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# The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability

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# THE INFLICTION OF HARM THROUGH THE PUBLICATION OF FICTION: FASHIONING A THEORY OF LIABILITY

*Paul A. LeBel\**

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The rather unwieldy title of my contribution to this Symposium reflects an attempt to avoid, from the outset, the suggestion that defamation theory is the most suitable vehicle for examining publishers' liability<sup>1</sup> for a work of fiction.<sup>2</sup> Although I am not convinced that the liability of such a publisher could

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<sup>1</sup> Unless otherwise indicated, the term "publisher" is used throughout this Article in its broadest sense, as referring to one who communicates to someone other than the plaintiff. See, e.g., RESTATEMENT (SECOND) OF TORTS § 577 (1976). The broad sense of the term makes unnecessary repeated references to "authors and publishers" as the parties who are likely to be defendants in an action of the sort described in this Article. When a distinction must be made between the author of the work and those who participate in the process of putting the work before the public, unless the context clearly indicates the distinction, the term "publishing firm" will be used to describe the latter party.

<sup>2</sup> For the sake of simplicity, the focus of this Article is limited to fictional works that appear in print. The extension of the basic ideas developed here to other media such as film should present no serious conceptual difficulties. Courts have applied defamation methodology indiscriminately to fictional portrayals in films and television. See, e.g., *Kelly v. Loew's, Inc.*, 76 F. Supp. 473 (D. Mass. 1948) (film); *American Broadcasting-Paramount Theatres, Inc. v. Simpson*, 106 Ga. App. 230, 126 S.E.2d 873 (1962) (television); *Brown v. Paramount Publix Corp.*, 240 A.D. 520, 270 N.Y.S. 544 (3d Dep't 1934) (film).

never be grounded in defamation, I have misgivings about how defamation theory typically has been applied to works of fiction.<sup>3</sup> My primary reservation, however, stems from the conceptual and constitutional baggage that the idea of defamation has carried over the last twenty years.<sup>4</sup> The weight of these constitutional concerns and restrictions<sup>5</sup> has made it particularly easy for courts to avoid important issues, such as risk distribution and loss spreading, that, even in the setting of what might be termed "speech torts,"<sup>6</sup> ought to affect liability.

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<sup>3</sup> See notes 19-72 and accompanying text *infra*.

<sup>4</sup> In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court first placed federal constitutional restrictions on the manner in which a state could structure its law of defamation.

<sup>5</sup> The nature and applicability of the constitutional restrictions on defamation law are still being developed by the Supreme Court. It is clear that plaintiffs who are characterized as public officials or public figures may not recover for defamation unless they prove by clear and convincing evidence that the defendants knew that the defamatory statements were false or that the defendants were reckless with regard to the truth or falsity of the statements. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (public figure); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (public officials). This showing will be referred to throughout this Article as *New York Times* actual malice. The Supreme Court considers the applicability of this standard to actions by public figures against nonmedia defendants to be an open question. See *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979). Plaintiffs who are neither public officials nor public figures must establish at least some fault in order to hold media defendants liable for defamation, and neither presumed nor punitive damages can be awarded unless the plaintiff establishes that the defendant's fault constituted *New York Times* actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The applicability of these restrictions to actions brought by private individuals against nonmedia defendants is before the Supreme Court in the October 1984 term. See *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414, *cert. granted*, 104 S. Ct. 369 (1983), *restored to calendar for reargument*, 104 S. Ct. 3583 (1984).

<sup>6</sup> Many kinds of tortious conduct involve some form of communication by the defendant to the plaintiff or to third parties. Constitutional restrictions are imposed on the torts of defamation, see note 4 *supra*, public disclosure of private facts, see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (first and fourteenth amendments prohibit states from imposing sanctions on publication of truthful information contained in official records open to public inspection), and false light invasion of privacy, see *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); note 254 and accompanying text *infra*. Constitutional restrictions have yet to be recognized for other torts that are equally dependent on the speech of the defendant, such as fraud, see *RESTATEMENT (SECOND) OF TORTS* § 525 (1977), public misrepresentation of a material fact about a product, see *id.* § 402B (1965), or certain varieties of the infliction of emotional distress, see *Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956 (Fla. Dist. Ct. App.) (communications of bill collector trying to locate plaintiff), *cert. dismissed*, 379 So. 2d 204 (Fla. 1979).

When first amendment considerations are present, concerns about freedom of speech and freedom of the press may be found to outweigh the interests of the plaintiff. Such concerns by themselves, however, do not automatically provide a sufficient justifi-

As a result of the exclusive focus on the constitutional issues, the dispute over liability for fiction can degenerate into a simplistic battle between the loyalists of two different camps: one camp rides into battle waving the first amendment flag and claiming that fiction is absolutely protected,<sup>7</sup> while the other relies on the falsity of the publication to eliminate or reduce the scope of the constitutional protection accorded the publisher.<sup>8</sup> Although these views may provide some rough guidance for deciding specific cases, they do so only at a level of imprecision that ought to be avoided if feasible.<sup>9</sup>

Perhaps courts and commentators have seized upon defamation as the conceptual category for analyzing liability because of the ease with which it can be used to characterize the harm caused by the publication of fiction as tortious and because of

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cation for assigning no weight whatsoever to the invaded interests of the individual. A constitutional prohibition against banning publication or distribution serves the "societal interest in the free flow of ideas" yet leaves the resolution of an action for damages to a balancing of the plaintiff's and defendant's interests. See *Miss America Pageant, Inc. v. Penthouse Int'l, Ltd.*, 524 F. Supp. 1280, 1282 (D.N.J. 1981).

<sup>7</sup> In *Miss America Pageant, Inc. v. Penthouse Int'l, Ltd.*, 524 F. Supp. 1280 (D.N.J. 1981), for example, the defendant-publisher, in a motion for summary judgment, argued that "the article in question was a fictional work and therefore absolutely protected under the First Amendment." *Id.* at 1281. The court denied the publisher's motion, stating that "the mere fact that a work could be characterized as fictional did not provide its publisher with a complete defense against an action for libel." *Id.* See note 18 *infra*.

<sup>8</sup> See, e.g., *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 76-78, 155 Cal. Rptr. 29, 38-39 (despite fact that defendant's work was labeled a "novel," appellate court upheld finding that statements in question were libelous), *cert. denied*, 444 U.S. 984 (1979). For a pre-*New York Times* decision attaching significance to the falsity of fiction, see *Dall v. Time, Inc.*, 252 A.D. 636, 640, 300 N.Y.S. 680, 685 (1st Dep't 1937) ("the falsity of [the] statement was conceded, indeed, it was in effect relied on as part of the defense in that the statement was claimed to be obviously fictitious"), *aff'd*, 278 N.Y. 635, 16 N.E.2d 297 (1938).

<sup>9</sup> The choice between these views and the option to reject both views in favor of a compromise position may depend in large part on the goals that the tort action is intended to achieve. If the primary goals are administrative convenience in the litigation process and predictability of results so that parties are able to shape their behavior with knowledge of the legal consequences, then either of the extreme views — affording absolute first amendment protection in cases of harm caused by the publication of fiction or absolutely eliminating constitutional protection in such cases — would provide an acceptable method of achieving these goals. If the goal is expanded or modified to guarantee the maximum protection for speech activities, then the first view — which treats fiction as absolutely protected because of its nonfactual, satirical, or opinionative nature — would best accomplish that protective purpose. It is only when the goal of the legal system is to balance conflicting legitimate private and public interests that each extreme view offers an unacceptably simplistic approach to the question of liability for the harm caused by the publication of fiction.

the susceptibility of the tort action to a constitutional analysis. As lawyers, we probably have an occupational proclivity toward categorizing the matters that we have to deal with regularly. Those of us who are also academics both display and bear responsibility for the perpetuation of this tendency in its most aggravated form.<sup>10</sup> While well-recognized categories are useful, principally as time-saving devices,<sup>11</sup> there are instances in which reliance on categories detracts from the careful analytical scrutiny that an issue requires.<sup>12</sup> The use of defamation as the theoretical category within which to analyze liability for injury caused by fiction is just such an instance.

