PLAINTIFFS IN PURSUIT OF PRIVACY—LIBEL IN FICTION

> You don't know about me without you have read a book by the name of *The Adventures of Tom Sawyer*; but that ain't no matter. That book was made by Mr. Mark Twain, and he told the truth, mainly. There was things which he stretched, but mainly he told the truth. That is nothing. I never seen anybody but lied one time or another, without it was Aunt Polly, or the widow, or maybe Mary. Aunt Polly—Tom's Aunt Polly, she is—and Mary, and the Widow Douglas is all told about in that book, which is mostly a true book, with some stretchers, as I said before.
>
> —Mark Twain,
> THE ADVENTURES OF
> HUCKLEBERRY FINN[1]

I. INTRODUCTION

If there were real-life counterparts to Aunt Polly, Mary, and the Widow Douglas, upon which these characters were based, would they have a cause of action against Mr. Twain, not only due to his suggestion that these three ladies are liars, but also because they "is all told about in that book"?[2] *The Adventures of Huckleberry Finn*[3] is no doubt a work of fiction. In fact, the author himself threatens, in a manner sounding like a modern disclaimer,[4] that "[P]ERSONS attempting to find a motive in this

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[1] In XIII THE WRITINGS OF MARK TWAIN 15 (1884).

[2] *Id.* It is not libel *per se* merely to tell about a person in a book. However, if the plaintiff's "name, portrait or picture" is used without permission, the plaintiff may have a cause of action under the New York Civil Rights Law. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976) (one who uses the name, portrait, or picture of any living person without prior written consent is guilty of a misdemeanor); *see* Wojtowicz v. Delacorte Press, 58 A.D.2d 45, 395 N.Y.S.2d 205 (1st Dep't 1977) (plaintiff's name, portrait, or picture must be used in the work in order to overcome defendant's motion to dismiss in a right of privacy case), *aff'd*, 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 218 (1978). If the plaintiff does not sue under this statute for invasion of his right of privacy, he may nevertheless sue for libel. Such a suit requires a showing of defamation, identification, and publication. W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 113, at 802 (5th ed. 1984). The second element, that of identification, is the focus of this Note.

[3] M. TWAIN, *supra* note 1.

[4] A typical disclaimer states that the work is intended to be fictitious and that any resemblance to actual characters and events is merely coincidental. *See, e.g.*, People v. Charles Scribner's Sons, 205 Misc. 818, 819, 130 N.Y.S.2d 514, 516 (N.Y.C. Magis. Ct. Kings County 1954). Although an author may include such a disclaimer in order to discourage potential plaintiffs from suing, it is unlikely that a court will permit a dis-

narrative will be prosecuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot".[5] Yet, this does not suggest that a real person suddenly represented in the world of fiction, especially in an unfavorable light, has no means by which to set the story straight.

According to Dean Prosser, in order to demonstrate *prima facie* libel, a plaintiff must prove that the defendant "(1) published a statement that was (2) defamatory, [and] (3) of and concerning the plaintiff."[6] The last of these three elements, "of and concerning the plaintiff," was, and continues to be, the central focus in a defamation suit.[7] This common law requirement has been further refined by statute.[8]

The "of and concerning" requirement examines the identification between the plaintiff and the fictional character, and compares the similarity between the two. A court, in turn, analyzes and evaluates certain elements which the plaintiff and the fictional character may have in common.[9] If a plaintiff is represented by a fictional character so that identification between the

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claimer alone to be used in an attempt to shield the author from liability for a work that is clearly "of and concerning" the allegedly defamed plaintiff.

5 M. TWAIN, *supra* note 1, at iii.

6 W. PROSSER & W. KEETON, *supra* note 2, § 113, at 802.

7 R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 112, n.293 (1980) (citing Farber v. Cornils, 94 Idaho 326, 487 P.2d 689 (1971); Louisville Times Co. v. Emrich, 252 Ky. 210, 66 S.W.2d 73 (1933); Granger v. Time, Inc., 174 Mont. 42, 568 P.2d 535 (1977); Hillman v. Star Publishing Co., 64 Wash. 691, 117 P. 594 (1911)); *see* Rich & Brilliant, *Defamation-in-Fiction: The Limited Viability of Alternative Causes of Action*, 52 BROOKLYN L. REV. 1, 10-14 (1986).

8 *See, e.g.*, N.Y. CIV. PRAC. L. & R. § 3016(a) (McKinney 1974) ("In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.") In addition, the words must refer to a particular plaintiff. *See* Slobodin v. Sun Printing & Publishing Ass'n, 135 A.D. 359, 120 N.Y.S. 386 (1st Dep't 1909).

The California statute varies somewhat from New York's. "[I]t is sufficient to state, generally, that the [defamatory matter] was published or spoken *concerning* the plaintiff . . . ." CAL. CIV. PROC. CODE § 460 (West 1973) (emphasis added); *see also* Velle Transcendental Research Ass'n v. Esquire, Inc., 41 Ill. App. 3d 799, 354 N.E.2d 622 (1976) (Under California law it is sufficient to state that the words are "of and concerning" the plaintiff. *Id.* at 626.).

9 "Whether the defamatory words are 'of and concerning' the plaintiff may be decided by the court as a matter of law." LIBEL DEFENSE RESOURCE CENTER 50-STATE SURVEY 461 (H. Kaufman ed. 1983) (citing Carlucci v. Poughkeepsie Newspapers, Inc., 57 N.Y.2d 883, 442 N.E.2d 442, 456 N.Y.S.2d 44 (1982); Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983)); *see generally* Geisler v. Petrocelli, 616 F.2d 636, 639-40 (2d Cir. 1980); Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966) (quoting Miller v. Maxwell, 16 Wend. 9, 18 (N.Y. Sup. Ct. 1836)); Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962); Middlebrooks v. Curtis Publishing Co., 281 F. Supp. 1 (D.S.C. 1968), *aff'd*, 413 F.2d 141 (4th Cir. 1969); Velle Transcendental Research Ass'n v. Esquire, Inc., 41 Ill. App. 3d 799, 354 N.E.2d 622 (1976); Archibald v. Belleville News Democrat, 54 Ill. App. 2d 38, 203 N.E.2d 281 (1964); Giaimo v. Literary Guild, 79 A.D.2d 917, 434 N.Y.S.2d 419 (1st Dep't 1981).

two is clear, and that representation is defamatory, the author is liable.[10] Thus, an author's potential liability devolves from the degree to which the fictional creation is "of and concerning" the plaintiff.

This analysis does not question whether an author *intended* the writing to be "of and concerning" the plaintiff. In fact, an author's intent plays no role in the process of identification.[11] It is possible to imagine a situation in which an author has not intended to libel an individual, but has nevertheless created a character with substantial similarity to that individual, who then claims to have been injured by the portrayal. This situation may leave an author with limited options if the work is based on real-life experiences and acquaintances. Usually, though, a writer aware of this will alter the people and places in an attempt to avoid sufficient identification.[12] Yet, if the similarity between a plaintiff and a fictional character is sufficient, not even the standard disclaimer that persons and events are purely fictional[13] will protect an author from liability.

This Note will examine an author's potential liability to a private-figure[14] plaintiff in works of fiction.[15] Part II will explore the processes by which courts have compared and contrasted the plaintiff and the fictional character in order to discover what characteristics are essential for identification. However, the

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[10] In addition to being defamatory and of and concerning the plaintiff, the fiction must have been "published."

[11] R. SACK, *supra* note 7, at 120-22.

[12] The court in People v. Charles Scribner's Sons, 205 Misc. 818, 821, 130 N.Y.S.2d 514, 517 (N.Y.C. Magis. Ct. Kings County 1954) explained:

> [i]t is generally understood that novels are written out of the background and experiences of the novelist. The characters portrayed are fictional, but very often they grow out of real persons the author has met or observed. This is so also with respect to the places which are the setting of the novel. The end result may be so fictional as to seem wholly imaginary, but the acorn of fact is usually the progenitor of the oak, which when full grown no longer has any resemblance to the acorn. In order to disguise the acorn and to preserve the fiction, the novelist disguises the names of the actual persons who inspired the characters in his book.

[13] For cases mentioning disclaimers, see Allen v. Gordon, 86 A.D.2d 514, 515, 446 N.Y.S.2d 48 (1st Dep't), *aff'd*, 56 N.Y.2d 780, 437 N.E.2d 284, 452 N.Y.S.2d 25 (1982); Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980); People v. Charles Scribner's Sons, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954).

