Welcome to the Nineties, Bindrim v. Mitchell: Now Drop Dead

Robert Asa Crook
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\textit{by}

ROBERT ASA CROOK*

\textbf{Introduction}

More than ten years have passed since the United States Supreme Court denied certiorari to \textit{Bindrim v. Mitchell}, the California suit that expanded the scope of an author's potential to libel through a work of fiction.\footnote{\textit{Bindrim v. Mitchell}, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979), \textit{cert. denied}, 444 U.S. 984 (1979).} Although \textit{Bindrim} enters another decade essentially intact, questions remain regarding its practical validity. Decisions since then have limited the application of defamation to fictional works, with important ramifications for both artists and courts everywhere. This Note will evaluate these decisions and define current law for artists, publishers, and their representatives. A plea is made for more judicial reform in this area. Let the reader be warned, however, that this Note seeks to illuminate not the law of any particular jurisdiction, but rather the prevailing trend.

Generally, any unprivileged false statement made to a third person concerning and harming a plaintiff's reputation is defamatory.\footnote{W. \textsc{Prosser} \& R. \textsc{Keeton}, \textsc{The Law of Torts} 773-78 (5th ed. 1984) [hereinafter \textsc{W. Prosser}]. This Note uses "libel" and "defamation" interchangeably. "Libel" is a form of defamation that refers to written false statements of fact which injure another. \textit{Id.} at 785-86. Libel may also be applied to defamatory statements made within a theatrical production, motion picture, or teleplay. \textit{Id.} at 786.} A desire to harm the plaintiff is not necessary to establish intent. The plaintiff need only prove that the defendant intended to communicate the statement to a third party.\footnote{\textit{Id.} at 808-09.} When applied to fiction, however, these deceptively lucid rules become muddled and inequitable. \textit{Bindrim} illustrated these problems in a decision that potentially exposed authors to indiscriminate libel suits.

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2. \textsc{W. Prosser} \& \textsc{R. Keeton}, \textsc{The Law of Torts} 773-78 (5th ed. 1984) [hereinafter \textsc{W. Prosser}]. This Note uses "libel" and "defamation" interchangeably. "Libel" is a form of defamation that refers to written false statements of fact which injure another. \textit{Id.} at 785-86. Libel may also be applied to defamatory statements made within a theatrical production, motion picture, or teleplay. \textit{Id.} at 786.

3. \textit{Id.} at 808-09.
The Birth of Bindrim

A. Factual Background

The story behind Bindrim is as unusual as its holding. After participating in a nude encounter therapy program, author Gwen Mitchell wrote a novel, Touching, which was set in a fictional group engaged in nude encounter therapy. Touching portrayed nude encounter therapy negatively. Dr. Simon Herford, the leader of the fictional encounter group, was a raunchy, foul-mouthed psychiatrist. Paul Bindrim, the clinical psychologist who led the actual encounter group, sued Mitchell alleging that Dr. Herford was identified with him and that this identification constituted libel. Bindrim denied that he ever acted in Dr. Herford’s crude fashion.

The trial court agreed with Bindrim, though he shared few similarities with Dr. Herford other than being a leader of a nude encounter group. Herford was a psychiatrist; Bindrim was a clinical psychologist. Herford was described as a “fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face;” Bindrim was clean shaven with short hair. Their names did not sound similar. Yet, the trial and appellate courts were not impressed with the differences between Bindrim and Herford as precluding identification. Three witnesses claimed they had identified the fictional character with the real life psychologist.

B. The Law

Defamation has consistently been a particularly sensitive area because of its potential to chill the dissemination of information. By holding an author liable for his statements, a disgruntled person, organization, or government could effectively constrict criticism if libel suits were not curbed by the rights of free speech and free press guaranteed by the first amendment. An encapsulated interpretation of the United States Supreme Court ruling in New York Times Co. v. Sullivan states that:

[T]here can be no liability for defamation of a public figure unless the plaintiff demonstrates: (1) that the statement is false; (2) that the content defamed plaintiff’s reputation; (3) that the alleged defamatory statement is ‘of and concerning’ the plaintiff; and (4) that the defend-
ant acted with knowledge that the statement was false or acted in reckless disregard of the truth.\textsuperscript{11}

Also, it must be shown that a reasonable person would rely on the defamatory statement as a true portrayal of the plaintiff. The plaintiff must prove this objective standard.\textsuperscript{12}