My aim, therefore, is to raise some questions concerning the nature of fiction, the difficulty of stretching a claim for relief based on the publication of fiction to fit a defamation framework of liability, and, most importantly, the full range of factors that must be considered to determine whether liability should be imposed for harm caused by works of fiction. I am not necessarily concerned with addressing the correctness of the recent judicial decisions regarding liability for fiction. Accordingly, I will leave to others an explicit focus on such questions as whether *Bindrim v. Mitchell*<sup>13</sup> was correctly decided,<sup>14</sup> whether the result in *Pring*

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<sup>10</sup> See, e.g., Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. LAW & ECON. 201, 208 (1971) (criticizing "limitations inherent in a certain type of legal scholarship" as including "a propensity to compartmentalize questions and then consider each compartment in isolation from the others").

<sup>11</sup> Particularly for lawyers, an ability to organize information and concepts around certain analytical cores improves the capacity to identify and resolve routine issues that are presented in the course of practice. Rough categorization can serve as an aid to retrieve knowledge that a lawyer is expected to possess and to be able to articulate on demand.

<sup>12</sup> See Posner, *supra* note 10, at 227 ("there are far more conceptual pigeonholes in the law of torts . . . than there are useful distinctions"). Problems arise, of course, when the categorical boundaries operate as rigid barriers to creative thinking about the nature of legal problems and about the wisdom and feasibility of various solutions.

<sup>13</sup> 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979).

<sup>14</sup> Bindrim, a clinical psychologist who employed nude marathon group therapy, successfully sued the author and the publisher of the novel *Touching*, alleging that the portrayal of a character in the novel libeled him. The author had initially been denied permission to register for Bindrim's therapy, but she was permitted to attend after she assured Bindrim that she did not intend to write about the session. Two months after attending a session, the author signed a book contract with the publisher. *Id.* at 69, 155 Cal. Rptr. at 33. The appellate court concluded that the following issues were properly submitted to the jury: (1) whether the conduct of the author and the publishing firm demonstrated "actual malice," *id.* at 72, 155 Cal. Rptr. at 35; (2) whether Bindrim was reasonably identified as the fictional character, *id.* at 75, 155 Cal. Rptr. at 37; and (3)

*v. Penthouse International, Ltd.*<sup>15</sup> was justified,<sup>16</sup> or whether the summary judgment in *Miss America Pageant, Inc. v. Penthouse International, Ltd.*<sup>17</sup> ought to have been based on the defendant's alternative assertion that fiction has an "absolute constitutional protection."<sup>18</sup>

The basic premise of this Article, which is developed in Section I, is that, given a clean legal slate, the concept of defamation would almost certainly not be the most likely candidate for a theoretical construct with which to analyze the issue of liability for fiction. Proceeding from this premise, Section II of this Article sets forth the factors that can be used to develop compensation and liability principles that will enable a court to identify the legitimate harms that individuals can suffer as a result of the publication of fiction and to determine whether a particular publisher should be held liable for those harms. Section

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whether a reader who made the identification between Bindrim and the fictional character would regard the offensive passages "as mere fictional embroidering or as reporting actual language and conduct," *id.* at 78, 155 Cal. Rptr. at 39.

<sup>15</sup> 695 F.2d 438 (10th Cir. 1982), *reprinted in* 8 MEDIA L. REP. 2409 (BNA) (1983) (includes discussion of unreported district court proceedings), *cert. denied*, 103 S. Ct. 3112 (1983).

<sup>16</sup> The plaintiff in *Pring* had been a Miss Wyoming in a Miss America pageant. She claimed to have been harmed by a story entitled "Miss Wyoming Saves the World . . .," which appeared in *Penthouse* magazine. The story described sexual acts performed by a Miss Wyoming, including a scene at the concluding ceremonies of the pageant in which the character performed fellatio on her coach and caused him to levitate. The plaintiff sued the author of the story and the publisher of the magazine. A jury verdict awarded her \$1.5 million in actual damages and \$25 million in punitive damages (reduced to \$12.5 million by remittitur) against the publisher, and \$10,000 in actual damages and \$25,000 in punitive damages against the author. *See* 8 MEDIA L. REP. (BNA) 2409 (1983). The court of appeals reversed the judgment entered on the verdict and directed the district court to dismiss the action, concluding that it was "simply impossible to believe that a reader would not have understood that the [allegedly defamatory] portions [of the story] were pure fantasy and nothing else" and that the plaintiff had, therefore, failed to prove that those portions "in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated." 695 F.2d at 442-43.

<sup>17</sup> 524 F. Supp. 1280 (D.N.J. 1981).

<sup>18</sup> *Id.* at 1281-82. The corporation that ran the Miss America contest claimed that the *Penthouse* article at issue in the *Pring* litigation, *see* notes 15-16 *supra*, had also defamed the corporation. The district court granted summary judgment for the publisher based on a lack of clear and convincing evidence that the publisher had acted with "actual malice," i.e., knowledge of falsity or reckless disregard as to the truth or falsity of the publication. 524 F. Supp. at 1286-88. The court refused, however, to accept the argument that summary judgment should be granted to the publisher on the ground that the satirical nature of the publication provided the publisher with absolute constitutional protection. *Id.* at 1281-82. *See* note 7 *supra*.

III speculates about the ways that the harm caused by fiction could be fit into existing alternative tort categories, including one or more of the privacy actions, the infliction of emotional distress, or even a form of products liability. The purpose of Section III is not to argue for the use of those categories. Instead, I am proposing that the alternative compensation and liability principles that are developed in this Article can be used to fashion a theory of liability that compensates for the harm caused by fiction while avoiding some of the conceptual and constitutional problems associated with the use of existing tort law in the context of fiction.

#### I. THE INADEQUACY OF DEFAMATION THEORY IN THE CONTEXT OF FICTION

The first task in fashioning a theory of liability for harm caused by fiction is to justify extending the inquiry beyond the confines of the tort of defamation. This step would not be necessary if the law of defamation adequately protected the interests of injured parties at a cost acceptable both to those who inflict the injury and to the society as a whole. If such were the case, the primary focus of this Article would probably be on the nature and extent of the constitutional protection that should be afforded fictional speech.<sup>19</sup> Further attention would then be given to the optimum structure of the tort law core of the defamation action used in this context, assuming that any nonconstitutional room to maneuver were left at the end of the constitutional debate.<sup>20</sup> For reasons described in this section, however, the law of defamation provides an unsatisfactory foundation on which to build a claim for relief when the injury-producing publication is fictional.

According to most mainstream statements of the current law of defamation, a plaintiff must plead and prove three basic elements: (1) harm to reputation (2) produced by a false state-

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<sup>19</sup> See, e.g., Schauer, *Liars, Novelists, and the Law of Defamation*, 51 BROOKLYN L. REV. 233 (1985).

<sup>20</sup> For an analogous discussion concluding that nothing should remain of the invasion of privacy tort action for public disclosure of private facts after proper constitutional protection is afforded, see Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362 (1983). Professor Zimmerman argues that the Warren-Brandeis private facts tort "cannot coexist with constitutional protections for freedom of speech and press." *Id.* at 293.



ment of fact (3) that is published through the fault of the defendant.<sup>21</sup> Using this as a working definition of defamation,<sup>22</sup> my objection to its application to works of fiction is that it leads us to ask the wrong questions. Probing questions about the defendant's conduct and the harm that it has caused are not asked. Thus, information that we need in order to assess the propriety of imposing tort liability in a given case is likely to be ignored. Furthermore, the defamation twist to the questions we do ask about harm and fault creates conceptual difficulties that are best avoided. The following outline of how the defamation elements are applied to fiction reveals the difficulties raised by using defamation theory in this context.

#### A. *Reputational Harm*

In the first place, the tradition of defamation theory as a means of protecting or vindicating an individual's interest in reputation<sup>23</sup> unrealistically — and, I think, irresponsibly — narrows our inquiry about the fiction-produced injuries that warrant compensation. According to the extreme position advocated by Professor Anderson<sup>24</sup> and adopted by a number of courts,<sup>25</sup> a defamation plaintiff unable to prove injury to reputation will be

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<sup>21</sup> For the most comprehensive and thoughtful recent study of the law of defamation, see Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983).