[14] A discussion of the public-figure plaintiff is beyond the scope of this Note. Liability for defamation of public figures is based upon a different standard than that involving private plaintiffs. In order for an author to be held liable to a public figure, a showing of "actual malice" is required. Actual malice arises from publication of a defamatory falsehood that the author either knew to be false or published in reckless disregard of its falsity. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[15] The works of fiction to be examined include novels and short stories. For recent litigation in this area, see N.Y. Times, Feb. 3, 1987, at C17, col. 1.

courts' treatment in both the older and more recent cases illustrates analytical discrepancies in the application of the "of and concerning" requirement. What was clearly sufficient identification between the plaintiff and the fictional character in some cases was grossly inadequate in others.[16]

As a result of the courts' problematic interpretations of the identification requirement, several critics have suggested that liability should turn on the degree to which an author's conduct intended to portray the real person. However, Part III of this Note will argue that such an analysis is highly subjective and no more helpful than the tenuous precedents previously established.

Finally, Part IV of this Note will designate the various elements of identification, and will propose an overall scheme for their application to the "of and concerning" requirement. It is intended that an objective analysis will lead courts to a more pre-

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[16] *Compare* Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980) (commonality of name and physical description were of enough import to overcome defendant's motion to dismiss for failure to state a claim) *and* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (close parallel between narrative of novel and actual events resulted in verdict for plaintiff), *cert. denied*, 444 U.S. 984 (1979) *with* Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947) (plaintiff had same name as fictional character, but the court looked to several dissimilarities before granting summary judgment in favor of defendant) *and* Springer v. Viking Press, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983) (similarities, such as name, height, weight, build, habit, and activities between plaintiff and fictional character were found insufficient to satisfy the "of and concerning" requirement) *and* Allen v. Gordon, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't) (dissimilarities between plaintiff and fictional character were weighed more heavily by the court than the fact that the names were identical), *aff'd*, 56 N.Y.2d 780, 437 N.E.2d 284, 452 N.Y.S.2d 25 (1982) *and* Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980) (although plaintiff's occupation and residence were identical to those of the novel, the fact that plaintiff did not participate in the investigation upon which the work was based precluded his recovery) *and* People v. Charles Scribner's Sons, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954) (mere use of plaintiff's surname insufficient). *See* Note, *"Clear and Convincing" Libel: Fiction and the Law of Defamation*, 92 YALE L.J. 520, 530 (1983) [hereinafter *"Clear and Convincing" Libel*].

In analyzing the "of and concerning" element, one critic has gone so far as to state that "sufficiency of the identification is determined on an ad hoc basis." Note, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U.L. REV. 571, 580 (1980) [hereinafter *Defamation in Fiction*]. Another critic was concerned with the "present inconsistencies, irrelevancies, uncertainties, and dangers in the law of defamation when applied to works of fiction" and proposed to solve this problem by refining the "of and concerning" requirement so that recovery may be had only upon a showing that the work "unmistakably, individually, and convincingly" libels the plaintiff in the eyes of the reader. *"Clear and Convincing" Libel, supra*, at 542.

This proposed standard, however, is not free from certain inherent dangers. Although one may strive to assert one's individuality, it is nevertheless possible for two individuals to share a set of characteristics or experiences. According to the proposal advanced in *"Clear and Convincing" Libel, supra*, at 534-42, only one of these individuals may recover even if both claim to have been defamed by the character portrayal. Moreover, this analysis leaves unanswered the degree to which the reader must be "convinced" that the work is "of and concerning" the plaintiff. Although the proposed standard is a step in the right direction toward refinement of the "of and concerning" element, it is nevertheless faulty.

cise and consistent method for applying this requirement. Ultimately, this will enable plaintiffs, and authors alike, to more accurately determine the requisite degree of similarity required to establish libel in fiction.[17] As one critic has suggested, "protection and predictability" should be the goal of any new analysis.[18] Since liability essentially turns on the resolution of the "of and concerning" requirement,[19] the need for a uniform system for analyzing the degree of similarity between the plaintiff and the fictional character cannot be overestimated.

II. THE COMMON LAW INTERPRETATION OF THE "OF AND CONCERNING" REQUIREMENT

The initial element to be examined when comparing the plaintiff with the fictional character is the use of the plaintiff's name. Whether a name is the most essential element for comparison has not been conclusively decided.[20] However, it has been established that "it is not necessary that [the person defamed] be mentioned by name in the alleged defamatory statement."[21] This implicitly requires courts to investigate other elements of comparison. Yet, it is questionable whether there is an established hierarchy of indicators which courts follow when weighing other elements.[22] For example, in cases in which the plaintiff and the fictional character share overt traits, such as personality or

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17 Perhaps the following warning to authors will be less threatening once the new standard is effectuated: "[y]ou may never have been sued for libel. You may never have even thought of being sued. But an action for libel can come from anywhere at anytime from anyone." Lasky, *Guidelines Against Libel*, in LAW AND THE WRITER 39 (K. Polking & L. Meranus 3d ed. 1985).

18 *"Clear and Convincing" Libel, supra* note 15, at 528.

19 *See supra* text accompanying notes 7-9.

20 *See* Mullenmeister v. Snap-On Tools Corp., 587 F. Supp. 868 (S.D.N.Y. 1984); Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947); Giaimo v. Literary Guild, 79 A.D.2d 917, 434 N.Y.S.2d 419 (1st Dep't 1981); Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N.E. 462 (1893); *see also* Franklin & Trager, *Literature and Libel*, 4 COMM/ENT 205 (1981); LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOKLYN L. REV. 281, 308 (1985); Comment, *"Hey, That's Me!"—The Conundrum of Identification in Libel and Fiction*, 18 CAL. W.L. REV. 442, 447-52 (1983).

21 Blowers v. Lawyers Coop. Publishing Co., 44 A.D.2d 760, 354 N.Y.S.2d 239, 241 (4th Dep't 1974) (citation omitted); *accord* Dewing v. Blodgett, 124 Cal. App. 100, 11 P.2d 1105 (1932); Peterson v. Rasmussen, 47 Cal. App. 694, 191 P. 30 (1920); Velle Transcendental Research Ass'n v. Esquire, Inc., 41 Ill. App. 3d 799, 354 N.E.2d 622 (1976); Steak Bit of Westbury, Inc. v. Newsday, Inc., 70 Misc. 2d 437, 334 N.Y.S.2d 325 (Sup. Ct. 1972); Cole Fischer Rogow, Inc. v. Carl Ally, Inc., 29 A.D.2d 423, 288 N.Y.S.2d 556 (1st Dep't 1968), *aff'd*, 25 N.Y.2d 943, 252 N.E.2d 633, 305 N.Y.S.2d 154 (1969); Poe v. San Antonio Express-News Corp., 590 S.W.2d 537 (Tex. Civ. App. 1979); *see generally* Annotation, *Libel and Slander: sufficiency of identification of plaintiff by matter complained of as defamatory*, 100 A.L.R.2d 457-61 (Later Case Serv. 1983); *see also* RESTATEMENT (SECOND) OF TORTS § 564 (1979).

22 *See infra* note 140 and accompanying text.

physique, but do not share the same name, courts have not consistently determined whether the plaintiff may recover on this basis alone.[23] If the plaintiff's full name, nickname, or even pseudonym has been attributed to the fictional character, but all other characteristics are dissimilar, an author's liability may also be questioned. To resolve these issues, it is necessary to examine the relevant case law to uncover how courts have treated both intrinsic and extrinsic factors[24] in determining whether the fictional work is "of and concerning" the plaintiff.

A. *Cases in which Plaintiffs Have Prevailed*

In a recent case, *Geisler v. Petrocelli*,[25] the author used the plaintiff's full name in his book. Based on the commonality of name and physical traits, the Second Circuit reversed the lower court's decision[26] to dismiss the case for failure to state a claim.[27] The Second Circuit stated that "[t]his central character bears appellant's precise name, 'Melanie Geisler' and is described as young, attractive and honey-blond . . . ."[28] The court also sympathized with the plaintiff's averment that the "use of her exact name coupled with a commonality of physical traits and personal knowledge have reputedly caused reasonable people to understand that the character pictured in 'Match Set' was appellant, acting as described."[29]

Thus, *Geisler* relied on the elements of namesake and physical likeness to compare the plaintiff with the fictional character. The facts of this case did not require that the court address the question whether sufficient similarity for a finding of liability would have been established if only the plaintiff's name was shared with the fictional character. Thus, the role these two factors play, both independently and together, merits consideration.

An attempt to explore the roles of the different identification

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[23] *See, e.g.*, Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979). *But cf.* Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966); Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962); Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983); Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980).

[24] The term "intrinsic factors" will be used to connote the personality, habits, and behavior of an individual, whereas "extrinsic factors" will be used to describe an individual's appearance or undisputed traits (age, marital status, residence, occupation, etc.).

[25] 616 F.2d 636 (2d Cir. 1980).

[26] *Id.* at 636.

[27] *Id.* at 641.

[28] *Id.* at 638.