Libel suits would have a "chilling effect" upon open debate if the standards of defamation did not obligate a high level of scrutiny. First amendment concerns demand that the law protect the freedom to write without reprisal by giving these expressions "breathing space" in order to survive.\textsuperscript{13} Therefore, to be liable, the defendant must have acted with the requisite level of fault. \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{14} applied the \textit{New York Times} standard to a private individual who was not a public figure. Although the \textit{Gertz} Court emphasized the need to protect the "vigorous exercise of [f]irst [a]mendment freedoms," the private plaintiff does not have to prove "actual malice."\textsuperscript{15}

In both \textit{New York Times} and \textit{Gertz}, the Supreme Court held that in order to provide adequate protection to the flow of information in society, all communications, including those that are fictional, must be given a wide margin of liberality. A plaintiff's disdain for a particular publication is insufficient to establish a cause of action. Allusions and inaccuracies within a publication do not necessarily entitle the plaintiff to a judgment; some falsehood must be protected.\textsuperscript{16} The plaintiff must meet the standards set out in \textit{New York Times}. \textit{Bindrim}, however, narrowly interpreted this wide margin of liberality, effectively reading it out of the law. Circular reasoning dominated the majority opinion. Justice Files dissented, criticizing these flaws: "Those practices which are similar to plaintiff's technique are classified as identifying. Those which are unlike plaintiff's are called libelous because they are false. Plaintiff has . . . spurious logic . . . ."\textsuperscript{17} Fiction by its very definition connotes that the artist has deliberately stated a falsehood. To infer actual malice because the novel was false is absurd.\textsuperscript{18} Thus, if liberality is not applied, a plaintiff asserting defamation through a fictional work need only prove that in some small way the statement was "of and concerning" him.

\textsuperscript{12} W. Prosser, \textit{supra} note 2, at 809.
\textsuperscript{13} \textit{New York Times}, 376 U.S. at 271-72.
\textsuperscript{14} 418 U.S. 323 (1974).
\textsuperscript{15} \textit{Id.} at 348-49.
\textsuperscript{16} \textit{Id.} at 341.
\textsuperscript{18} \textit{Id.} at 88, 155 Cal. Rptr. at 44-45.
The plaintiff’s task is made easier because general damages are presumed when asserting libel.\textsuperscript{19} Bindrim, therefore, did not need to show specific injuries. Three witnesses who were familiar with Bindrim’s work in nude encounter therapy testified that they identified Herford with Bindrim.\textsuperscript{20} Although the court recognized that defamation could be sustained if only one person received and believed the plaintiff to be the subject of the defamatory statement,\textsuperscript{21} the majority neglected to ascertain whether the witnesses accepted the false statements within the novel as a factual account of Bindrim’s actions. Presumably, Bindrim was not harmed by the statements if none of the witnesses accepted the novel as truthful. Bindrim’s claim of defamation was “limited to the imputation of vulgar speech and insulting manners”\textsuperscript{22} with no showing that any purported identification directly harmed his business or reputation.

If a standard could be delineated in \textit{Bindrim}, the extreme interpretation of court dicta would be that actual malice may automatically be inferred from fiction and that demonstration of reliance and actual damages caused by the fictional work would be unnecessary to support a claim of defamation. Although courts outside the Second District of California were not required to follow the case, \textit{Bindrim} set an important national precedent. Because the Supreme Court refused to hear the case, \textit{Bindrim} effectively broadened the scope of defamation in fiction throughout the country.

\textbf{C. The Standard Spreads}

In \textit{Geisler v. Petrocelli},\textsuperscript{23} the Second Circuit reversed a trial court’s dismissal of a complaint for failure to assert that allegedly defamatory material was “of and concerning the plaintiff.” The defendant wrote a novel concerning the odyssey of a female transsexual tennis player through the allegedly corrupt system of women’s professional tennis.\textsuperscript{24} The work was purportedly fictional, and even carried a disclaimer at the beginning of the book stating that similarities between characters and actual people were coincidental.\textsuperscript{25}

“Melanie Geisler,” the tennis player and central character in the novel, perpetrated fraud on the tennis circuit and was lured into indecent sexual conduct. “Melanie” was described as “young, attractive, and

\begin{itemize}
\item \textsuperscript{19} W. PROSSER, \textit{supra} note 2, at 795.
\item \textsuperscript{20} \textit{Bindrim}, 92 Cal. App. 3d at 86, 155 Cal. Rptr. at 43.
\item \textsuperscript{21} \textit{Id.} at 79, 155 Cal. Rptr. at 39.
\item \textsuperscript{22} \textit{Id.} at 85, 155 Cal. Rptr. at 43.
\item \textsuperscript{23} 616 F.2d 636 (2d Cir. 1980).
\item \textsuperscript{24} \textit{Id.} at 638.
\item \textsuperscript{25} \textit{Id.}
honey-blonde, her body firm and compact . . . .” While the plaintiff, Melanie Geisler, shared the same name and some of the physical attributes of the character in the novel, there were many important differences between the two. The plaintiff was a mother who had worked as a publicity assistant for a small publishing company. She did not play professional tennis nor was she a transsexual.