<sup>22</sup> I do not concede certain points that are routinely accepted as having been established by the existing cases on defamation. For example, while it is clear that an allegedly defamatory communication must be false, I take issue with the conclusion that the plaintiff must bear the burden of establishing falsity. See, e.g., F. SCHAUER, *FREE SPEECH: A PHILOSOPHIC ENQUIRY* 172 (1982) ("in the United States the burden of proving falsity in all cases is now on the defamed plaintiff"). Although the decisions on the issue are subject to that interpretation, see generally Franklin & Bussell, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984), a plausible argument could be made in appropriate cases to shift at least the burden of production of evidence of truth to the defendant. When, for example, the plaintiff has established by clear and convincing evidence that the defendant was reckless with regard to the truth or falsity of the defamatory communication, it would be both appropriate and consistent with the Constitution to shift to the defendant the burden of demonstrating the truth of the communication. Because that argument is outside the scope of this Article, I will assume, for the purposes of this Article, that the plaintiff in a defamation action must establish each of the three elements. See text accompanying note 21 *supra*.

<sup>23</sup> See generally L. ELDREDGE, *THE LAW OF DEFAMATION* § 2 (1978).

<sup>24</sup> See Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747 (1984).

<sup>25</sup> See *id.* at 758, n.57 (citing cases on point).

precluded from any recovery regardless of demonstrable nonreputational injuries caused by the defendant's publication. The United States Supreme Court, however, in *Time, Inc. v. Firestone*,<sup>26</sup> has declined the opportunity to impose an absolute requirement that the defamation plaintiff prove damage to reputation in order to recover.<sup>27</sup> Yet, even without such an absolute requirement, analyzing liability for fiction within the framework of defamation theory almost invariably entangles the court in the "of and concerning the plaintiff" web of issues associated with the finding of reputational harm.<sup>28</sup>

The number of cases seeking recovery for harm caused by the publication of fiction that have been decided on the ground that the publication was not "of and concerning" the plaintiff<sup>29</sup> is disproportionately high considering the limited role that this issue should play in such cases. It is apparent, therefore, that courts are allowing the "of and concerning" issue to serve as a major hurdle on the plaintiff's path to recovery, restricting the plaintiff's ability to establish a *prima facie* case.<sup>30</sup> An examina-

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<sup>26</sup> 444 U.S. 448 (1978).

<sup>27</sup> Faced with a defamation plaintiff who had, "on the eve of trial," withdrawn her claim for damages based on injury to reputation, the Supreme Court refused to treat the action as "something other than an action for defamation as that term is meant in *Gertz*." *Id.* at 460. The Court stated that although the plaintiff "has decided to forego recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her." *Id.*

<sup>28</sup> See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 111, at 783 (5th ed. 1984) ("[i]t is necessary that some recipient of a defamatory communication believe that it refers to the plaintiff") [hereinafter cited as *PROSSER AND KEETON*]; notes 31-32 & 110-11 and accompanying text *infra*. See generally L. ELDRIDGE, *supra* note 23, § 10.

<sup>29</sup> See, e.g., *Springer v. Viking Press*, 90 A.D.2d 315, 320, 457 N.Y.S.2d 246, 249 (1st Dep't 1982) (dismissing complaint because defamatory description of fictional character was not "so closely akin to [plaintiff] that a reader of the book, knowing the real person," would be able to link the two without any difficulty); notes 38-39 & 88 *infra*; *Allen v. Gordon*, 86 A.D.2d 514, 515-16, 446 N.Y.S.2d 48, 49-50 (1st Dep't 1982) ("mere fact that [plaintiff] is the only psychiatrist surnamed Allen in Manhattan is insufficient [to conclude] that the book was about or referred to plaintiff"); see also note 30 *infra*.

<sup>30</sup> In *Lyons v. New Am. Library, Inc.*, 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980), for example, the court found that the allegedly defamatory statements that "form[ed] the basis of the [plaintiff's] complaint [could not] be read to refer to plaintiff." *Id.* at 724, 432 N.Y.S.2d at 538. The court apparently based its conclusion on two factors: (1) "[t]he work clearly state[d] that it [was] fiction" and (2) the plaintiff admitted that he had not participated in the police investigation that was the subject matter of the novel. *Id.* These reasons ignore entirely the possibility that the novel did in fact create a risk of harm to the plaintiff. Although the risk of harm might have been justified and the harm that actually occurred might not have been worthy of compensation, the

tion of a more limited role for the "of and concerning" inquiry suggests the wisdom of de-emphasizing this issue and demonstrates the inappropriateness of the defamation model in cases of harm caused by the publication of fiction.

The rationale for, and functional import of, the "of and concerning" inquiry is tied to the reputational interests of the plaintiff.<sup>31</sup> Consequently, the purpose of the inquiry is to determine whether the defendant's publication actually or potentially caused harm to the plaintiff's reputation. If no one exposed to the publication made the connection between the fictional character and the plaintiff, then the plaintiff's reputation can not have been injured by the publication. Requiring that a plaintiff introduce evidence to establish that a connection with the plaintiff actually was made by someone in the defendant's audience is justified only if the sole purpose of imposing liability is to protect against and compensate for *actual* invasions of the plaintiff's interest in reputation.<sup>32</sup> If, however, the purpose of al-

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court's superficial and flawed reasoning prevented it from addressing those matters.

Professor Smolla believes that the current approach to the "of and concerning" issue works "inappropriately [and] inexorably toward a plaintiff's victory." See Smolla, *supra* note 21, at 43. Although the contention is plausible, particularly in Professor Smolla's hypothetical cases, see *id.* at 43-46, the existing cases reveal a level of hostility to defamation actions based on fictional publications that suggests that fears of excessive plaintiff victories can be laid to rest with some dispatch.

Franklin and Trager analyze 25 reported cases in this context in a way that creates the impression that plaintiffs have a slight edge in meeting the "of and concerning" requirement. See Franklin & Trager, *Literature and Libel*, 4 COMM/ENT 205, 206-07 nn.7-8 (1982). This impression may not be accurate for a number of reasons. For instance, the survey treated the denial of a motion to dismiss as a victory for the plaintiff; the survey's reliance on reported decisions, primarily from appellate courts, runs into the empirical unreliability of reported decisions as a way to gauge actual success and failure; and the survey failed to assign any sort of weight to the plaintiffs' claims or to the legitimacy of the grounds for the decisions.

<sup>31</sup> See, e.g., *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 65, 126 N.E. 260, 262 (1920) ("plaintiff recovers damages if he proves that the words apply to him and that his reputation has been injured"). The significance of the "of and concerning" issue to the disposition of defamation-in-fiction cases has been widely recognized, but the legitimate function of the issue is too often ignored or glossed over. Compare Franklin & Trager, *supra* note 30, at 208-12 with Note, *Toward a New Standard of Liability for Defamation in Fiction*, 58 N.Y.U. L. REV. 1115, 1122-24 (1983).

<sup>32</sup> See, e.g., *Salomone v. Macmillan Publishing Co.*, 77 A.D.2d 501, 502, 429 N.Y.S.2d 441, 442 (1st Dep't 1980) (complaint dismissed even though fictional character was identified as plaintiff; plaintiff "unable to come forth with any proof of loss of reputation because he knows of no one who believes he was a child molester or thinks less of him due to the [fictional] publication"); see also note 40 *infra*. In contrast, the United States Court of Appeals for the Eighth Circuit in *Davis v. R.K.O. Radio Pictures, Inc.*,

lowing recovery is also to protect against and compensate for the *risk* of harm to reputation, then a looser evidentiary requirement can be applied — for example, one demanding proof that a segment of the likely audience *could* make the connection between the publication and the plaintiff.<sup>33</sup> In the traditional defamation context, this latter requirement would provide some measure of assurance that the plaintiff actually was subjected to the risk of reputational injury. Similarly, in the context of fiction, requiring the plaintiff to establish the risk that he or she will be identified with the fictional character provides some measure of assurance that the publication has the potential to injure the reputation of the plaintiff. These assurances of potential risk of harm to the plaintiff are relevant *only* to the extent that an award of damages to the plaintiff is based on a potential loss of reputation.<sup>34</sup> The justification for giving such overwhelming significance to evidentiary requirements tied to reputational harm becomes much less compelling when the scope of legally cognizable injury is expanded beyond the reputational interests of the injured party.<sup>35</sup>

The ability to make a connection between the identity of the plaintiff and that of a character in a published work of fiction serves two important functions. It limits those who are eligible to recover<sup>36</sup> and those who are exposed to liability.<sup>37</sup> As it is currently used, however, the “of and concerning” issue, with its

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191 F.2d 901 (8th Cir. 1951), approved a jury instruction that testimony by a witness that he actually made a connection between the plaintiff and a character in the defendant's motion picture did not establish the plaintiff's claim for relief. Instead, the jury was to determine “whether persons who knew or knew of the plaintiff could *reasonably* have understood the exhibited picture to refer to him.” *Id.* at 904 (emphasis in original).