[29] *Id.*

elements must begin with the examination of another Second Circuit case, *Fetler v. Houghton Mifflin Co.*[30] *Fetler* addressed the situation in which the plaintiff's name was not used, but the events of his family's life were uniquely and shockingly similar to those which the characters in the novel encountered. Specifically, the composition of the family, the events in the life of the family, the central figure's role within that family, and the father's occupation as displayed in the fictional work, very closely resembled those characteristics and events alleged by the plaintiff as having been experienced by himself and his family.[31]

Based upon the court's finding that "[i]t 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[,]"[32] it concluded that an issue of fact regarding identification did exist.[33] Hence, the court reversed the previous summary judgment granted to the defendant-author.[34]

More recently, a California court also addressed the importance of other similarities when the plaintiff's name is not attributed to the fictional character. In *Bindrim v. Mitchell*,[35] the court looked to the content of the entire narrative and found the author liable for defamation. The publication at issue in *Bindrim*

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30 364 F.2d 650 (2d Cir. 1966).

31 The court determined that the similarities between the plaintiff's life and the character depicted in the novel were apparent from the following:

> [t]he 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. . . . 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. The family travels about Europe in an old bus. In fact, plaintiff's father was a Russian Protestant (Baptist) minister; the rest of his family gave concerts as a family band and choir. Plaintiff looked after them, and they journeyed through Europe during the 1930's in an old bus. Both families bought homes in Stockholm. There are several other similarities as well.

Id. at 651 (footnote omitted).

32 *Id.* (footnote omitted).

33 *Id.* at 654.

34 *Id.* Speaking of the district court's decision, Judge Feinberg held that "summary judgment on the issue of identification was improper on this record." *Id.*

35 Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979). The court found that Dr. Bindrim was a public figure. Therefore, the court used the actual malice standard to evaluate the defendant's possible liability. 92 Cal. App. 3d at 72. Nevertheless, the case is essential in developing the elements of identification. *See* 92 Cal. App. 3d at 75-76.

described the events of a nude encounter therapy session which the author, Gwen Mitchell, had attended.[36] Although based on a true experience, Mitchell had changed some of the circumstances in an attempt to fictionalize the facts. For instance, Dr. Paul Bindrim's name was changed to "Dr. Simon Herford," who was described in the book "as a 'fat Santa Claus type with long white hair [and] white sideburns . . . .' "[37] However, "Bindrim was clean shaven and had short hair."[38] Despite the fact that the name and physical traits were markedly different, it is questionable what justified the author's liability. The court explained that "[t]he test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described."[39] Because the plaintiff was identified by colleagues, who were regarded as "reasonable readers,"[40] as the character in the book, the court found Mitchell liable for defamation.[41] Therefore, *Bindrim* used the "reasonable reader"[42] standard in a limited fashion in order to satisfy the identification requirement. Although the name and appearance of the fictional character were purposely changed, the similarities in occupation and therapy methods were sufficient to allow the reasonable reader to identify Dr. Bindrim with Dr. Herford.[43] Thus, the *Bindrim* test fails to provide guidelines by which courts can structure the elements of identification.

B. *Cases in which Authors Were Absolved*

As was apparent in *Fetler*[44] and *Bindrim*,[45] a plaintiff's real name must not necessarily be attributed to a fictional character in order for that plaintiff to recover. Yet, if the names used are not identical, it is questionable whether the author had a certain plaintiff in mind, and further, whether he made a conscious attempt to alter the plaintiff's identity so that the latter would not be recognized. Although the author may advance these de-

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36 92 Cal. App. 3d at 69.
37 *Id.* at 75.
38 *Id.*
39 *Id.* at 78 (citation omitted).
40 Plaintiff's colleagues were regarded as "reasonable readers." *Id.*
41 *Id.* at 81. For further commentary about and criticism of *Bindrim*, see Rosen & Babcock, *Of and Concerning Real People and Writers of Fiction*, 7 COMM/ENT 221 (1983); Torem *Nude Encounters of the Legal Kind*, in 7 UPDATE ON LAW-RELATED EDUCATION 30 (1983).
42 *See supra* text accompanying note 39.
43 *See* 92 Cal. App. 3d at 75; *see also supra* text accompanying note 38.
44 364 F.2d 650 (2d Cir. 1966).
45 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979).

fenses,[46] this does not end the inquiry into the identification element. When the names are not identical, other traits must be examined in order to determine whether the plaintiff has been identified in the writing.

People v. Charles Scribner's Sons[47] suggests the general approach to such a situation. The plaintiff's surname was attributed to the fictional character. However, without the given name, the surname was not sufficient to enable the plaintiff to claim that he had been "named."[48] This demonstrates that the context in which the plaintiff appears in the work is relevant to identify him.

The novel in *Charles Scribner's Sons* related the experiences of several servicemen stationed in Hawaii before Pearl Harbor. Plaintiff, in fact, was stationed in Hawaii at this time, yet the specific events related in the novel were not shared by the plaintiff.[49] In this case, the background, acts, deeds, and events of the novel did not coincide with the plaintiff's past, and thus, the court held that he was not identified.[50] Such a decision appears to suggest that a general similarity of experience is insufficient to identify the plaintiff; rather, specific identification is required.

Springer v. Viking Press[51] presented a situation similar to that in *Charles Scribner's Sons*. General similarities of first name and

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46 In libel cases involving genre other than fiction, the truth of the matter stated or portrayed provides a complete defense. LIBEL DEFENSE RESOURCE CENTER 50-STATE SURVEY, *supra* note 9, at 454. Fiction, by nature, is not true and, therefore, the defense is unavailable. Silver, *Libel, the "Higher Truths" of Art, and the First Amendment*, 126 U. PA. L. REV. 1065, 1071 n.24 (1978); Garbus & Kurnit, *Libel Claims Based on Fiction Should Be Lightly Dismissed*, 51 BROOKLYN L. REV. 401, 421 (1985). Fiction is also not protected by the first amendment. The lack of defenses thus necessitates a clear and consistent standard of liability to ensure that an author will be safeguarded from haphazard libel claims. *See* Franklin, *Fiction, Libel, and the First Amendment*, 51 BROOKLYN L. REV. 269 (1985); *see also generally* Rich & Brilliant, *supra* note 7, at 1.

47 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954). Although the plaintiff claimed a statutory violation of § 50 of the New York Civil Rights Law (prohibiting the use of one's name for purposes of trade without first obtaining written consent), the principle of identification by virtue of the "of and concerning" requirement is the same.

48 205 Misc. at 820.

49 The book does not place this character in Company F, nor in the same battalion in which Jones [author] and Maggio [plaintiff] actually served. Nor does it in any wise portray acts which were actually performed by the complainant. Except for the alleged identity of name, none of the things which the character "Angelo Maggio" does in the book, nor any of the details of the background and life of "Angelo Maggio" as set forth in the book, are . . . a portrayal of him or of his life and do not in any wise point to or identify him as the person intended or referred to.

Id.

50 *Id.* at 824.

51 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983).

appearance were insufficient to hold the author liable:[52]

> Whether chapter 10 of the book 'State of Grace' defamed plaintiff is the only issue before us. 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 . . . .[53]

The author, Robert Tine, had developed a "close personal relationship"[54] with plaintiff Lisa Springer while the two attended Columbia University. Moreover, "Tine informed plaintiff that he had loosely patterned the relationship between the hero, the papal private secretary, and the heroine, an investigative reporter and the daughter of one of Italy's most influential and powerful industrialists, on the relationship between them."[55] In fact, both the plaintiff and the fictional character graduated from college, both lived on 114th Street in New York City, and both shared the same general physical attributes.[56] Yet, the court relieved the defendant from liability explaining that

> [w]hile the similarities adverted to are in large part superficial, the dissimilarities both in manner of living[57] and in outlook are so profound that it is virtually impossible to see how one who has read the book and who knew Lisa Springer could attribute to Springer the life-style of Blake.[58]

This rationale suggests that the court does not merely balance the dissimilarities against the similarities, but rather, probes into their significance. Although the similarities, coupled with the author's

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52 60 N.Y.2d at 917.

53 *Id.* (citations omitted). Since this is the appellate court's entire opinion, it is necessary to examine what the New York Appellate Division had decided previously in order to ascertain the basis of the appellate court's decision. *See* Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982).

54 90 A.D.2d at 316.

55 *Id.*

56 *Id.* at 319.

57 Blake was portrayed as a prostitute who lived in luxury, while Springer was a college tutor. *Id.* (footnote not in original).

58 *Id.* The court suggested that any reader who is acquainted with the plaintiff, and can identify her as the fictional character, provides the standard for the identification requirement. This is reminiscent of *Bindrim*'s use of the plaintiff's colleagues as "reasonable readers." Bindrim v. Mitchell, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29, 39, *cert. denied*, 444 U.S. 984 (1979); *see supra* notes 41-42.

admission that he modeled the character after Springer,[59] seem substantial in quantity, the court nevertheless found them "superficial" in quality.[60]

The rationale developed in *Springer* appears to be the first of its kind in New York. Both *Springer* and *People v. Charles Scribner's Sons*[61] suggest that the context of the narrative should be evaluated to determine whether the plaintiff was identified.[62] These cases, however, do not indicate what specific factors are to be examined. Although both courts made reference to "acts," "background,"[63] and "attributes,"[64] the standards used were neither appropriate nor helpful.