The defendant, Petrocelli, however, was acquainted with the plaintiff. Both worked for the same publishing company and knew each other on a casual basis. One might assume that he based his character superficially upon the plaintiff, as writers frequently draw upon the people they meet in day to day living to provide the backdrop for the stories they tell. One might also assume that fellow co-workers would recognize Geisler’s character traits within Petrocelli’s novel. Yet, did Petrocelli intend his tennis player to be the plaintiff? Logic would find such an association absurd. The Second Circuit, however, held that as a matter of law such a question must be given to the jury to decide.

As in Geisler, the jury in Pring v. Penthouse International, Ltd. had to decide whether a satirical article in Penthouse magazine contained defamatory statements “of and concerning” the plaintiff, Kimberly Pring. The article was a fictional parody of the Miss America Pageant where Miss Wyoming levitated her talent coach by fellatio. Pring, a former Miss Wyoming, claimed that “Charlene,” the fictional Miss Wyoming, was “of and concerning” her. No particular parallels between “Charlene” and Kimberly Pring were asserted other than they were both winners of the Miss Wyoming Pageant who had competed at the Miss America Pageant performing a baton twirling act. No showing was made that Philip Cioffi, author of the article, even knew of the plaintiff. Nevertheless, the jury returned a $26.5 million verdict in the plaintiff’s favor.

Under Bindrim, Geisler, and the trial court decision in Pring, defamation in fiction became far more expansive and muddled. The test the Geisler court used exemplified this confusion. “It is not necessary that all

26. Id.
27. Id.
28. Id.
29. “This points up a disturbing irony inherent in the scheme . . . . [T]he more deserving the plaintiff of recompense for the tarnishing of a spotless reputation, the less likely will be any actual recovery. Such a seeming contradiction is best resolved by the trier of fact . . . .” Id. at 639.
30. 695 F.2d 438 (10th Cir. 1982).
31. Id. at 441.
33. Ashman, First Amendment Shields Sexual Fantasy, 69 A.B.A. J. 218, 220 (1983). The verdict was later reduced to 12.5 million dollars by the district court.
the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that [she] is the person meant.\textsuperscript{34} Certainly Petrocelli meant to describe a Melanie Geisler who was a transsexual tennis player as much as Cioffari meant to describe a Miss Wyoming levitating her coach by fellatio. By failing to incorporate reasonableness of identification upon the allegedly defamatory statements, post-	extit{Bindrim} decisions overly broadened the standard of what constituted defamatory fiction.

II

Potential Problems for Artists

A. Literary Hypotheticals

As any artist would suspect, the expansive application of libel to fiction would place all writers, producers, and publishers in a vulnerable position. Fiction is, after all, delicately crafted, acknowledged falsehood. The artist lies when creating his work, but often draws upon real life for inspiration.

An expansive standard of defamation becomes extremely problematic when artists seek to allude to factual events or people within their creations. A roman à clef, a fictional work which incorporates factual elements, can be very powerful since it allows the reader to identify with the work by tailoring the work to reflect the reader's own life. Many world-renowned artists are effective creators of romans à clef.

Problems arise, however, when the actual person objects to the fictional characterization. For example, consider the character of Johnny Fontane, the popular Italian-American singer in \textit{The Godfather} who used his Mafia connections ruthlessly to further his career. Author Mario Puzo admits that many readers assumed that Fontane was based upon Frank Sinatra.\textsuperscript{35} Sinatra was so incensed by the allusion that he threatened to physically abuse Puzo when the two met at a well-known Los Angeles restaurant.\textsuperscript{36} A question thus comes to mind: how many of the specific attributes of Johnny Fontane would a reasonable person believe were "of and concerning" Frank Sinatra?

Analysis of a well-known motion picture may answer this question. \textit{Citizen Kane}, a fictional story concerning the struggles of an American billionaire, was based upon the life of William Randolph Hearst.\textsuperscript{37} Herman Mankiewicz, co-writer of the script with Orson Welles, knew

\textsuperscript{34} Geisler, 616 F.2d at 639.
\textsuperscript{35} M. Puzo, \textit{THE GODFATHER PAPERS} 53 (1972).
\textsuperscript{36} \textit{Id.} at 53-55.
\textsuperscript{37} P. Kael, \textit{Raising Kane}, in \textit{THE CITIZEN KANE BOOK} 63 (1971).
Hearst’s mistress, Marion Davies and the intimate details of the Hearst-Davies relationship. Welles and Mankiewicz wrote the fictional story of Charles Foster Kane and his mistress Susan Alexander, closely paralleling the actual lives of Hearst and Davies.