Franklin and Trager appear to combine the requirements that the connection be actually and reasonably made. While they state that the common-law test was “whether the ‘reasonable reader’ would understand the material to be ‘of and concerning’ the plaintiff,” Franklin & Trager, *supra* note 30, at 209, the approach they prefer requires the plaintiff to prove “that reasonable readers *did* take the story as being fact rather than fiction,” *id.* at 222 (emphasis added), and “that reasonable readers *understood* the fictional character to be the plaintiff,” *id.* at 223 (emphasis added).

<sup>33</sup> See, e.g., *Smith v. Huntington Publishing Co.*, 410 F. Supp. 1270, 1273 (S.D. Ohio 1975) (whether reasonable person could reasonably believe that article referred to plaintiff); RESTATEMENT (SECOND) OF TORTS § 559 comment d (1976) (defamatory character of communication depends on its “general tendency” to cause harm to reputation).

<sup>34</sup> See note 131 and accompanying text *infra*.

<sup>35</sup> See notes 119-33 and accompanying text *infra*.

<sup>36</sup> See notes 102-18 and accompanying text *infra*.

<sup>37</sup> See notes 183-87 & 204-19 and accompanying text *infra*.

concomitant evidentiary requirements — which have been carried over from the traditional defamation action with an apparent indifference as to how well they fit the attempt to recover for harm caused by fictional publications<sup>38</sup> — is too likely to produce a relatively easy judgment for the publisher without a rigorous analysis of the full range of other, equally significant, liability-determining factors that will be developed in Section II of this Article. As a result, the harm to reputation element inappropriately narrows the scope of liability for harm caused by the publication of fiction in two ways: it invites an underinclusive recognition of the legitimate harms that a plaintiff can suffer,<sup>39</sup> and it screens out potentially valid claims by relying on rationales tied to the reputation-protecting role historically played by defamation.<sup>40</sup>

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<sup>38</sup> See, e.g., *Springer v. Viking Press*, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982) (court applied "of and concerning" requirement from traditional defamation action to case involving harm caused by fiction without acknowledging differences between factual and fictional publications).

<sup>39</sup> The plaintiff in *Springer*, for example, see note 38 *supra*, should have been entitled to a consideration of whether the defendant's conduct had caused her to suffer such nonreputational injuries as emotional distress or humiliation. See generally notes 229-42 and accompanying text *infra*. The defendant, who was the author of the novel *State of Grace*, and the plaintiff had enjoyed "a close personal relationship" that "terminated[,] . . . apparently with some rancor," two years before the novel was published. 90 A.D.2d at 316, 457 N.Y.S.2d at 247. Rather than disposing of the case as the court in *Springer* chose to — on the "issue of whether a fictional depiction of a person contained in a single chapter of a novel is so closely related to plaintiff in the minds of people to whom she is known as to give rise to a cause of action," *id.* — the court might more appropriately have considered whether the author's conduct produced harm for which the plaintiff should be compensated.

<sup>40</sup> In *Salomone v. Macmillan Publishing Co.*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (1st Dep't 1980), the court acknowledged that the plaintiff had "suffered embarrassment and anguish" as a result of the publication of a parody of the 1955 book, *Eloise*. The parody included a drawing, with graffiti, stating that "Mr. Salomone was a child molester." *Id.* at 502, 429 N.Y.S.2d at 442. Salomone had been a manager of the hotel in which the original book had been set, but the defendants submitted evidence that supported the conclusion that they were not aware that the fictional character "was an actual person." *Id.* The court's conclusion that summary judgment should be entered against the plaintiff was based on too narrow an interpretation of the constitutional and common law of defamation, without regard to the reality of the harm suffered by the plaintiff or the ability of the defendants to have prevented the harm. Cf. *id.* at 502, 429 N.Y.S.2d at 443 (Kupferman, J., concurring) (basing summary judgment exclusively on nature of work, "an obvious parody," because reckless disregard for truth — fault required by Constitution — could not, as matter of law, be ruled out).

## B. *Factual Falsity*

The requirement that liability for defamation be based on the publication of a false statement of fact also produces conceptual difficulties when the publication is a work of fiction.<sup>41</sup> As was true of the harm to reputation element, giving this feature of defamation methodology too much weight in the analysis of liability for the harm caused by fiction can produce unnecessary confusion and distract attention from more important questions.

The specific weakness in applying the false-statement-of-fact element of defamation law to works of fiction is that it can produce a confrontation over, and perhaps even a decision based on, a pair of competing assertions about the significance of the element. A publisher may assert that, as a work of fiction, the defendant's publication is by definition not a statement of fact.<sup>42</sup> The injured party may assert, to the contrary, that, as a work of fiction, the defendant's publication is by definition false.<sup>43</sup> Neither of these assertions, however significant they may be in defamation theory,<sup>44</sup> is very helpful in resolving the question whether liability ought to attach to a particular work of fiction.

Basing an argument against liability on the nonfactual character of fictional statements misconceives the nature of the legal protection given to such categories of nonfactual statements as comment or opinion.<sup>45</sup> In misrepresentation theories of liability, for example, the frequently encountered rule that no liability at-

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<sup>41</sup> Because the defamation action requires the publication of a false statement of fact, see text accompanying note 21 *supra*, this element becomes as critical as the "of and concerning" requirement that the plaintiff be identified by the fictional portrayal, see notes 28-40 and accompanying text *supra*.

<sup>42</sup> See, e.g., *Dall v. Time, Inc.*, 252 A.D. 636, 300 N.Y.S. 680 (1st Dep't 1937) (in response to plaintiff's claim that statements were untrue and published with malice, defendant relied on obvious fictitious nature of statements in conceding work's falsity), *aff'd*, 278 N.Y. 635, 16 N.E.2d 297 (1938); Wilson, *The Law of Libel and the Art of Fiction*, 44 LAW & CONTEMP. PROBS. 27, 30 (1981); Comment, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U.L. REV. 571, 582-85 (1980).

<sup>43</sup> See, e.g., *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 89, 155 Cal. Rptr. 29, 45 (Files, P.J., dissenting) (chief failing of majority opinion is that it branded novel as libelous because it was "false," i.e., fictitious), *cert. denied*, 444 U.S. 984 (1979).

<sup>44</sup> See text accompanying note 21 *supra*.

<sup>45</sup> For a discussion of the protection afforded to statements of opinion in defamation actions, see Note, *Defamation in Fiction: With Malice Toward None and Punitive Damages for All*, 16 LOY. L.A.L. REV. 99, 133-36 (1983); Comment, *Defamation by Fiction*, 42 MD. L. REV. 387, 412-19 (1983).

taches to statements of opinion<sup>46</sup> needs to be qualified in a number of ways that reveal that the focus of analysis is not as much on what the defendant actually said as on whether the defendant created an appearance of using factual knowledge as the basis for the opinion.<sup>47</sup> Even in defamation law, a statement that may not be defamatory on its face can be shown to be defamatory if the plaintiff can demonstrate that the circumstances of the communication produced an impression that the defendant based the communication on facts that appeared to be known to the defendant and that were not true.<sup>48</sup> Such treatment of the factual falsity element of these speech torts properly permits an inquiry into the implications of what was said and indicates that the reasonable interpretation of the communication is as significant a consideration as the truth or falsity of the statements.

The same treatment should be accorded to cases of harm arising from fiction. Although the fictional nature of the scenes and characters in a publication should be considered in determining whether liability is imposed, that alone should not be a sufficient reason to terminate the inquiry into liability and to decide in favor of the publisher.<sup>49</sup> Fictional events and characters may be understood as being based on fact. The reasonableness of that understanding and the author's responsibility for creating the setting for that belief are among the factors that should be considered in a careful analysis of liability.

If liability should not automatically be precluded by the nonfactual character of fictional statements, neither should careful analysis be avoided by a simplistic emphasis on the falsity of the fictional work. Such an emphasis may, of course, serve a literary function. Characterizing the writer of fiction as a "lie-minded man," for instance, may serve the purposes of philoso-

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<sup>46</sup> See PROSSER AND KEETON, *supra* note 28, § 109, at 755 ("It is stated very often as a fundamental rule in connection with all of the various remedies for misrepresentation, that they will not lie for misstatements of opinion, as distinguished from those of fact.").