Although *Springer* lacks the guidance of a more objective and definitive standard, it is nevertheless an advance beyond the approach espoused by earlier courts. Earlier cases[65] employed quantitative approaches to the identification issue. In each case, the court weighed the similarities between the plaintiffs and the fictional characters against the dissimilarities. Whichever of these factors was more persuasive in number, but not necessarily in substance, predicated a finding of, or relief from, liability. For example, in *Clare v. Farrell*,[66] in addition to finding a similarity in name,[67] the court looked to the plaintiff's occupation and appearance as additional elements of identification. Although both the plaintiff and the fictional character were writers named "Bernard Clare," and shared the same physical attributes, the dissimilarities as to events, locales, and experiences[68] outweighed the similarities. Accordingly, the court granted the author's motion for summary judgment.[69]

In *Allen v. Gordon*,[70] the plaintiff argued that because the author had used the plaintiff's name in the work, the book was "of and

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59 *Springer*, 90 A.D.2d at 316.

60 *Id.* at 319.

61 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954).

62 *See Springer*, 90 A.D.2d at 319; *Charles Scribner's Sons*, 205 Misc. at 822-23.

63 *Springer*, 90 A.D.2d at 319.

64 *See Charles Scribner's Sons*, 205 Misc. at 820-21.

65 *See* Middlebrooks v. Curtis Publishing Co., 281 F. Supp. 1 (D.S.C. 1968), *aff'd*, 413 F.2d 141 (4th Cir. 1969); Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947); Allen v. Gordon, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't), *aff'd*, 56 N.Y.2d 780, 437 N.E.2d 284, 452 N.Y.S.2d 25 (1982); Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980); Swacker v. Wright, 154 Misc. 822, 277 N.Y.S. 296 (Sup. Ct. 1935).

66 70 F. Supp. 276 (D. Minn. 1947).

67 *Id.* at 277.

68 *Id.* at 278. The fictional character travelled from Chicago to New York to pursue his career, whereas the plaintiff never made such a trip.

69 *Id.* at 281.

70 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't), *aff'd*, 56 N.Y.2d 780, 437 N.E.2d 284, 452 N.Y.S.2d 25 (1982).

concerning" the plaintiff.[71] The court, however, held that "Allen" is a common name, and standing alone, does not demonstrate identification between the plaintiff and the fictional character.[72] Because no other similarities were alleged,[73] the plaintiff failed to prove that the writing was "of and concerning" him.[74]

Similarly, in *Swacker v. Wright*,[75] the plaintiff's name, "Swacker," was used in the defendant's book.[76] The fictional character was portrayed as the district attorney's secretary. However, the plaintiff never held such a position.[77] "Apart from the use of the name . . . there is not a single parallel between the plaintiff and the character depicted in the books."[78] The decision to relieve the defendant from liability,[79] as in *Allen*, turned on a quantitative comparison of similarities and dissimilarities.

Two years prior to *Allen*, *Lyons v. New American Library, Inc.*[80] came before the same court. The facts of *Lyons* are essentially the antithesis of those in *Swacker*. In *Lyons*, the plaintiff's name was not used in the book, but the fictional character's occupation[81] was claimed by the plaintiff to be sufficiently similar and unique so as to be "of and concerning" him.[82]

Although the court found the occupation to be the essential element of similarity,[83] it held that "[t]he work clearly states that it is fiction and that, combined with plaintiff's admission that he did not participate in the . . . investigation, requires the conclusion that the passage is not actionable."[84]

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71 86 A.D.2d at 515.

72 *Id.*

73 "[N]o first name and no physical description of the person called 'Dr. Allen' was given in the book (other than he had an 'angular' face), [and] the location of the office of 'Dr. Allen' in the book is different from the location of plaintiff's office . . . ." *Id.*

74 *Id.*

75 154 Misc. 822, 277 N.Y.S. 296 (Sup. Ct. 1935).

76 154 Misc. at 823.

77 *Id.*

78 *Id.*

79 *Id.* Although the relief sought by plaintiff in *Swacker* was based upon N.Y. CIV. RIGHTS LAW § 51, the basis of the court's analysis regarding identification is similar to an analysis of a claim for libel.

80 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980).

81 The fictional character was portrayed as the sheriff of Malone, New York. 78 A.D.2d at 723.

82 *Id.* at 724.

83 *Id.*

84 *Id.* The "investigation" referred to in the quotation is the theme of the book.

In *Lyons*, it is clear that the defendant's disclaimer played a role in the court's decision to dismiss the complaint. *But cf. supra* note 5. Because the work was labeled as fiction, the court dismissed plaintiff's complaint. However, this is precisely the issue which should have been addressed. All of the works for which plaintiffs are suing are works of fiction, yet at some point, when there is sufficient identification, a plaintiff must be able to recover. *Lyons*, however, circumvented the crux of the problem.

The last case to be considered, which used the quantitative approach to identification, is *Middlebrooks v. Curtis Publishing Co.*[85] *Middlebrooks* involved a story printed in the *Saturday Evening Post*. The plaintiff's name, "Middlebrooks," was not used in the article because the plaintiff forbade it. However, the author changed the plaintiff's name to "Brooks."[86] While numerous dissimilarities existed between the real person and the fictional character, the only similarity was the name element.[87] Because the similarities between the two were far outnumbered by the dissimilarities, the court rejected the plaintiff's claim.[88]

Although several courts have approached the issue of identification quantitatively, such an analysis is not only impractical, but also unhelpful, when a form of writing other than pure fiction is involved.

Pring v. Penthouse International, Ltd.[89] demonstrates this problem.[90] In *Pring, Penthouse Magazine* published an article about the Miss America beauty contest. Kimerli Pring, the Miss Wyoming contestant, sued *Penthouse* on the ground that the story defamed her. While the piece did not use Pring's name, her career as beauty

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85 413 F.2d 141 (4th Cir. 1969). It is worthwhile to note that the dissenting opinion in *Bindrim*, 92 Cal. App. 3d at 89 (Files, P.J. dissenting), also argued that the author should not be held liable. The dissent based its opinion on the fact that the differences between Dr. Bindrim and Dr. Herford were more numerous than the only similarity involving the type of therapy practiced. The dissent stated that " [d]efendant's novel describes a fictitious therapist who is conspicuously different from plaintiff in name, physical appearance, age, personality and profession . . . . Indeed, the fictitious Dr. Herford has none of the characteristics of plaintiff except that Dr. Herford practices nude encounter therapy." *Bindrim*, 92 Cal. App. 3d at 86 (Files, P.J. dissenting). Because occupation was the only similarity between the two doctors, the dissent concluded that this was an insufficient ground upon which to hold the author liable in light of the numerous dissimilarities. Bindrim, 92 Cal. App. 3d at 86-87 (Files, P.J. dissenting). This quantitative comparison is not unlike the courts' analyses in *Allen, Swacker, Lyons*, and *Middlebrooks*.

86 413 F.2d at 142.

87 [T]he marked dissimilarities between the fictional character and the plaintiff tend to support the District Court's finding against the reasonableness of an identification of the two. Among the factors considered were the difference in ages between the fictional Esco and the plaintiff, the absence of the plaintiff from Columbia at the time of the episode, and the differences in employment between the fictional character and the plaintiff. Nor did the story parallel the plaintiff's life in any significant manner.

Id. at 143 (footnote omitted).

88 *Id.*

89 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *see also* Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280 (D.N.J. 1981) (beauty pageant sued magazine for libel on the same facts as *Pring*).

90 In *Pring*, the court was faced with a situation in which the plaintiff was clearly identified by the author's creation. However, the finding that the writing was "of and concerning" the plaintiff was cast aside because the article described something so impossible that no reader could believe that the events depicted really happened. 695 F.2d at 439, 442; *see infra* note 91.

queen, as well as several other attributes, were transferred to the fictional Miss Wyoming.[91]

Although this article differs from the novels examined so far because it depicts impossibility and fantasy,[92] the standard of liability nevertheless remains the same: whether " 'the characters or plot bear such resemblance to actual persons and events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person.' "[93] The jury found the similarities between the plaintiff and the fictional character to be sufficient for identification.[94] However, because the story described something quite impossible,[95] the circuit court decided that no reader would ever think that the fictional character represented plaintiff Kimerli Pring.[96] Although the quantitative approach to identification was used, the finding was set aside. Ultimately, *Penthouse* prevailed.[97]

The dissent was not satisfied with the *Pring* court's rationale. The dissent posited that the author should not be permitted to escape liability by cloaking his portrayal of the plaintiff in the realm of fantasy.[98] Moreover, "[t]he descriptions of the conduct of Miss Wyoming would make even the most careless reader aware of sexual deviation and perversion."[99] The dissent appeared to rely on the fact that there was only one Miss Wyoming (Kimerli Pring) at that

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91 *Id.* at 440-41.