Kane was the leader of a newspaper empire as was Hearst. Both were ruthless in hiring and firing their editorial staff. Both were avid collectors of world artifacts and both built palatial homes to house their treasures. Both used their positions as newspaper editors to foment war with Latin American nations in order to increase newspaper revenues. Both attempted to enter politics, with their respective attempts ending in scandal.

Susan Alexander and Marion Davies shared a love of jigsaw puzzles and a love of the stage. Kane sponsored Alexander’s operatic career and Hearst frequently subsidized and promoted Davies’ motion pictures. Welles and Mankiewicz even drew upon intimate details of the Hearst-Davies relationship which were not publicly known.

In spite of the unflattering similarities between Citizen Kane’s fictional characters and the actual people they were based upon, Kane and Alexander possess qualities which could only be dubiously attributed to Hearst and Davies. Kane had a violent temper. He slapped Alexander and tore up her room “in a truly terrible and absolutely silent rage.” Alexander was portrayed as a depressed, “cheaply blonded” alcoholic. When she failed to achieve success as a singer, she attempted suicide.

Could or should these character traits be attributed to Hearst or Davies? Before 1979, Hearst and Davies would need to show that Kane and Alexander paralleled their identities to a striking degree. Although there were many similarities between fictional character and actual person, several differences precluded identification past mere allusion. Presumably, the label “fiction” would clue the viewer to not absorb the story as fact. Under Bindrim, however, either Hearst or Davies could successfully seek damages from Welles, Mankiewicz, or anyone else responsible for the creation of Citizen Kane.

38. Id.
39. Id.
40. Id. at 64.
41. Id. at 61.
42. Id. at 68-69.
43. Before “Rosebud” was the name of Kane’s sled, it was Hearst’s nickname for Davies’ clitoris. K. Anger, Hollywood Babylon II 159 (1984).
45. Id. at 279.
46. Id. at 237-40.
47. Id. at 257-58.
Several legal scholars have recognized this problem and some have suggested that courts should define "malice" as common malice, as opposed to the legal definition which incorporates a lower threshold of intent. The difficulty in applying this standard is that often an artist does have common malice when creating the work. This is especially true when the artist seeks to point out a social injustice or stir the public to action.

In *The Jungle*, for example, Upton Sinclair sought to expose the shoddy conditions under which companies processed meat. This turn-of-the-century novel is the fictional story of Lithuanian immigrants whose American dreams are crushed within the sweatshop system of American slaughterhouses. The plot, however, is a mere pretext to describe the disgusting conditions of meat processing at that time.

The novel's immense worldwide appeal resulted in substantial reforms within the meat processing industry. In the United States, the book inspired President Theodore Roosevelt and Congress to pass the first enforceable national Pure Food and Drug Act. Indeed, few would argue the immense social benefits *The Jungle* wrought, yet under the *Bindrim* rule, a company like the Armour Corporation might have a cause of action against Sinclair for defamation. Armour need only show that someone identified Armour with the fictional slaughterhouse and that aspects of the fictional slaughterhouse did not apply in whole to Armour.

**B. How These Problems Were Handled in the Past**

Defamation in fiction did not spring from the loins of *Bindrim*, as many may be inclined to believe. Before *Bindrim*, however, the plaintiff had to sustain a high burden of proof demonstrating that the fictional material was not merely alluding to the plaintiff, but was so descriptive of the plaintiff that the reader would perceive the fiction as fact.

In *Corrigan v. Bobbs-Merrill Co.* the defendant wrote a novel depicting a corrupt magistrate named Corrigan who sat in the Jefferson

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48. "Malice" is commonly defined as "[a] disposition or indication of anger, jealousy, hatred, revenge, or the like; active malevolence." *Funk and Wagnalls, New Standard Dictionary of the English Language* 1498 (1931).


51. "The hogs that arrived already dead of cholera and tubercular steers were processed and sold for human consumption as were 'old and crippled and diseased cattle . . . covered with boils.'" *Id.* at 73.

52. *Id.* at 90.

53. Armour was among a small group of meat processing giants in existence at the time Sinclair first published his novel. *Id.* at 68.