<sup>47</sup> See *id.* at 760.

<sup>48</sup> See RESTATEMENT (SECOND) OF TORTS § 566 (1976) ("defamatory communication . . . in the form of an opinion, . . . is actionable only if it implies the allegation of undisclosed defamatory facts as a basis for the opinion"); see also *Warner Bros. Pictures, Inc. v. Stanley*, 56 Ga. App. 85, 98, 192 S.E. 300, 313 (Ct. App. 1937).

<sup>49</sup> See *Bindrim v. Mitchell*, 92 Cal. App. 3d at 79 n.6, 155 Cal. Rptr. at 39 n.6 (whether reader who identifies real person with fictional character understands literary incidents to be strictly fictional, rather than based on fact, is question of fact for the jury).

pher-novelist-critic William Gass,<sup>50</sup> and asking whether fiction is the art of lying, as did the novelist Mario Vargas Llosa, may deepen our appreciation of the nature of fiction.<sup>51</sup> When, however, the issue is whether a publisher of fiction should be held liable for harm that the work has caused, the facile leap from a consideration of the art of fiction to an application of the defamation element of falsity in this context produces the same objectionable focus on the wrong questions that results from applying the other elements of defamation law to works of fiction. Instead, the focus ought to be on the nature and degree of correspondence between the fictional presentation and the actual people or events on which it is based.<sup>52</sup> Placing too much weight on the falsity inherent in fiction ignores the tension between an artistic portrayal of experience and the interests of an individual who might be adversely affected by a fictional portrayal.

### C. *Fault*

A defamation law framework also causes the analyst of liability for fictional publication to pose the wrong question concerning the fault of the defendant. In the law of defamation, as limited by the constitutional protection of speech and press, the central inquiry into fault currently focuses on the defendant's awareness of the falsity of the published statements.<sup>53</sup> Fault is established when a defamation defendant negligently, recklessly, or intentionally causes the publication of statements that are false and defamatory.<sup>54</sup> Although the attention of the courts has been centered largely on the issue of whether the defendant knew or should have known that the published statements were false,<sup>55</sup> a distinct fault issue of whether the defendant knew or should have known that the statements were defamatory,<sup>56</sup> that is, capable of injuring the reputation of another, is often either

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<sup>50</sup> See W. GASS, *FICTION AND THE FIGURES OF LIFE* 32 (Vintage ed. 1972).

<sup>51</sup> See Llosa, *Is Fiction the Art of Lying?*, N.Y. Times, Oct. 7, 1984, § 7 (Book Review), at 1.

<sup>52</sup> See notes 102-18 and accompanying text *infra*.

<sup>53</sup> See Franklin & Bussel, *supra* note 22.

<sup>54</sup> See note 5 *supra*.

<sup>55</sup> See, e.g., *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 73-74, 155 Cal. Rptr. 29, 35-36 (court focused on fact that defendant "was in position to know the truth or falsity of her own material"), *cert. denied*, 444 U.S. 984 (1979).

<sup>56</sup> See Franklin & Bussel, *supra* note 22, at 828-34.



sidestepped<sup>57</sup> or treated as if it was subsumed under the fault-as-to-falsity issue.<sup>58</sup> When the publication is a work of fiction, a defamation theory approach to the fault of the defendant, raising one or both of these issues, has the disadvantage of fostering a nearly exclusive concern with falsity and reputational injury. This concern, although relevant, ought not to be dispositive of the question of a publisher's liability for harm caused by fiction.

#### D. *Why Defamation?*

If defamation theory is as poor a vehicle for the analysis of liability for harm caused by fiction as I claim it is, the question that arises is why the debate in this area of the law has continued to focus on defamation. I suspect the explanation can be found in two attitudes, one or both of which are probably shared by many of the participants in the debate. First, there seems to be a virtually universal agreement that the Constitution does and should set at least some constraints on the legal system's treatment of published works of fiction.<sup>59</sup> Although there are undoubtedly deep divisions over the proper location and force of these constraints,<sup>60</sup> I detect a reluctance to depart from the theoretical construct of the law of defamation, which has produced the most detailed elaboration of the relationship between the constitutional protection of speech and the imposition of tort li-

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<sup>57</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974) (Court concluded that substance of statement at issue made "substantial danger to reputation apparent" and therefore did not address liability question in those instances when content of statements would "not warn a reasonably prudent editor or broadcaster of its defamatory potential").

<sup>58</sup> This problem was even more acute before *Gertz*, 418 U.S. 323 (prohibiting strict liability in defamation actions against media defendants), when the publisher of a statement that was innocent on its face could be held strictly liable if the audience was aware of extrinsic facts on which the statement could be interpreted as defamatory. See, e.g., *Morrison v. Ritchie & Co.*, (1902) 4 Fr. 645 (Sess. Cas.).

<sup>59</sup> Even when a publisher of a work of fiction is held liable, the liability determination is typically dependent upon satisfying the constitutional criteria for the imposition of liability for conditionally privileged speech. See, e.g., *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, cert. denied, 444 U.S. 984 (1979). In *Geisler v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980), the United States Court of Appeals for the Second Circuit vacated a summary judgment in favor of an author and the publishing firm that had published his novel, without making explicit reference to constitutional restrictions on liability. The court did refer, however, to allegations in the complaint that would have satisfied the constitutional requirement of fault. *Id.* at 641 n.7.

<sup>60</sup> Compare Schauer, *supra* note 19 with Garbus & Kurnit, *Libel Claims Based on Fiction Should Be Lightly Dismissed*, 51 BROOKLYN L. REV. 401 (1985).

ability for speech.<sup>61</sup>

Employing the methodology of defamation law when analyzing liability for works of fiction assures that everyone is playing a tort liability game on a first amendment playing field. If the methodology were to be changed, the venue of the game might shift to a field where first amendment constraints do not apply<sup>62</sup> or where the participants must go through an arduous process to justify the application of such constraints with at least some risk that this "zero-based" constitutional justification would not be successful.<sup>63</sup> The use of a defamation framework for analyzing liability for fiction thus builds on twenty years of constitutional development in setting limits on tort liability and avoids the risk that liability for harm caused by fiction will develop outside what may have become a very comfortable arena of constitutional protection.<sup>64</sup>

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<sup>61</sup> While constitutional restrictions on defamation law have been expanded into other tort claims, primarily invasions of privacy, the methodology has often been carried over from the developing constitutional limits on liability for defamation. See, e.g., *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

<sup>62</sup> An analysis of liability for the intentional infliction of emotional distress, for example, would not necessarily have to turn on the fact that the defendant's conduct happened to involve speech.

<sup>63</sup> Unless all speech is to be equally protected, the proponents of constitutional protection for speech that takes place in different contexts, by different speakers, for different purposes, and with different results, may be forced to justify why protection ought to apply in a manner that does not draw as directly on the self-government rationale that formed the basis of the restraints on public official defamation plaintiffs' recovery originally announced in *New York Times*. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-83 (1964).

<sup>64</sup> I am not suggesting that fictional publications deserve no constitutional protection, nor am I willing to adopt the position that fiction is entitled to less constitutional protection than other speech. My point is twofold: first, fiction, by its very nature, requires an exploration not of how much more or how much less protection is provided by the Constitution but rather of how that protection is different; second, as long as liability for fiction remains firmly lodged in the traditional treatment of defamatory speech, a careful consideration of that difference is too easily avoided.

Philip Bobbitt refers to the "ideology of doctrinal argument" as reflecting the preferences of sophisticated, well-to-do Wall Street lawyers. Among these prejudices are a *distrust of juries*, an abiding *attachment to the legal status quo*, a preference for uniform and clear rules that *inhibit local and personal discretion*, a willingness to rely on extended procedural inquiry, a *preference for appellate decisionmaking* rather than legislative rule making, and an *attention to form*.

P. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 52-53 (1982) (emphasis added). Not much effort is required to detect these traits and preferences in the literature and arguments about defamation in general and defamation by fiction in particular.