92 The article vividly described Miss Wyoming's participation in the talent contest during the pageant. It presented a detailed account of her thoughts and actions during the competition in which Miss Wyoming's baton-twirling was likened to fellatio, and ultimately resulted in levitation, which was physically impossible. *Id.*

93 *Id.* at 442 (quoting trial court).

94 *Id.*

95 *See supra* notes 89 & 91.

96 *Pring* reveals a dilemma. Because the events attributed to the plaintiff deviated so far from reality, the court reasoned that "[t]he charged portions of the story described something physically impossible in an impossible setting. . . . [I]t is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else." *Id.* at 443. The plaintiff claimed that although she did not engage in the acts depicted, she was identified by reference to her career and home state.

Fiction is not factual. It may be unreal and may even reach the level of impossibility, unbelievability, and fantasy. The *Pring* court, however, did not treat fantasy and impossibility as "pure" or "standard" fiction, but rather, carved out a section of fiction and accorded it separate and particular treatment. This special treatment does not seem justified because a work is either fact or fiction, and if it is fiction, a uniform system of analysis should be used for all of its degrees.

For further discussion on this issue, see generally Rosen & Babcock, *supra* note 40; Note, *Defamation by Fiction*, 42 MD. L. REV. 387 (1983); Torem, *supra* note 40; Note, *Fictionalized Publications: When Should Defamation and Privacy Be a Bar?*, 1984 UTAH L. REV. 411.

97 *Pring*, 695 F.2d at 443.

98 *Id.* at 444.

99 *Id.*

time, and that a magazine article about a Miss Wyoming, no matter how fictitious, would naturally point to her. The dissent found the portrayal libelous since the overall similarities between both figures identified the plaintiff.[100] However, the majority opinion held that although the similarities identified the plaintiff, the identification had to be discarded for lack of reality.[101]

Wheeler v. Dell Publishing Co.[102] is another example of fiction clearly based upon fact. Although the novel, *Anatomy of a Murder*, was not wholly fantastic, it nevertheless was, as in *Pring*, a fictionalization of fact.[103] The novel at issue in *Wheeler* presented an account of a murder trial. The settings and several of the characters closely resembled those involved in the actual trial upon which the novel was based.[104] However, the court held 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 her with Hazel Wheeler. It is important to note that while the trial and locale might suggest Hazel Wheeler to those who knew the Chenoweth family, suggestion is not identification.[105]

This court really seemed to be suggesting that while the similarities were adequate to identify the plaintiff, the fictional character was purposely made to deviate from the plaintiff. Thus, those who were able to identify the plaintiff would never believe what was writ-

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100 *Id.*

101 *Id.* at 443.

102 300 F.2d 372 (7th Cir. 1962).

103 "The novel 'Anatomy of a Murder', by Robert Traver, is the fictionalized version of the Chenoweth trial." *Id.* at 374.

Fictionalization of fact, using a factual event as the basis of a work of fiction, is also known as "faction." For further examination of such works and the principles of liability involved for defamation, see generally Franklin & Trager, *supra* note 19; Silver, *supra* note 45.

104 The libel suit against Dell is based on allegations that Hazel Wheeler has been defamed because in the locale, trial, and characters presented in "Anatomy of a Murder" she is identified with the fictional Janice Quill.

> "Anatomy of a Murder" is a study through fiction of an actual murder trial. The fictional locale is fairly identifiable with the actual. The Peterson trial was in Marquette, in the Upper Peninsula of Michigan. The fictional trial is in Iron Bay, in the Upper Peninsula. Certainly those who knew of the Peterson trial would identify it with the fictional trial of Lieutenant Manion. Admittedly Barney Quill represents Maurice Chenoweth. And those who knew John Voelker as defense attorney for Peterson would identify Paul Biegler, the fictional defense attorney, with Voelker.
>
> But none who knew Hazel Wheeler could reasonably identify her with Janice Quill . . . .

Wheeler, 300 F.2d at 375-76.

105 *Id.* at 376.

ten of her.[106] This argument is akin to that used by the *Pring* majority. However, this argument is unjustified in light of similar cases where it was sufficient that the identification was established and no inquiry was made into the "believability" of the acts depicted.[107]

Various decisions concerning the sufficiency of identification have been rendered during the past two decades. Some courts seemed to have balanced the quantity of similarities against the dissimilarities,[108] while others have relied on the general context of the writing,[109] and still others have taken the reality-fantasy[110] or reality-fiction[111] distinction into account. In some jurisdictions, the use of the plaintiff's name was often the primary concern.[112] In other cases, elements such as appearance, occupation, or setting were more persuasive.[113] The variety of inconsistent methods used by

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106 Yet, this rationale runs afoul of the principle that fiction "does not insure immunity when a reasonable man would understand that the fictional character was a portrayal of the plaintiff." Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969).

107 *See, e.g.*, Judge Breitenstein's dissenting opinion in Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

108 *See generally* Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980); Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966); Middlebrooks v. Curtis Publishing Co., 281 F. Supp. 1 (D.S.C. 1968), *aff'd*, 413 F.2d 141 (4th Cir. 1969); Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947); Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983); Allen v. Gordon, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't), *aff'd*, 56 N.Y.2d 780, 437 N.E.2d 284, 452 N.Y.S.2d 25 (1982); Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980); Swacker v. Wright, 154 Misc. 822, 277 N.Y.S. 296 (Sup. Ct. 1935); *see also* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979); People v. Charles Scribner's Sons, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954).

109 *See generally* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979), *cert. denied*, 444 U.S. 984 (1979); Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N.E. 462 (1893); People v. Charles Scribner's Sons, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954).

110 *See generally* Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

111 Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962).

112 *See generally* Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980). For cases involving defamation in newspapers, where use of the plaintiff's name was sufficient to identify him, see Mooney v. New York News Publishing Co., 48 A.D. 271, 62 N.Y.S. 781 (1st Dep't 1900). *But cf.* Smith v. Harnish, 167 Cal. App. 2d 115, 333 P.2d 815 (1959) (article applied as well to an indeterminate group of people); Ledger-Enquirer Co. v. Brown, 214 Ga. 422, 105 S.E.2d 229 (1958) (not referring to plaintiff in light of *all* circumstances); Minday v. Constitutions Publishing Co., 52 Ga. App. 51, 182 S.E. 53 (1935) (more than name required); Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N.E. 462 (1893) (name is only one of the many elements to be considered); Fleischmann v. Bennett, 87 N.Y. 231 (1881) (name insufficient in light of fact that plaintiff was not in the business described or a member of the firm named in the publication).

113 Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966); Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962); Middlebrooks v. Curtis Publishing Co., 281 F. Supp. 1 (D.S.C. 1968), *aff'd*, 413 F.2d 141 (4th Cir. 1969); Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979); Springer v. Viking Press, 90 A.D.2d 315, 457

the courts to determine the degree of similarity demonstrates the need for a more consistent and uniform approach. The present identification evaluation tends to be applied on a specific and subjective case-by-case basis which allows too much room for error in interpretation and for inconsistency in application.

III. Recent Approaches—Shift From The "Of And Concerning" Requirement To An Examination Of The Author's Intent And Conduct

The discouraging judicial treatment and resulting unpredictability of the "of and concerning" requirement has prompted inquiry into new methods for determining whether one has been libeled in a work of fiction.[114] These approaches rely primarily on an examination of the author's intent *vis-à-vis* the work.[115] Although such methods have been proposed by several critics,[116] only one court, almost a century ago, has seriously examined the author's intent along with the similarities which existed between

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N.Y.S.2d 246 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 916, 458 N E.2d 1256, 470 N.Y.S.2d 579 (1983); Allen v. Gordon, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't), *aff'd*, 56 N.Y.2d 780, 437 N.E.2d 284, 452 N.Y.S.2d 25 (1982); Giaimo v. Literary Guild, 79 A.D.2d 917, 434 N.Y.S.2d 419 (1st Dep't 1981); Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980); People v. Charles Scribner's Sons, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954); Swacker v. Wright, 154 Misc. 822, 277 N.Y.S. 296 (Sup. Ct. 1935).