54. 228 N.Y. 58, 126 N.E. 260 (1920).
Market Court in New York City. The plaintiff, Corrigan, was a magistrate in that court. The case held that the defendant intentionally and vindictively wrote the character into his novel in order to expose the plaintiff to contempt and ridicule. Similar name, same occupation, and same place of employment—coupled with the fact that the defendant had previously come before the plaintiff in a criminal proceeding—established the inference that the character in the book was of and concerning the plaintiff.

Fetler v. Houghton Mifflin Co. likewise was concerned with whether a jury could reasonably find that an alleged libel referred to the plaintiff. In the defendant's book, The Travelers, the central character, Maxim, abandoned his dying father in order to serve a Nazi organization for easy profit. The author of the book, plaintiff's brother, conceded that the novel "was about our father, the family concerts and me." Indeed, the parallels between the plaintiff and Maxim were not merely similar, but striking. The story centers around a Latvian family of thirteen children traveling around Europe in an old bus giving concerts. The father is a protestant minister who owns a home in Stockholm. Maxim, the oldest son, is twenty-three years old in 1938 and is responsible for taking care of the family. All of the above literary structures parallel the plaintiff's life.

After considering these parallels and the defendant's acknowledged basis for the story, the Second Circuit found that a reasonable person could understand the character Maxim to be the plaintiff. "It is obvious that there are few, if any, other families with a minister father and thirteen children in which the third, fourth, and eighth are girls and the eldest a son with great responsibility, who toured Europe in a bus in the 1930's giving family concerts."

Contrast Corrigan and Fetler with Wheeler v. Dell Publishing Co., in which the plaintiffs claimed the novel and movie Anatomy of a Murder defamed them. The story was based upon an actual murder and subsequent trial. The fictional plot in many ways paralleled the actual occurrence in its locale and sequence of events and many of the fictional characters were readily identifiable with their living counterparts.

55. Id.
56. Id.
57. 364 F.2d 650 (2d Cir. 1966).
58. Id. at 651.
59. Id.
60. Id.
61. Id.
62. 300 F.2d 372 (7th Cir. 1962).
63. Id. at 375-76.
The Seventh Circuit, however, refused to find that a reasonable person would identify the unsavory characters with the plaintiffs upon whom they were based. Wheeler, the actual victim's wife, alleged that she was portrayed through the character "Janice" as a foul-mouthed woman who bore her child out of wedlock. Nevertheless, the court held that the author so clearly distinguished the physical traits and personality of "Janice" that no one could reasonably understand the character to be a portrayal of Wheeler. "[A]ny 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 her with Hazel Wheeler."  

III
The Tide Turns Back

A. Humor Gets the Last Laugh

Clearly, the holding in Wheeler is inimical to that in Bindrim. Where the Wheeler court found unflattering characterizations to be useful devices precluding identification with the plaintiff, the Bindrim court viewed them as the basis upon which libel could be asserted.

Reaction to Bindrim and its progeny was immediate. Writers and publishers became vulnerable targets for any disgruntled reader's assertion that the novel, movie, or cartoon "was about me." A plethora of legal scholars warned of decisions which "could chill the creation or dissemination" of fiction, declaring that "[s]uch outrageous verdicts inhibit an author's freedom of expression." However, in spite of concerns for first amendment protection, predictions of impending disaster were premature. This was due in part to the healing powers of the courts to rectify bad law, and in part to the reluctance of artists, when faced with legal mumbo-jumbo, to honestly give a damn.

A slow recision to pre-Bindrim standards began with the Tenth Circuit's reversal of the Pring verdict. The court recognized that in many instances readers do not understand words in their literal sense when writers use them for obvious exaggeration. Similarly, cases involving humorous and satirical works should not be decided based upon their literal statements if no one could reasonably understand these statements to de-
scribe actual facts. "The charged portions of the story described something physically impossible in an impossible setting. . . . It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else." The appellate court set aside the verdict for the plaintiff and dismissed the action.

The Tenth Circuit’s decision emphasized an important detail which was absent from the trial court’s consideration. The plaintiff may have proven that a third person would understand that the fictional character was based upon plaintiff’s performance at the Miss America Pageant, but she could not prove that a reasonable person would understand the fictional statements as fact. Subsequently, courts in many jurisdictions looked to whether a reasonable person would rely upon the characterization as actually reflecting the traits of the plaintiff.