A second reason for such widespread acceptance of the use of defamation theory in this setting is probably related to the uneasiness with which the legal system has approached the question of liability for harms such as mental distress,<sup>65</sup> which are neither quantifiable<sup>66</sup> nor readily distinguishable from the normal incidents of life in a complex society.<sup>67</sup> The trend of development in the law of intentional torts displays a marked preference for stretching traditional tort categories to cover new situations<sup>68</sup> rather than for explicitly recognizing a distinct interest in protection from emotional harm.<sup>69</sup> Similarly, when a defendant's negligent conduct produces only emotional harm, courts have been extremely reluctant to give up such bright line indicia of legitimacy as the impact rule,<sup>70</sup> the physical harm requirement,<sup>71</sup> or the zone-of-danger doctrine.<sup>72</sup> Perhaps the benefits

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<sup>65</sup> This harm is referred to under a variety of labels in tort law, including mental distress, mental anguish, and emotional distress. The use of the term mental distress in this Article is intended to encompass whatever variations may have been adopted within particular jurisdictions.

<sup>66</sup> In a sense, the harm to reputation element of a traditional defamation action also cannot be quantified. Direct pecuniary losses may be identified, for example, when a defamed plaintiff loses a job or a contract, but those losses are merely the indicia of the intangible injury to reputation.

<sup>67</sup> The mental distress cases tend to place a premium on being able to distinguish meritorious from frivolous or illegitimate claims. In the insult cases, for example, conduct that might be a routine part of certain cultural patterns could be considered so far out of line in other settings that one subjected to the conduct seeks legal relief. *See, e.g.,* *Slocum v. Food Fair Stores of Florida, Inc.*, 100 So. 2d 396 (Fla. 1958).

<sup>68</sup> This stretching has occurred in the context of the tort action of battery with regard to both the type of harm and the type of conduct that is actionable. The paradigm battery action of physically harmful contact has been expanded to include contact that is merely offensive. *See* RESTATEMENT (SECOND) OF TORTS § 18 (1963 & 1964). The requirement that the contact must have been with the person of the plaintiff has been expanded to include contact with an item the plaintiff is holding. *See* *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967).

<sup>69</sup> The refusal to stretch the traditional assault action in a manner analogous to the treatment of battery, *see* note 68 *supra*, leaves uncompensated some plaintiffs who suffer harm that is virtually indistinguishable from harm that would be the basis of a claim for damages under a mental distress theory. *Compare* *Cucinotti v. Ortmann*, 399 Pa. 26, 27, 159 A.2d 216, 217 (1960) *with* *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 336, 240 P.2d 282, 284-85 (1952).

<sup>70</sup> *See, e.g.,* *Russo, Malicious, Intentional and Negligent Mental Distress in Florida*, 11 FLA. ST. U.L. REV. 339, 355-63 (1983).

<sup>71</sup> *See, e.g.,* *Daley v. LaCroix*, 384 Mich. 4, 179 N.W.2d 390 (1970). In *Daley*, the court abandoned the impact requirement but continued to require that the mental distress suffered by the plaintiff produce physical harm.

<sup>72</sup> *See, e.g.,* *Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 485-90

derived from the evolutionary path of development of legal doctrines by courts outweigh the risks associated with inaccurate decision making in categories of cases that are ahead of the developmental curve. Those of us, however, whose role it is to think about conceptual problems, rather than to be responsible for either arguing or deciding cases, have a special obligation to press beyond the arguably timid advances of existing case law and to highlight the issues that are being ignored or downplayed under approaches that currently dominate the field.

## II. A FUNCTIONAL ANALYSIS OF LIABILITY FOR FICTIONAL PUBLICATION

I am confident that each of us, at one time or another, has been convinced that someone ought to write a book about a situation that we have experienced or observed. Certain characters we encounter, whether in the military or in school, on a job or in a family, may appear to have been drawn from fiction rather than from real life. Often, I suspect, a sense of anger, frustration, or helplessness lies behind the impulse to express our reactions to our experiences in a fictional format. Thoughts about displaying a superior as the borderline-psychotic character of a devastatingly witty novel have diverted what is probably a disproportionate amount of the mental energy of those who feel trapped in a situation. It is undoubtedly one of the blessings of western civilization that not everyone who has had the impulse to write a book about his or her experiences has had access to a forum to get the work before the public. Perhaps because access seems to have been easiest for those who are either overeducated or underemployed, far too many first novels are blindingly dull accounts of graduate education. In contemporary shorter fiction, on the other hand, one might suppose that stories about people who shop at K-Marts in Appalachia<sup>73</sup> would have the surest chance of reaching the segment of the literate population that does not read "little magazines."

It is admittedly a proposition of stunning banality that everything has to be about something.<sup>74</sup> However, as is the case

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(1982).

<sup>73</sup> See, e.g., B. MASON, *SHILOH AND OTHER STORIES* (1982); B. PANCAKE, *THE STORIES OF BREECE D'J PANCAKE* (1983); J. PHILLIPS, *BLACK TICKETS* (1979).

<sup>74</sup> Professor Wilson makes the point much more eloquently when she says that "the

with the man who, upon being discovered in someone else's bedroom closet, tries to account for his presence by saying that "everybody's got to be someplace," the quarrel is not with the general proposition. Rather, the quarrel is with the particular choice of where to be or, in the case of fiction, of what to be about. The essence of the case for liability for harm caused by the publication of fiction is nothing more than the common-sense recognition that some experiences are not appropriately put before the public.

The problem, of course, is to fashion a theory of liability that permits the incidents that are inappropriate for inclusion in a work of fiction to be identified in a manner that is administratively manageable and that strikes a reasonable balance between the competing interests involved. Any attempt to fashion such a theory must clearly articulate two principles: a compensation principle<sup>75</sup> that articulates reasons why a particular plaintiff is a person who has suffered harm for which he or she should be compensated and a liability principle<sup>76</sup> that articulates reasons why a particular defendant is a person who ought to be responsible for the harmful consequences of the allegedly tortious conduct.

One trap that is not easily avoided is the tendency to devise a name for the theory one is trying to build. This tendency all too often leads to a bad attack of the cutes, causing those who succumb to offer such terms as "defamacast"<sup>77</sup> or "faction."<sup>78</sup> An

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source of art is inevitably life." Wilson, *supra* note 42, at 38. I do not mean to venture into territory better left to literary criticism. There are, I suppose, works of pure fantasy that have no connection with the experiences of their authors. The works of fiction that are of concern in this Article draw on people the authors have known and events in which those people have participated.

<sup>75</sup> See notes 87-149 and accompanying text *infra*. In the introduction to their collection of essays on the philosophical underpinnings of tort law, Bayles and Chapman present this principle as a question of "who receives benefits (compensation)? The members of this class depend upon the scope of persons to whom duties are owed, whether a violation of a duty is a legal cause of damage, and what damages are compensable." M. BAYLES & B. CHAPMAN, *JUSTICE, RIGHTS, AND TORT LAW* 3 (1983).

<sup>76</sup> See notes 150-227 and accompanying text *infra*. Bayles and Chapman pose this principle as a matter of "who pays?" which "depends upon what duties there are, what constitutes a violation of those duties, and what constitutes causing damage." M. BAYLES & B. CHAPMAN, *supra* note 75, at 3.

<sup>77</sup> In *American Broadcasting-Paramount Theatres, Inc. v. Simpson*, 106 Ga. App. 230, 240, 126 S.E.2d 873, 879 (1962), the court coined the term "defamacast" to describe a defamatory broadcast. See PROSSER AND KEETON, *supra* note 28, § 112, at 787, which refers to the court's neologism as "a barbarous new word."

<sup>78</sup> See Silver, *Libel, The "Higher Truths" of Art and the First Amendment*, 126 U.

attempt to avoid this trap may act as an extremely subtle force toward the use of existing theories of liability. For example, one might conclude that the infliction of emotional distress is the most accurate description of the harmful conduct that supports liability for the publication of fiction.<sup>79</sup> Nothing could be more foolish, however, than to saddle an emerging theory with such a wimpy label as the "fictional infliction of emotional distress." The courts of those states that have referred to the *Restatement (Second) of Torts* section 46 tort action for emotional distress<sup>80</sup> as "the tort of outrage"<sup>81</sup> must be reacting, at least subconsciously, to the need to match the connotative force of the label with the substance of the liability theory.

In the film *Manhattan*,<sup>82</sup> the former wife of Isaac, the character played by Woody Allen, published a book describing the breakup of their marriage. When Isaac announced this to his best friends, one of them remarked, "That's really tacky." The concept of tackiness begins to capture the nature of the conduct to which liability ought to attach, but then one faces the problem of how to distinguish the author who puts her former husband's sex life into a book from the people who make plaster animals for front yards. Clearly, tackiness must be rejected as an overinclusive label.

