persons and events. Previous decisions involving a "fiction is fiction" standard limited the inquiry to only those incidents of the fictional work involving the character at issue, rather than focusing on the work as a whole. Such a limitation has allowed courts to base their decisions on nothing more than a "gut reaction."²⁰⁵

In *Pring*,²⁰⁶ the court noted that the "central issue"²⁰⁷ on appeal was "whether the story must reasonably be understood as describing actual facts or events about plaintiff or actual conduct of the plaintiff."²⁰⁸ Although recognizing that this was a "matter to be determined from the story as a whole,"²⁰⁹ the court in *Pring* nonetheless limited its inquiry to only the "charged portions of the story."²¹⁰ By narrowing its focus to those aspects of the work that the plaintiff claimed were defamatory, the court easily concluded that "it is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else."²¹¹ However, it is readily apparent that this conclusion represented the "gut reaction" of the appellate panel rather than the perceptions and understandings of a reasonable reader. This is evidenced by the fact that "the trial court had decided the story generally was not fiction"²¹²

By limiting the focus of inquiry to only the "charged portions of the story," the court in *Pring* implicitly ruled that a writer may escape liability by embellishing the defamatory content of his work with fantastic feats, regardless of the tenor of the work as a whole. Under the proposed standard, such a result would be avoided. The new test requires that a determination first be made as to whether the work, when read as a whole, could be understood by a reasonable reader as depicting an actual person or persons and/or actual events. Application of the first prong of the proposed standard to the facts in *Pring* would have resulted in a ruling that a reasonable reader could understand the article, when read as a whole, as involving actual persons and/or actual events.²¹³ This is not to say,

205. See *supra* note 87 and accompanying text.

206. 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

207. *Id.* at 440.

208. *Id.* at 439.

209. *Id.*

210. *Id.* at 443.

211. *Id.*

212. *Id.* at 442.

213. The article in *Pring* was described by the court as "a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants." *Id.* at 443. Since

however, that the end result in *Pring* would have been any different under the new test, only that the first prong of the proposed standard would have been satisfied. Once the first prong of the new test has been fulfilled, the trier of fact must then determine whether the fictional character at issue could be understood by a reasonable reader as referring specifically to the named plaintiff.

The second part of the proposed standard requires a balancing of certain factors; it demands a comparison of both the similarities and dissimilarities between the fictional character and the named plaintiff. Neither factor alone should be dispositive of whether a reasonable reader would understand the fictional character to be a portrayal of the plaintiff. Only after a detailed comparison of the similarities and dissimilarities may the trier of fact adequately weigh the evidence and determine the understandings and perceptions of a reasonable reader. It would be helpful if the judge and/or jury would document this balancing process and actually list the similarities and dissimilarities between the fictional character and the plaintiff, indicating which factors they found to be controlling.

Because the second prong of the proposed standard is concerned with whether the fictional character may be understood as a portrayal of the plaintiff, the focus of inquiry should be on the physical and mental characteristics of the two persons rather than upon the activities engaging the attention of the fictional character. While inquiry may be made into the similarities and dissimilarities between the conduct of the fictional character and that of the plaintiff, the primary focus should be on the physical and mental characteristics of the two persons. If it is apparent to a reasonable reader that the fictional character looks and thinks like the plaintiff, the latter should not be penalized merely because the author has chosen to engage the fictional character in conduct in which the plaintiff would never have taken part. By so limiting the balancing process, the "disturbing irony" of prior cases is avoided.²¹⁴

Clearly, while the conduct of a fictional character should not defeat a plaintiff's claim for relief, the court may consider such evidence in establishing whether a reasonable reader would understand the fictional character to be a portrayal of the plaintiff. In

the article involved an actual beauty pageant with contestants who represented actual states, it is safe to assume, as the district court found, that the first prong of the new test would be satisfied by this fictional work. However, it is unclear from the reported decision whether the article was mostly "fantasy" or whether the fantastic aspects of the article were merely interspersed throughout the work.