Indeed, lack of reasonable reliance upon statements made in a Saturday Night Live comedy skit exonerated the defendant in Frank v. National Broadcasting Co. The plaintiff, Maurice Frank, was a tax consultant who claimed that he was identified with a character in “Saturday Night News,” a parody of a standard television news broadcast. The character, “Fast Frank,” shared the plaintiff’s full name and allegedly bore a physical resemblance with the plaintiff. “Fast Frank” gave tax advice which the plaintiff described as “ludicrously inappropriate” thereby holding the plaintiff up to ridicule. A sample of “Fast Frank’s” material:

Here are some write-offs you probably aren’t familiar with. . . . Got a houseplant? A Ficus, a Coleus, a Boston Fern—doesn’t matter. If you love it and take care of it—claim it as a dependent. Got a horrible acne? . . . use a lotta Clearasil . . . that’s an Oil-Depletion Allowance. You say your wife won’t sleep with you? You got withholding tax coming back. If she walks out on you—you lose a dependent. But . . . it’s a home improvement—write it off.

The test used by the court to determine if the skit constituted defamation was whether the plaintiff could prove that the statements exposed him to public contempt or ridicule in the minds of right thinking persons, thereby depriving him of their friendly intercourse in society. The court assumed, without deciding, that the defendants intended to portray

68. Pring v. Penthouse Int’l, Ltd., 695 F.2d 438, 442 (10th Cir. 1982).
69. Id. at 443.
70. Id. at 439-40.
72. Id. at 254, 506 N.Y.S.2d at 870.
73. Id.
74. Id.
75. Id. at 255, 506 N.Y.S.2d at 871.
the plaintiff in the skit, but found that reliance upon the tax advice would be unreasonable because no sensible person would believe the statements to be true. The court thus granted humor and satire greater deference than melodramatic works, provided no reasonable person could take the statements made as fact. The court, however, did not give humor and satire blanket protection. It reserved the right to find a work so vicious a personal attack that it would grant relief to the plaintiff.

_Hustler Magazine v. Falwell,_ however, indicated that even vindictive attacks may be protected by the first amendment if they are not susceptible to interpretation as fact. In _Falwell_, the Supreme Court upheld the rationale of _Pring_ and _Frank_. A plaintiff must demonstrate that a person could reasonably interpret the statements made as fact in order to prevail. The Court held that a satirical piece of fiction was protected by the first amendment even though it specifically mentioned the plaintiff, a public figure, by name.

Although the Court based its ruling upon plaintiff’s assertion of intentional infliction of emotional distress rather than his libel claim, the Court’s dicta reaffirmed the need to protect humor. Satire and criticism of public figures have long been part of the American tradition of free government. To set a standard where certain types of critical humor are not protected would result in liability contingent upon a jury’s particular views.

The statements made by _Hustler Magazine_ were labeled fiction; because of their absurdity, no reasonable person would interpret the statements made to be truthful. In order for a public figure plaintiff to recover, there must be a showing that the false declarations were made with a "heightened level of culpability." Knowing or reckless conduct in asserting a falsity as fact is actionable. Here, however, the Court found that no attempt was made by the defendants to assert that the statements were fact. Therefore, the statements were protected not as false declarations which no one would reasonably believe, but as opinion protected under the first amendment.

76. _Id_. at 256, 506 N.Y.S.2d at 872.
77. _Id_. at 259, 506 N.Y.S.2d at 874.
78. _Id_. at 256-58, 506 N.Y.S.2d at 872-73.
80. _Id_. at 57.
81. _Id_. at 48.
82. _Id_. at 54.
83. _Id_. at 55.
84. _Id_. at 49.
85. _Id_. at 56.
86. _Id_. at 51-52.
The decisions in *Pring, Frank* and *Falwell* indicate an author writing a piece of humor has a great deal of protection from libel suits, provided the work could not reasonably be understood as presenting reality. Although *Falwell* specifically reserved application of first amendment protection to satirical pieces based upon non-public figures, *Pring* and *Frank* indicate that such protection should apply.

B. Subsequent Protection of Drama

The law protects comedy more than drama. Humor and satire inherently tell the reader not to take the statements made in earnest. Drama, on the other hand, relies upon the reader's intellect to discern truth from fantasy. Although dramatic works are still vulnerable, they have gained considerable protection from libel suits in the past eight years.


The character, Lisa Blake, was the sexually aberrant "whore" of a ruthless Italian industrialist.[^89] Springer and Blake shared the same first name, similar physical characteristics, lived on the same street, and were college-educated.[^90] Mutual friends of Springer and Tine recognized that Tine based Blake's character, superficially at least, upon plaintiff Springer. One wrote: "I have read Robbie's book and am absolutely amazed that he has put Lisa into it—under her own namel—as a psychology student who has become a high-class prostitute. What a childish revenge!"[^91]

In spite of the strong testimony of defendant and witnesses that Lisa Blake was a manifestation of Lisa Springer, the court held that such a conclusion was unreasonable due to profound dissimilarities between the two. Springer was a college tutor presumably living off a modest income,[^92] whereas Blake was an affluent woman living in luxury.[^93] No

[^88]: Id. at 316, 457 N.Y.S.2d at 247.
[^89]: Id.
[^90]: Id. at 319, 457 N.Y.S.2d at 249.
[^91]: Id. at 321, 457 N.Y.S.2d at 250.
[^92]: Id. at 319, 457 N.Y.S.2d at 249.
[^93]: Id.
reasonable person would impute sexual promiscuity to Springer based upon the character in defendant's novel.