For newspaper defamation cases examining various elements of identification, see Riss v. Anderson, 304 F.2d 188 (8th Cir. 1962) (name and occupation); Memphis Commercial Appeal, Inc. v. Johnson, 96 F.2d 672 (6th Cir. 1938) (name and town of residence); Washington Post Co. v. Kennedy, 3 F.2d 207 (D.C. Cir. 1925) (name, age, and occupation); Carlisle v. Fawcett Publications, Inc., 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (1962) (name, appearance, and athletic ability in the only high school in the city named); International Fraternal Alliance v. Mallalieu, 87 Md. 97, 39 A. 93 (1898) (name and occupation); Ellis v. Brockton Publishing Co., 198 Mass. 538, 84 N.E. 1018 (1908) (name and life events); Davis v. Marxhausen, 86 Mich. 281, 49 N.W. 50 (1891) (name and residence); Thorson v. Albert Lea Publishing Co., 190 Minn. 200, 251 N.W. 177 (1933) (name and address); Gold v. S. Pian Time Payment Jewelry Co., 165 Mo. App. 154, 145 S.W. 1174 (1912) (handicap and occupation); Michaels v. Gannett Co., 10 A.D.2d 417, 199 N.Y.S.2d 778 (4th Dep't 1960) (name and residence); Sweet v. Ken, Inc., 169 Misc. 407, 7 N.Y.S.2d 737 (Sup. Ct. 1938) (name, occupation, and address), *aff'd*, 256 A.D. 1063, 12 N.Y.S.2d 240 (1st Dep't 1939); Soper v. Associated Press, 115 A.D. 815, 101 N.Y.S. 343 (4th Dep't 1906) (name, religion, and occupation), *aff'd mem.*, 188 N.Y. 550, 80 N.E. 1120 (1907); Palmer v. Bennett, 83 Hun 220, 31 N.Y.S. 567 (2d Dep't 1894) (name, former occupation, and residence), *aff'd mem.*, 152 N.Y. 621, 46 N.E. 1150 (1897); Costello v. Suleski, 61 Pa. D & C 572 (1948) (name and address); Commonwealth v. Donaducy, 176 Pa. Super. 27, 107 A.2d 139 (1954) (name and appearance), *appeal dismissed*, 349 U.S. 913 (1955).

114 *See generally* Rosen & Babcock, *supra* note 40; Franklin & Trager, *supra* note 19; Note, *Toward a New Standard of Liability for Defamation in Fiction*, 58 N.Y.U. L. Rev. 1115 (1983) [hereinafter *New Standard of Liability*]; Note, *Defamation in Fiction: The Need for a New Test*, 24 Santa Clara L. Rev. 449 (1984) [hereinafter *New Test*]; N.Y. Times, Apr. 5, 1987, § 6 (Magazine), at 28.

115 *See supra* note 113.

116 *Id.*

the plaintiff and the fictional character.[117] That court stated that "[t]he defendant's meaning in regard both to the person to whom the words should be applied, and the imputations against him, is always to be ascertained."[118] Although the defendant used the plaintiff's name, the court believed the author's claim that he did not intend to identify the plaintiff, H.P. Hanson, a real estate and insurance broker of South Boston, in his work. The court believed that he meant to portray A.P.H. Hanson, another real estate and insurance broker of South Boston.[119] The "mistake" as to first and middle initials prompted the plaintiff to sue. The court concluded that the author did not intend to portray H.P. Hanson, but used his name by mistake.[120] Thus, the author was not liable.[121] If the other characteristics of the fictional character's life were not so similar to plaintiff's, the author's intent may be ascertainable and his mistake forgivable. But, as the dissenting opinion explained, the high degree of similarity between both individuals makes the author's intent difficult to assess.[122] The notion of an author's intent as determinative of liability has never taken precedence over an examination of the degree of similarity between a plaintiff and a fictional character.

Two commentators proposed that "the constitutional requirement of 'fault' [be added] to the common law defamation elements that previously dominated fiction-defamation cases."[123] This approach, however, is limited in application, and thus cannot be uniformly and successfully used in all cases. It limits liability to four situations,[124] and makes the central issue at the core of the approach—whether the defendant *intended* to portray the plaintiff—difficult to determine. The authors appear to answer

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117 *See* Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N.E. 462 (1893) (the similarities which existed between the plaintiff and fictional character included name, residence, and occupation).

118 159 Mass. at 294-95.

119 *Id.* at 298-99. The author intended to report on one "A.P.H." Hanson, but mistakenly referred to him as "H.P." Hanson. The plaintiff, whose name was H.P. Hanson, sued. *Id.* at 298.

120 *Id.*

121 *Id.* at 299.

122 *Id.* at 299-305 (Holmes, J., dissenting).

123 *See* Franklin & Trager, *supra* note 19, at 233. The author is at "fault" if deliberately intending to describe the plaintiff. *Id.* at 223.

124 The authors suggest that once the element of fault is added, the defendant will be liable in cases involving the following situations: the "sham" case (the author intended to defame the plaintiff); the failed disguise (the author intended to portray the plaintiff but tried, unsuccessfully, to disguise him); the forgotten plaintiff (the author once knew, but now claims to have forgotten, the plaintiff); and the accidental description (the author does not know the plaintiff, but somehow created a character similar to him). *See id.* at 223-30.

this with the statement that "[a]ll 'close' cases should be decided in favor of the author rather than the plaintiff."[125] However, this hardly seems any more justifiable than the subjective analysis employed by the courts until now.

In *Of and Concerning Real People and Writers of Fiction*,[126] coauthors Rosen and Babcock argued that the "of and concerning" test is insufficient and requires modification.[127] Hence, a new test is needed whereby a plaintiff must prove by clear and convincing evidence that (1) the defendant intentionally used fiction to defame the plaintiff, and (2) the defendant acted with malice in defaming the plaintiff.[128] The proposed test thus looks to the author's possible intent to harm the plaintiff by the portrayal:

> If an author is blameworthy at all, it is not because of what the reader thought, but rather because of what the author himself thought. We argue . . . that even the intent to use a person's persona is not sufficient fault, for that too may be an important literary device. An author should only be culpable when he *intends* to harm the person portrayed. At the very least, however, an author who is not shown even to intend to portray a person, let alone injure him, should not be subject to liability.[129]

Another commentator proposed a new liability test for fiction, which focuses on negligent misrepresentation[130] in the case of private figure plaintiffs.[131] The test asks courts to analyze whether an author intended for readers to believe that a statement made was a statement of fact, or whether the author reasonably failed to realize that readers would so interpret the statement. "[The] court should focus on the author's intent to make a statement purporting to be true, rather than on the author's intent to defame . . . ."[132] The difference of this approach, in effect, is that "[a]n author's affirmative steps to disguise a source for a fictional character would shield him from liability even in cases where a jury might find the character to be 'of and concerning' a plaintiff."[133] Ultimately, however, the commentator argued that "the 'of and concerning' inquiry remains

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125 *Id.* at 222.
126 Rosen & Babcock, *supra* note 40.
127 *Id.* at 225.
128 *Id.*
129 *Id.* at 247 (emphasis added).
130 Misrepresentation is defined as "a false 'statement of fact.' " *New Standard of Liability, supra* note 113, at 1151.
131 *See generally id.*
132 *Id.* at 1118 (footnote omitted).
133 *Id.* at 1153.

unchanged under the proposed test."[134] It therefore appears as though the additional standard of negligent misrepresentation is neither helpful nor necessary in clarifying the "of and concerning" requirement.

Another commentator also suggested a new test for defamation in fiction. The general focus of the proposed standard is on the author's conduct and specifically questions whether the author used "due care in describing the fictional character so as not to confuse the fictional character with the plaintiff[.]"[135] If the author can demonstrate that the two cannot be confused, there will be no liability.[136] However, to prove that the plaintiff and the fictional character cannot be confused, the author must show how different the two really are. To accomplish this, the author will, in effect, argue that the dissimilarities far outweigh, or are more substantial than the similarities. Because this involves the elements of identification between the two figures, the "of and concerning" requirement reappears.

The foregoing approaches require a subjective inquiry into an author's state of mind regarding probable intent to represent a plaintiff. Subjective standards often lead to arbitrary determinations rendered on case-by-case bases instead of relying upon demonstrable legal principles.

IV. Elements To Be Examined—Return To The "Of And Concerning" Requirement

In light of the difficulties in applying the subjective test of intent to determine libel in fiction, a return to the traditional objective standard may be a better solution. A return to the "of and concerning" standard will avoid the great room for error inherent in an examination of intent. However, a modification of the traditional requirement is necessary to provide a more workable, accurate, and uniform analysis by which to determine liability. Uniform and consistent application of the modified standard would enable both parties to know exactly what elements are required to fulfill the requisite degree of similarity dictated by the courts.

In modifying the existing standard so that it may be applied more consistently, many of the elements considered by the

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134 *Id.*

135 *New Test, supra* note 113, at 449. The author's conduct is evaluated by a negligence test.

136 *Id.* at 449, 464.

courts[137] should be utilized and arranged within the overall scheme sought to be implemented. These elements include both external attributes, such as physical characteristics, traits, mannerisms, and setting, as well as emotional characteristics, such as thoughts, behavior, and habits.