214. See *supra* notes 177 and 178 and accompanying text.

other words, the activities of a fictional character may help to satisfy the second prong of the new test, but they may not be used to invalidate any nexus between the fictional character and the plaintiff. For example, even though the fictional Dr. Herford was physically quite dissimilar to the plaintiff in *Bindrim*, the second part of the new test could still have been satisfied if the trier of fact determined that a reasonable reader could identify the fictional character as depicting the plaintiff based upon similarities in occupational techniques. In contrast, the conduct of the fictional characters in *Middlebrooks* and *Pring* should not have defeated the claims presented simply because the plaintiffs in those cases would not have engaged in such activities.²¹⁵

It must be remembered that the test proposed by this Article is confined to the *of and concerning* element of defamation in fiction cases. Once it has been established that a fictional work is "of and concerning" the plaintiff, the remaining elements of a cause of action for defamation must still be established. One writer has proposed the following test for establishing the defamatory nature of a fictional work:

The falsity of the defamatory language would be measured by the reasonable reader test. Would a reasonable reader believe that the conduct or characteristics ascribed to the character in fact were true of the plaintiff? If the answer is yes, then the plaintiff has shown that he has been defamed.²¹⁶

215. In *Middlebrooks*, the district court found that the story "describes the character 'Esco Brooks' as having committed acts indictable as crimes under the laws of South Carolina and the United States. It also describes 'Esco Brooks' as an irresponsible, undependable, and dishonest person who . . . is a 'very fast liar.'" *Middlebrooks v. Curtis Publishing Co.*, 281 F. Supp. 1, 5 (D.S.C. 1968). The witnesses produced by the plaintiff in *Middlebrooks* all testified that "they did not believe that plaintiff had ever engaged in such escapades . . . or that he possessed the bad and undesirable traits attributable to 'Esco Brooks.'" *Id.* at 6.

Similarly, the article in *Pring* described the fictional character as performing fellatio upon two different men, one incident being before a live national television audience, as well as committing fellatio like acts upon her baton at the Miss America contest. 695 F.2d at 441. However, the witnesses produced by the plaintiff "all testified that the story could not possibly be about her as she would not do that." *Id.* at 441-42 (emphasis in original).

216. See Comment, *Defamation in Fiction*, *supra* note 15, at 443. The standard proposed by that author involved two separate questions. The questions as applied to *Bindrim* were: (1) whether a reasonable reader would believe that the plaintiff used vulgar and abusive language, and (2) whether the plaintiff did in fact use such language. If the answer to the first question was yes, and the answer to the second question was no, then the plaintiff would have proven his case for defamatory content. Application of these same questions to *Pring* results in: (1) would a reasonable reader believe that the plaintiff performed acts of fellatio at the Miss America contest, and (2) did the plaintiff in fact perform such acts. Although no reasonable reader would believe that the plaintiff levitated anyone during the act of fellatio, a reasonable reader might infer the plaintiff was promiscuous. If a reasonable

VI. CONCLUSION

Applying the law of defamation to fictional works has resulted in less than fifty reported cases. Yet, among this relative handful of cases there is little consistency in the formulation of an *of and concerning* standard. In fact, an examination of these decisions reveals several inconsistent rationales used by the courts. While most tribunals have used a reasonable reader standard to determine whether a fictional work is "of and concerning" the plaintiff, this has not been altogether satisfactory. Courts have introduced vague terms into the analysis, thereby serving only to perpetuate the myriad of contradictory decisions. The recent cases of *Bindrim* and *Pring* magnify the inconsistency of the present case law.

Underscoring all of this lies a sense that the existing *of and concerning* standards are unsatisfactory; that courts, and the parties to these lawsuits, need guidance in defining a simple and pragmatic approach to determining whether a fictional character may be identified with a particular plaintiff. The standard must serve both the first amendment interests of the writer and the interests of the individual plaintiff in maintaining his privacy and reputation. To accomplish this task a new *of and concerning* standard is proposed, whereby the trier of fact must decide: (1) whether the fictional work, when read as a whole, could be understood by a reasonable reader as depicting an actual person or persons and/or actual events, despite assurances by the author and the publisher to the contrary; and (2) whether the fictional character at issue could be understood by a reasonable reader as referring specifically to the named plaintiff.²¹⁷

reader believed either that the plaintiff performed these sexual acts or that she was promiscuous, and those charges were in fact false, then the plaintiff would have been defamed. *Id.* at 443-44.

217. The standard proposed by this Article is not offered to alleviate all of the problems implicit in prior decisions. However, a uniform *of and concerning* standard is necessary and desirable. The new test, if adopted, should provide such uniformity while at the same time remain flexible. The flexibility of the rule lies in its adoption of a "pure" reasonable reader standard. What is reasonable to a reader in 1986 may or may not be reasonable to a reader in the year 2000.