Even the California Second Appellate District retreated from the ruling it espoused in *Bindrim*. In *Aguilar v. Universal City Studios, Inc.*,[94] the court refused to overrule a summary judgment granted to the defendant in a lawsuit involving alleged defamation in a fictional motion picture. The plaintiff, Bertha Aguilar, argued that the character "Bertha" in Luis Valdez' play and motion picture *Zoot Suit* defamed her. *Zoot Suit* was based upon the Sleepy Lagoon murder trials and ensuing gang riots.[95] The character referred to was "a fornicating woman of loose morals"[96] who was heavily involved in gang activity.

Numerous similarities identified Aguilar with the character. They shared the same name and grew up in the same neighborhood with members of the 38th Street Gang. Both shared some minor role within the unfolding events which led up to the "zoot suit" riots.[97] Aguilar, however, was not involved in the same sordid gang activity as "Bertha."[98]

Yet, in spite of Aguilar's identification with the character, the court distinguished *Bindrim*, neither overturning nor applying it to the case. Although "[c]lose parallels between real and fictional events may establish a reasonable belief in identity despite the author's efforts to hide the real person through alteration of name or physical appearance,"[99] the court looked to pre-*Bindrim* decisions; the several points of similarity between Aguilar and "Bertha" were not enough to establish identification within the reasonable person's mind.

Why the different outcome? Certainly *Bindrim* and *Aguilar* involved group-specific situations in which only a relatively small number of people were involved in the actual event from which the fictional story was derived. Identification with particular individuals would be easier to achieve within a small group setting as opposed to the world in general. One possible answer is that the court took into account Luis Valdez' testimony that he was unaware of Aguilar's role in the Sleepy Lagoon murder when he wrote *Zoot Suit*[100] and, therefore, was reluctant to find actual malice.

Another possibility, one supported by a large volume of dicta, is that the court returned to a more strict requirement of reasonable identification between the plaintiff and the fictional character. One witness, who

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95. Id. at 386, 219 Cal. Rptr. at 891.
96. Id.
97. Id. at 390, 219 Cal. Rptr. at 894.
98. Id.
99. Id. at 389, 219 Cal. Rptr. at 893.
100. Id. at 391, 219 Cal. Rptr. at 894.
made such an identification, did not actually rely on the portrayal of "Bertha" as being a true description of Aguilar twenty-five years previous. The court therefore found the differences between "Bertha" and Aguilar to be determinative and held that no reasonable identification could be established.

As the courts continued to further narrow the application of libel to fiction, artists began to rely more and more upon fact as a substantial basis for their stories. *Zoot Suit* and a plethora of motion pictures, plays, and other works of art became part of a trend to incorporate real characters and situations, disguising these factual elements in a thin web of fiction. One need only look at the latest *TV Guide* to see that modern television is dominated by the "docudrama," a fictional interpretation of an actual event. These programs usually focus upon a sensational incident or a matter of public concern.

The motion picture *Missing* is one such docudrama. In the spirit of Upton Sinclair's *The Jungle*, *Missing* chronicles the involvement of the United States in the overthrow of an independent Latin American government and the murder of a U.S. citizen. The film is based upon a true story, but it distorts time and characters into a palatable structure suitable for its medium and audience. As previously argued, under *Bindrim*, the creators of such a film would be prone to liability for defamation if a single person could prove that any aspect of an identifying character did not apply to that person in whole.

This was the situation presented in the *Davis v. Costa-Gavras* decisions. Three former members of the American delegation to Chile contended they were defamed by the motion picture because it accused them of either ordering or approving the order of a U.S. citizen's murder. During the violent overthrow of Chilean President Allende, an American journalist, Charles Horman, was killed. In the book, *The Execution of Charles Horman*, author Tom Hauser reported that plaintiffs and other members of the American delegation to Chile were involved in the decision to kill Horman. *Missing* is based upon Hauser's research.