The guidelines developed below aim to provide courts with a step-by-step analysis with which to evaluate and determine the degree of similarity between plaintiffs and fictional characters. A certain minimal degree of similarity will be defined so that common elements falling below this standard will absolve authors from liability, and similarities meeting or exceeding the requisite standard will enable plaintiffs to withstand defendants' motions to dismiss.[138] Therefore, once the degree of similarity is established, a court will be able to determine whether the author is liable to the plaintiff.

The initial elements of identification between a plaintiff and a fictional character upon which a court must focus are the plaintiff's external characteristics which the fictional character allegedly shares. The first element is the plaintiff's name.[139] Although name is the initial element by which one is identified, the

> [p]erson defamed need not be named in [a] defamatory publication if, by intrinsic evidence, allusion is apparent, or if he can be identified by others from description or reference to facts and circumstances contained in the publication, or if he could be and was identified by others by extraneous circumstances.[140]

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137 *See generally* Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980); Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966); Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962); Middlebrooks v. Curtis Publishing Co., 281 F. Supp. 1 (D.S.C. 1968), *aff'd*, 413 F.2d 141 (4th Cir. 1969); Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979); Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983); Allen v. Gordon, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't), *aff'd*, 56 N.Y.2d 780, 437 N.E.2d 284, 452 N.Y.S.2d 25 (1982); Giaimo v. Literary Guild, 79 A.D.2d 917, 434 N.Y.S.2d 419 (1st Dep't 1981); Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980); People v. Charles Scribner's Sons, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954); Swacker v. Wright, 154 Misc. 822, 277 N.Y.S. 296 (Sup. Ct. 1935).

138 For example, the courts in *Allen, Giaimo, Lyons, Charles Scribner's Sons, Springer*, and *Swacker* all granted defendants' motions to dismiss. *Clare* and *Wheeler* granted defendants' motions for summary judgment. However, *Geisler* denied defendant's motion to dismiss, and *Fetler* denied summary judgment.

139 "Name" also includes nickname, alias, or pseudonym.

140 Annotation, *supra* note 20, § 5, at 458; *see supra* note 15 and accompanying text.

In addition to name, or in lieu thereof, other external characteristics meriting inquiry include: (1) physical likeness; (2) age; (3) geographical locations; (4) occupation; (5) family; (6) incidents and events; and (7) other characters.[141] The second major group of identifying elements that must be examined is the internal characteristics which a plaintiff shares with a fictional character. These include those attributes that are not readily described or stated as facts, but which relate more to the plaintiff's emotional composition, thoughts, and behavior. For example, if a fictional character responds and behaves in the narrative as a plaintiff does in reality, then a parallel has been drawn. This includes similarities in outlook, perspective, and opinion. The fictional character must be evaluated as consistently exhibiting one or another behavior pattern. One particular response or expression is not sufficient to allow the plaintiff to state that because he too once responded similarly, this fictional character is clearly a representation of him. Thus, a pattern of responsive behavior is required; a singular response is not a pattern. Although these internal attributes are more difficult to uncover, they may provide an even more precise degree of similarity between the plaintiff and the fictional character than a name does. One's name is certainly individualistic, but two people often, by coincidence, have the same name. Rarely, however, do two people have the same personality.

Because an individual is composed of both physical and emotional characteristics,[142] and because the elements of identification can be classified as belonging to either one of these two major categories, courts evaluating similarities should ensure that at least one element of identification in each group has been satisfied. This may provide the minimal degree of similarity required for identification. Thus, if a plaintiff claims that the fictional character resembles him in name or appearance *only*, he cannot recover since no emotional or mental similarities have been attributed to the fictional character.

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141 Examples of the seven categories of external characteristics are:

(1) physical likeness: height, weight, appearance;

(2) age;

(3) geographical locations: general setting or particular scenes;

(4) occupation: career, position, profession, title;

(5) family: background, heritage, members, composition, size, relationships;

(6) incidents and events: those related in the work *vis-à-vis* plaintiff's life experience, plaintiff's presence on the occasion described;

(7) other characters: their relation to and association with the plaintiff.

142 One similar aspect of a character is never enough to satisfy the identification; rather, the composite person must be examined. *Cf.* Garbus & Kurnit, *supra* note 46, at 409.

The same claim can have the reverse effect. A character's personality may easily be created as a composite of the personalities of several people the author may have used as models, and hence, may not be attributed to any one individual. To avoid liability for creating a composite personality, the author will not be deemed to have written "of and concerning" the plaintiff, unless at least one of the elements in the "external" group is satisfied as well. Thus, once a court has determined that the statement was published and that it was defamatory,[143] the "of and concerning" element must be satisfied by showing that the plaintiff's external and internal characteristics were portrayed. One characteristic from each category will usually satisfy the requisite minimal degree of similarity. Anything less would be insufficient to create a cause of action, and anything more will enable the plaintiff to get to the jury. Exact similarity between the plaintiff and the fictional character is not required. Such would constitute a biography, not a work of fiction.

This new analysis should be applied in all situations in which a private individual claims to have been defamed by a fictional character purporting to portray the individual. The proposed application of the "of and concerning" requirement is workable not only in cases where a "true" novel is at issue; it is also suitable for evaluating liability in cases where the fictional character represents a real person that the author may have known,[144] and in cases where the fictional character is portrayed in an impossible manner.[145] Moreover, the proposed application of the "of and concerning" test can also adequately deal with situations where the similarities between the plaintiff and the fictional character are claimed by the author to be coincidental.[146] Lastly, the two-part test is equally applicable in situations in which the plaintiff claims to have been defamed by the work's lead or minor character.

In order to best demonstrate the proposed refinement of the "of and concerning" requirement, it must be applied to the aforementioned cases.[147] When the proposed approach is applied to the

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143 These are the other two elements a plaintiff must allege in his action against an author. The writing must not only be "of and concerning" the plaintiff, but moreover, it must have been published and be defamatory. *See supra* text accompanying notes 6-7.

144 This is fiction based upon or resembling fact, or more classically, art imitating life.

145 *E.g.*, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

146 An author's claim of coincidental similarity appears suspect if a fictional character is similar to a plaintiff in both external and internal attributes.

147 The cases to which the new proposal will be applied include the following: Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980); Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966); Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962);

three cases discussed above in which the plaintiffs prevailed,[148] the analyses of the issue of identification would be different than that employed by the courts. Moreover, the result in *Bindrim v. Mitchell*[149] would be the reverse. In both *Geisler v. Petrocelli*[150] and *Fetler v. Houghton Mifflin Co.*[151] the "of and concerning" requirement is satisfied in the external characteristics group,[152] but it is less clear whether the fictional characters shared the plaintiffs' emotional characteristics.[153] In evaluating the internal qualities, the fictional characters' relation to the context of the work in general must be compared to the plaintiffs.

Using the aforementioned structure in evaluating the "of and concerning" requirement in *Geisler*, the different decisions rendered by the district and circuit courts[154] can realistically be avoided. The same is true in *Fetler* where the district court granted the author's motion for summary judgment,[155] while the circuit court reversed that determination.[156] Using the newly proposed standard, such inconsistent rulings will not be rendered since both categories of characteristics will, or will not, be satisfied. The more guidance that is available to the courts in evaluating identification, the less likelihood of reversal on appeal.

Middlebrooks v. Curtis Publishing Co., 281 F. Supp. 1 (D.S.C. 1968), *aff'd*, 413 F.2d 141 (4th Cir. 1969); Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979), *cert. denied*, 444 U.S. 984 (1979); Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983); Allen v. Gordon, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't), *aff'd*, 56 N.Y.2d 780, 437 N.E.2d 284, 452 N.Y.S.2d 25 (1982); Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980); People v. Charles Scribner's Sons, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954); Swacker v. Wright, 154 Misc. 822, 277 N.Y.S. 296 (Sup. Ct. 1935).

148 Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980); Fetler v. Houghton Miffling Co., 364 F.2d 650 (2d Cir. 1966); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979).

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

150 Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980).

151 Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966).

152 In *Geisler*, the fictional character bore the same name and appearance as the plaintiff; in *Fetler*, the fictional character shared these same traits, *inter alia*, with the plaintiff.

153 Relying, however, on the court's discussion in *Geisler*, as it made reference to "[t]he use of [Melanie Geisler's] . . . personal knowledge," it would appear that some of the plaintiff's inner qualities, such as knowledge, were used to portray the fictional character. *Geisler*, 616 F.2d at 638.

In evaluating the internal qualities which the fictional character may have shared with the plaintiff in the novel, *The Travelers*, the references to Fetler's role in the family are essential. He was described as having "great responsibility" due not only to his position as eldest among the thirteen children, but also because his father's position did not allow him to spend a great amount of time with the family. *Fetler*, 364 F.2d at 651.