What might then present itself as the distinguishing feature of this liability-forming conduct is its sleaziness. A sleaze factor (perhaps) enables us to exclude from liability the producers and displayers of pink flamingo lawn ornaments, so we seem to be on the right track. One might object that sleaziness tends to lap over into a description of the conduct of such actors as the *Na-*

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PA. L. REV. 1065, 1067 (1978).

<sup>79</sup> My principal concern with the current treatment of liability for fiction as a species of defamation is that nonreputational harm receives inadequate relief. To the extent that contemporary tort law focuses on the "excess" harm that is uncompensated or undercompensated by defamation theory, the emotional distress actions come closest to identifying the relevant considerations in determining liability. See notes 229-41 and accompanying text *infra*.

<sup>80</sup> RESTATEMENT (SECOND) OF TORTS § 46 (1963 & 1964) ("Outrageous Conduct Causing Severe Emotional Distress").

<sup>81</sup> See, e.g., *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 91 (1981); see also *American Road Serv. Co. v. Immon*, 394 So. 2d 361, 362 (Ala. 1980) ("tort of outrageous conduct").

<sup>82</sup> *United Artists Communications, Inc.*, 1979.

*tional Enquirer* and Richard Nixon, but they seem to me to be eminently reasonable candidates for liability of one sort or another. In any event, the seriousness of the problem should begin to emerge when the "tort of sleazy fiction" seems to be the most promising label. Obviously, the safest course of action to take is to admit failure and simply go on to describe the theory of liability, leaving to others the task of attaching an appropriate label.

How one goes about constructing a theory of liability depends on one's view of what the finished product should be able to accomplish. As suggested earlier, providing an opportunity to identify and balance the competing interests while maintaining some measure of administrative convenience in the application of the theory are desirable goals. To achieve these ends, the optimum form for the expression of a theory of liability could be patterned after a number of the key provisions of the *Restatement (Second) of Torts*.<sup>83</sup> Rather than carrying forward the definitional approach of the First Restatement,<sup>84</sup> the drafters of the Second Restatement opted for a more analytical and policy-oriented approach. The technique of the Second Restatement tends to be two-pronged: first, setting out a vague statement of the conclusion that liability attaches under a particular concept;<sup>85</sup> and second, identifying factors, without assigning weights to them, that should be considered in deciding whether liability ought to attach in a given case.<sup>86</sup> The benefits of this approach

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<sup>83</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 222A (1963 & 1964) ("What Constitutes Conversion"); *id.* §§ 519-520 (1976) (Abnormally Dangerous Activities).

<sup>84</sup> See, e.g., RESTATEMENT OF TORTS § 223 (1934) ("Ways of Committing Conversion"); *id.* § 520 (1938) ("Definition of Ultrahazardous Activity").

<sup>85</sup> The best example is the strict liability provision:

§ 519 General Principle

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

RESTATEMENT (SECOND) OF TORTS § 519 (1976).

<sup>86</sup> The accompanying strict liability provision states:

§ 520 Abnormally Dangerous Activity

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

include, at the very least, an increased likelihood that legal decisionmakers will be forced to confront the full range of factors that affect liability. A somewhat more conceptual advantage is that the liability decision will be accurately depicted as a trade-off between competing interests, and thus the determination of liability *vel non* will be made as a result of, rather than as a substitute for, a careful analysis of all relevant factors.

If I were to propose a Restatement version of the theory of liability developed in this Article, the provision would appear in the following form: "One who unreasonably and unnecessarily inflicts harm on another by publishing a work of fiction is liable to that other for such harm. In deciding whether the infliction of harm has been unreasonable and unnecessary, the following factors [described in Section II of this Article] should be considered." The following discussion will set out and describe the various factors that are necessarily involved in the shaping of compensation and liability principles for the publication of fiction.

#### A. *Toward a Compensation Principle*

The search for a compensation principle proceeds from the premise that not every individual who detects a resemblance between himself or herself and a fictional character is thereby entitled to recover damages from the author and publisher of the work of fiction. A former President of the United States, for example, would ordinarily not have a claim for relief based on a suspense novel that included a President who had some of the former President's characteristics.<sup>87</sup> That seems to me to be an

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- (c) inability to eliminate the risk by the exercise of reasonable care;
  - (d) extent to which the activity is not a matter of common usage;
  - (e) inappropriateness of the activity to the place where it is carried on; and
  - (f) extent to which its value to the community is outweighed by its dangerous attributes.

*Id.* § 520 (1976).

<sup>87</sup> Exceptions to the general premise stated in the text can be imagined. Consider, for example, a novel written by a former President's close aide that depicts a fictional President who resembles very closely the person for whom the author had worked. Further, the novel includes scenes in which the character engages in acts that are unrelated to the official functions of the President's office. Finally, the character is cast in a harshly negative fashion. The added dimension of credibility provided by the relationship between the author and the person upon whom the character is modeled, see notes 97-101 and accompanying text *infra*, would call for a more careful consideration than is indi-



easy case. However, what seems to me to be an equally easy case is one in which the defendant, whose relationship with the plaintiff ends with a good deal of bitterness, writes a novel in which a character with many of the plaintiff's characteristics is portrayed in a way that subjects the plaintiff to embarrassment or ridicule and the attendant mental distress.<sup>88</sup> A legal system that does not even attempt to provide a vehicle to redress this type of harm is well on its way toward treating interests of the individual as commodities that can be expropriated to achieve a broader societal goal.<sup>89</sup> Such an instrumental exploitation of the individual may be justifiable under some circumstances,<sup>90</sup> but if protection of the individual can be accomplished without serious risk to the broader societal goal, then the legal system has an obligation to strive toward providing that protection.

In their efforts to distinguish meritorious claims for relief from nonmeritorious claims, courts would benefit from a consideration of the following factors: (1) the plaintiff's expectation that the events upon which the fictional episodes are based would remain private; (2) the strength of the resemblance between the plaintiff and the fictional character; and (3) the nature and extent of the harm suffered by the plaintiff.

### 1. Expectation of Privacy

Some authors of fiction may place a character who is closely identified with the plaintiff in totally invented scenes. However, authors who insert into works of fiction a character based on the plaintiff may place that character in scenes based on actual experiences of the plaintiff. In the latter case, an important factor in identifying the plaintiff as a party entitled to relief for harm caused by the publication is whether the plaintiff had a reasonable expectation that his or her participation in the events depicted would be protected from disclosure. In determining whether an expectation of privacy is reasonable, the relevant

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cated by the "rule" and the example given in the text.

<sup>88</sup> See *Springer v. Viking Press*, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982).

<sup>89</sup> See Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 564-69 (1972); LeBel, Book Review, 76 NW. U.L. REV. 838, 840-41 (1981). For an analysis of these ideas in the defamation context, see Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 811-26 (1979).

<sup>90</sup> See Fletcher, *supra* note 89, at 550-56.

considerations include (a) the public or private status of the plaintiff, (b) the nature of the events recounted in the work of fiction, and (c) the relationship between the plaintiff and the author of the fictional work.

*a. Status of the Plaintiff*

The distinction between public figures and private individuals is well established in the law of defamation.<sup>91</sup> In the context of actions they might bring for defamation, public figures are given less protection from harm because of a belief that they have, in a sense, assumed a risk that others will lie about them and that they have access to the means of getting their corrective messages before the recipients of the defamatory communication.<sup>92</sup> Similar rationales could be used to support a suggestion that public figures are less likely to have a valid claim for relief when events in which they have participated are incorporated into works of fiction. Inviting attention to one's activities should create an expectation that those activities may become the subject of sufficient interest and knowledge to become part of the public domain. Thus, if I assume a public role, I have less reason to complain about a fictional portrayal of a person in that public role. If I am careful, however, to maintain a private identity, my claim for relief when I appear in the latest best-selling novel should arouse a more sympathetic response.

*b. Events Depicted*

The public or private status of the plaintiff does not, by itself, indicate conclusively the legitimacy of an expectation of privacy.<sup>93</sup> When a famous journalist marries a novelist and then has an affair with the wife of a prominent diplomat,<sup>94</sup> the fact that the journalist has invited attention to his reportorial efforts should not necessarily deprive him of an expectation of privacy

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<sup>91</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). But see Zimmerman, *supra* note 20, at 344-47 (raising questions about value of distinction).

<sup>92</sup> See *Gertz*, 418 U.S. at 344-46.