In the film, Ed and Beth Horman, father and wife of the victim, search for answers explaining his disappearance. The film opens with a statement that the film is based upon a true story, but that some of the names have been changed. No specific mention is made to Chile, Al-

101. *Id.* at 391, 219 Cal. Rptr. at 895.
104. There are two. See notes 102, 103.
106. *Id.* at 1374.
lende, or those specifically involved in the cover-up. However, someone familiar with American foreign policy at that time would reasonably understand the references made in the film to be "of and concerning" American involvement in Chile. The defendants did not deny this contention. Indeed, references made to the particular plaintiffs were thinly disguised with similar sounding names. Captain Ray Davis was portrayed as Captain Ray Tower;107 Frank Purdy was portrayed as Consul Putnam.108 Unquestionably, these characters were meant to be interpreted as the plaintiffs acting as described. *Bindrim* and *Geisler* would infer actual malice because the work was fiction.

The district court, however, refused to allow the method of communication to determine actual malice. Although the court held that a reasonable person viewing the motion picture would understand Ray Tower to be Ray Davis acting as described,109 it found no actual malice as a matter of law. Looking to the "substantial truth" of the statements made, the court recognized that a docudrama differs from a documentary, the latter being "a film of real people and real events as they occur. A documentary maintains strict fidelity to fact."110 Docudramas, on the other hand, must "utilize simulated dialogue, composite characters, and a telescoping of events" in order to fit dramatic structure.111 "[A docudrama] is a creative interpretation of reality—and if alterations of fact in scenes portrayed are not made with serious doubts of truth of the essence of the telescoped composite, such scenes do not ground a charge of actual malice."112

This "truth of the essence" test is an extremely helpful transmutation of current defamation standards. If adopted by other courts, this standard would allow an author to write a socially scathing book in the vein of Sinclair's *The Jungle* with substantial protection from nuisance suits. Considering the general move away from *Bindrim*'s all-inclusiveness, it is probable that other courts would look to the substantial truth of what was said within the fictional work in determining actual malice. Thus, it is unlikely that a plaintiff who could prove identification with a fictional character would prevail in the suit if the fictional statements differ only superficially with the facts.

107. *Id.* at 1376.
108. *Id.* at 1383.
109. *Id.* at 1376.
110. 654 F. Supp. at 658.
111. *Id.*
112. *Id.*
IV

Legal Loose Ends

Incessant thought and change have governed the law of defamation in fiction since the brief period when Bindrim, Geisler, and Pring reigned supreme. Undoubtedly, in years to come the boundaries will again be adjusted and defamation will play a different role in fictional works. Modern courts seem to be allowing artists greater leeway in utilizing real people and incidents in their creations. Actual reliance and reasonableness of identification increase the plaintiff’s burden to demonstrate that the declarations are “of and concerning” him.

Yet, in spite of movement toward pre-Bindrim standards, courts unevenly protect certain novels, plays, and motion pictures, leaving some forms of fiction more protected than others. Although humor and satire are given strong first amendment protection, drama has been given virtually none.

Judicial protection of humor and satire is nearly complete, provided the fictional work can only be interpreted as humor or satire. Drama, on the other hand, is still vulnerable to the attacks of the vindictive and the greedy. Courts must set clear standards upon which to adjudicate libel suits based upon dramatic material. The United States Supreme Court is in the best position to hear such a case and finally overrule Bindrim and its brood.

Currently, the dramatist has few options to escape liability. The “truth of the essence” test may assist writers of docudramas or other works which assert themselves as based on a true story, but the test provides little protection for works which are based both on fact and fantasy. No clear standard has been established to evaluate these latter works. In fact, courts have an inordinate amount of discretion adjudicating whether someone has been libeled by a vague character description in a novel.

V

Proposal

The Supreme Court should adopt a three-pronged test to evaluate whether a dramatic work constitutes libel. First, if the work purports to be based on fact, the “truth of the essence” test of Davis v. Costa-Gavras should be applied. Second, plaintiffs should be required to prove actual, as well as reasonable, reliance by third parties upon the statements made. Third, plaintiffs should be required to establish that the author actually intended his work to portray the plaintiff acting as described. This three-pronged test would allow the dramatic writer greater leeway in criticiz-
ing public figures through writing. It would also protect authors from nuisance suits brought by private figures claiming that coincidental similarities between the plaintiff and a specific character amount to libel.

The general trend has been to narrowly apply libel standards to works of fiction, but this trend is sporadic. If Bindrim has any substance at all, it derives from the uncertainty that at any moment a court could use the case as precedent to assert liability against the author of a movie, play, or novel. This arbitrary law is inappropriate. Standardization would better protect the free flow of those ideas contained in fictional works. Until then, the artist must look to the prevailing law concerning defamation in fiction—and hope for the best.