154 The suit was dismissed by the district court. Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980). However, on appeal, that judgment was vacated and the case remanded. *Id.*

155 Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966).

156 *Id.*

Applying the new identification evaluation to *Bindrim*[157] would create an ephemeral victory for the plaintiff. The only external characteristic shared by the fictional Dr. Herford and the plaintiff Dr. Bindrim was that both practiced nude encounter therapy.[158] They were not alike in name, appearance, or age.[159] Furthermore, since they were dissimilar in personality,[160] the internal characteristics category would remain deficient. Consequently, the identification is not minimally sufficient, and therefore, the work cannot be presumed to be "of and concerning" the plaintiff.

When the two-tier evaluation is applied to the cases discussed above in which authors were absolved of liability,[161] more uniform analyses and predictable results are evident. In all of these cases the external characteristics tier of the identification process is satisfied because the plaintiff's name, appearance, or occupation was attributed to the fictional character.[162] However, in none of these cases, with the possible exception of *Clare*,[163] is the internal characteristics tier satisfied. The works show no similarity between the emotional or mental states of the plaintiffs and the fictional characters.[164] Be-

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157 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979).

158 92 Cal. App. 3d at 70.

159 *Id.* at 75-76.

160 The dissent stated that the "fictitious therapist . . . is conspicuously different from plaintiff in . . . personality . . . ." *Id.* at 86 (Files, P.J., dissenting).

161 Middlebrooks v. Curtis Publishing Co., 281 F. Supp. 1 (D.S.C. 1968), *aff'd*, 413 F.2d 141 (4th Cir. 1969); Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947); Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983); Allen v. Gordon, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't), *aff'd*, 56 N.Y.2d 780, 437 N.E.2d 284, 452 N.Y.S.2d 25 (1982); Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980); People v. Charles Scribner's Sons, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954); Swacker v. Wright, 154 Misc. 822, 277 N.Y.S. 296 (Sup. Ct. 1935).

162 Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947) (name and appearance); Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982) (first name and appearance), *aff'd*, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983); Allen v. Gordon, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't) (surname), *aff'd*, 56 N.Y.2d 780, 437 N.E.2d 284, 452 N.Y.S.2d 25 (1982); People v. Charles Scribner's Sons, 205 Misc. 818, 130 N.Y.S.2d 514 (N.Y.C. Magis. Ct. Kings County 1954) (name).

163 In *Clare*, the first category for comparison would be satisfied since both the plaintiff's name and appearance were attributed to the fictional character. Moreover, the fictional character's "hopes, observations, frustrations, and sordid experiences" were described in detail in the work. *Clare*, 70 F. Supp. at 277. Whether these emotional qualities match those of the plaintiff was a question left unanswered by the court. If so, the identification would be complete. If not, identification of the plaintiff would be lacking, and hence, the author would be absolved of liability.

164 In *Charles Scribner's Sons*, the court stated that the complaint was devoid of any allegation that the plaintiff's life was portrayed. Thus, the plaintiff's personal characteristics were in no way attributed to the fictional character. 205 Misc. at 820. From this, it can be inferred that the plaintiff's mental composition was in no way attributed to the fictional character.

The court in *Springer* found the plaintiff and the fictional character to be dissimilar in manner of living and in "outlook." 90 A.D.2d at 319. Such a finding precludes the plaintiff's potential recovery because the second category of identification is left unful-

cause the second tier of identification is not met, the plaintiffs have not been sufficiently identified and, thus, the writings cannot be "of and concerning" them.

The proposed method of analysis may also be used to reevaluate the decisions rendered in the two cases which did not involve pure fiction.[165] Although the outcome in *Pring v. Penthouse International, Ltd.*[166] would remain the same under the proposed identification test, the court's rationale would not. Instead of relying upon the fact that the events described were more fantasy than reality,[167] the contents of the article should be examined under the suggested analysis. The external characteristics group is satisfied because the plaintiff, Kimerli Pring, and the fictional Charlene were both beauty queens from Wyoming who performed baton twirling routines in the Miss America Pageant.[168] In the article, Charlene's thoughts were described.[169] Since the plaintiff did not share these dreams, her inner qualities were not exhibited. Therefore, the identification between the plaintiff and fictional character is lacking.

Lastly, the decision in *Wheeler v. Dell Publishing Co.*,[170] granting summary judgment to the publisher, would probably be upheld if the new method of identification were applied. This is because, *inter alia*, the plaintiff's name was not used to identify the fictional character. Other external elements of similarity were also not described

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filled. In this case, although the outcome under the proposed identification analysis is the same as the decision rendered by the court (defendant not liable), it would be so for different reasons. This demonstrates that the proposed analysis may render the same result as that rendered by the court, but suggests a consistent and rational method for arriving at the decision.

In *Allen*, the court stated that "there is nothing in the complaint showing that the book was about or referred to the plaintiff." 86 A.D.2d at 515. Thus, the plaintiff's personality traits were not claimed to have been attributed to the fictional Dr. Allen, and consequently, the plaintiff would fail to prove identification under the proposed two-part analysis.

For the same reasons underlying the proposed identification analysis in *Allen*, the plaintiffs in *Swacker* and *Lyons* would be unsuccessful in demonstrating that the works were "of and concerning" them.

In *Middlebrooks*, the article "Moonshine Light, Moonshine Bright" did not "parallel the plaintiff's life in any significant manner." 413 F.2d at 143. This statement suggests that the plaintiff's internal, emotional attributes were not apparent in the portrayal of the fictional Brooks. Therefore, not having established minimal identification within each group to be analyzed, the plaintiff would fail to demonstrate, under the two-part analysis, that "Moonshine Light, Moonshine Bright" was "of and concerning" him.

165 Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962).

166 695 F.2d 438 (10th Cir. 1983), *cert. denied*, 462 U.S. 1132 (1983); *see supra* notes 88-100 and accompanying text.

167 The events were more fantasy than reality because the experience depicted was physically impossible. 695 F.2d at 443.

168 *Id.* at 440.

169 *Id.* at 441.

170 300 F.2d 372 (7th Cir. 1962); *see supra* notes 101-04 and accompanying text.

with particularity. The greatest similarity of external reference was the location of the real and the fictitious trials.[171] However, this similarity does not specifically point to the plaintiff and it does not end the identification examination. The plaintiff's personality traits, thoughts, or other internal characteristics merit inquiry. The complaint alleges that the plaintiff was defamed because, *inter alia*, the novel described her as having "unsavory characteristics."[172] If these unsavory characteristics were not similar to those of the plaintiff, then the plaintiff has not satisfied the identification necessary under the two-part test.

Although a reexamination of the foregoing cases in light of the proposed two-tier analysis of identification may result in the same outcomes as those previously rendered by the courts, it will prove invaluable because it provides a uniform method of identification. Consistent use of this method will reduce reversal on appeal, a problem prevalent in the foregoing cases.[173] In addition, it will enable authors to pursue their profession without unnecessary restraints, and will provide readers with a better way to assess the potential merits of litigation.

V. CONCLUSION

Under the proposed approach, the rationale of *Springer* still holds true:

> The teaching of these cases is that for [the] 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 real person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two. Superficial similarities are insufficient . . . .[174]

Moreover, the proposal preserves and balances the need for an author to know the limits of his efforts and the plaintiff's interest in not being defamed.[175] Although "some latitude must be given authors in their selection of . . . characters so that the production of

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171 *Wheeler*, 300 F.2d at 375 (both trials were set in the Upper Peninsula of Michigan).

172 *Id.* at 374.

173 *See, e.g.*, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966); Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980).

174 Springer v. Viking Press, 90 A.D.2d 315, 320, 457 N.Y.S.2d 246, 249 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983).

175 A balance must be struck between "protection of the creative process, while at the same time providing a damage remedy to the party who has been aggrievedly abused." Rosen & Babcock, *supra* note 40, at 261.

fictional literature may continue, and the mean, the base, and the good of the characters therein fearlessly portrayed[,]"[176] the plaintiff is not left without a remedy if he can show that his individuality, composed both of external and internal characteristics, has been portrayed or identified.

The question initially posed regarding Aunt Polly's, the Widow Douglas', and Mary's chances of recovery from Mark Twain can now be evaluated in light of the two-part analysis of identification. If such plaintiffs did in fact exist, and "Polly," "Widow Douglas," and "Mary" were their real names, or if they shared any other external characteristics with the fictional characters, *and* if the plaintiffs' personalities or other mental characteristics were also attributed to these three fictional characters, then Mark Twain has written "of and concerning" them.[177] However, if the minimal degree of similarity is not satisfied, then Mr. Twain can continue to rest.

Eva J. Goldenberg

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[176] Clare v. Farrell, 70 F. Supp. 276, 279 (D. Minn. 1947).

[177] He would be liable so long as the other elements of the cause of action, defamation, and publication, are proven.