<sup>93</sup> See Zimmerman, *supra* note 20, at 344-47.

<sup>94</sup> See Kornbluth, *Scenes from a Marriage*, NEW YORK, Mar. 14, 1983, at 40. See also Langdon & Smilgis, *Can Carl Bernstein Handle Deep Truth?*, PEOPLE, Jan. 14, 1980, at 37 (discussing resemblance between principal male character of Nora Ephron's novel *Heartburn* and Ephron's former husband, Carl Bernstein).

about all of his life. The nature of the events depicted in the fictional work must be evaluated to determine the reasonableness of an expectation that, whatever else might be made public about the plaintiff's life, those events would be preserved from public scrutiny. The more intimate the events<sup>95</sup> and the more they depart from the public aspects of the plaintiff's life,<sup>96</sup> the more likely it is that the plaintiff has a meritorious claim for relief.

*c. Relationship to Author*

Even if the plaintiff is a private individual who sees intimate details of his or her life portrayed in a work of fiction, the law should not necessarily look kindly on fools. By considering the relationship between the plaintiff and the author, courts should be able to identify those plaintiffs who have assumed a risk of loss of privacy by becoming involved with writers whose imaginations may be fueled by a voracious appetite for the details of the lives of those around them. Whether the nature of the relationship is sufficient to put the plaintiff on notice that such a risk exists is an important element in determining the reasonableness of the plaintiff's expectation of privacy.<sup>97</sup> Being

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<sup>95</sup> Details of the plaintiff's sexual life would be the clearest case of events for which the plaintiff is likely to have a legitimate expectation of privacy.

<sup>96</sup> There is a potential danger of deterring a work that truthfully discloses that the private life of the plaintiff is at odds with the public persona of the plaintiff. A publication that reveals the crude and often unintelligible conversation of a public official who has carefully created a different public image, *see, e.g.*, *THE WHITE HOUSE TRANSCRIPTS* (New York Times/Bantam Books ed. 1974), may have a legitimate and quite valuable role to play in undermining the credibility of a public official. But when the fictional events are both false and diametrically opposed to the public image of the plaintiff, the greatest potential for harm to the individual is present.

Jerry Falwell's action for \$45 million in damages against *Hustler Magazine* and the magazine's publisher, Larry Flynt, involved the publication of a work that might fall into this latter category. The defendants published a parody of a liquor advertisement that depicted the plaintiff as having engaged in drinking alcohol and in sexual activities with his mother. *See Battiatia, Falwell-Flynt Libel Trial Best Show in Town*, *Wash. Post*, Dec. 6, 1984, at A24, col. 1. *See also* *N.Y. Times*, Dec. 4, 1984, at A18, col. 6. The depiction clearly was not in keeping with the image of the plaintiff, a major figure in the "Moral Majority" movement. A case such as this one, presenting such unsympathetic figures on both sides, may easily provoke the reaction one might have to such sporting events as the Army-Navy football game, that is, rooting for both sides to lose. In the Falwell-Flynt action, the filing of a counterclaim by Flynt raised the possibility that this optimal solution could, in fact, occur.

<sup>97</sup> As should be true of the assumption of risk doctrine that is generally applicable

caught by surprise by the publication of the Great American Office Gossip Novel on which the author, with whom the plaintiff shares office gossip, has been secretly scribbling away for years is substantially different from being indignant when an incident that the plaintiff revealed in a heart-to-heart talk with John Updike shows up in a short story about the Maples family.<sup>98</sup>

The relationship between the plaintiff and the author or publishing firm can also indicate whether the plaintiff has consented to being used as the model for a character in a work of fiction. Consent would undermine a plaintiff's claim of an expectation of privacy and thus should be a factor in determining whether such a claim is valid. If the consent is express, the points of contention are likely to be whether the scope of the consent was breached<sup>99</sup> or whether the consent was effectively revoked.<sup>100</sup> The more difficult cases are likely to be those in which consent is claimed to be either apparent or implied. In these situations, the relevant inquiry is not so much whether the plaintiff actually consented as it is whether a reasonable person in the defendant's position, with the defendant's knowledge of the plaintiff, would conclude that the plaintiff had consented to the defendant's use of the plaintiff's name, characteristics, or activities as the basis for portions of the defendant's fictional work.<sup>101</sup>

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in the law of torts, a careful inquiry should be made into precisely what risk a party has assumed before that party is deemed to have "assumed the risk." Proving that the plaintiff was aware of only the general type of risk involved should be insufficient for a defendant to assert this defense successfully against a plaintiff. In addition to proving awareness of the general risk, the defendant should be required to establish that the plaintiff was aware of both the manner in which the risk would be expected to cause harm and the extent of the harm that would be encountered. Measured in this way, one might conclude that when Carl Bernstein married Nora Ephron, see note 94 and accompanying text *supra*, and said "I do," he should have been thinking, "She might."

<sup>98</sup> See J. UPDIKE, *Too Far To Go: The Maples Stories* (Fawcett Crest ed. 1979).

<sup>99</sup> See, e.g., *Kelly v. Loew's Inc.*, 76 F. Supp. 473 (D. Mass. 1948).

<sup>100</sup> See, e.g., *Middlebrooks v. Curtis Publishing Co.*, 413 F.2d 141 (4th Cir. 1969).

<sup>101</sup> See PROSSER AND KEETON, *supra* note 28, § 18, at 113 ("The defendant is entitled to rely upon what any reasonable man would understand from the plaintiff's conduct."). The issue of implied or apparent consent might arise in a situation such as the one Alan Paton recounts in his "Author's Note" to *Ah, But Your Land is Beautiful*, in which two persons who appeared in the novel gave permission, without having seen the manuscript, for the author to use them in the novel. See A. PATON, *Author's Note*, in *AH, BUT YOUR LAND IS BEAUTIFUL* (1981).

## 2. The Strength of the Resemblance Between the Plaintiff and the Fictional Character

When Tom Smith, who lives in Dubuque, sues an author whose first novel, set in Greenwich Village, includes a character named Tom Smith who engages in practices abhorrent to an ordinary Iowan, the court should be skeptical about the validity of the claim that led Mr. Smith to go to court. The mere identity of name between a plaintiff and a fictional character is an insufficient indicator of an entitlement to relief.<sup>102</sup> On the other hand, a change of name and geographic setting may not be enough to destroy a resemblance between a plaintiff and a fictional character who have many other critical attributes in common.<sup>103</sup> Rather than searching for a bright line indicator of identification to distinguish between meritorious and nonmeritorious claims,<sup>104</sup> courts should approach this factor from a pragmatic perspective. Such an approach should focus on the purpose of the inquiry, namely, to determine whether the particular plaintiff is someone who ought to have access to relief for harm allegedly caused by the defendant's published work of fiction.

At the heart of the legal system's concern for the person who claims to have been harmed by the publication of fiction is the risk that a fictional character's possession of some of the plaintiff's traits or characteristics will suggest that the plaintiff in fact has other traits in common with the fictional character.<sup>105</sup> If those other traits are matters of great sensitivity<sup>106</sup> or if they

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<sup>102</sup> See *Clare v. Farrell*, 70 F. Supp. 276 (D. Minn. 1947).

<sup>103</sup> See *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650 (2d Cir. 1966).

<sup>104</sup> See, e.g., *Allen v. Gordon*, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't 1982).

<sup>105</sup> This concern seems to be the thrust behind the court's sustained metaphor in *Callahan v. Israels*, 140 Misc. 295, 250 N.Y.S. 470 (Sup. Ct. N.Y. County 1931):

The defamation is accomplished under the literary forms of a work of fiction. The theory of the complaint is that the libel consisted of a skillfully painted picture. The background was made up of many allusions, not in and of themselves libelous, to incidents, circumstances, and facts in the life and associations of plaintiff and his wife. In the foreground was set forth the libelous statements which expose the plaintiff to contempt, ridicule and disgrace, evil opinion, and obloquy.

The background and shadows alone were not harmful. The distorted figures and false lights in the foreground were in and of themselves damaging. The combination and setting, and the ruinous result of the finished picture, however, was the evil accomplished.

*Id.* at 296, 250 N.Y.S. at 471.

<sup>106</sup> But see *Kelly v. Loew's Inc.*, 76 F. Supp. 473 (D. Mass. 1948). The court refused

paint a false and derogatory picture of the plaintiff,<sup>107</sup> the risk of incorrectly attributing the traits to the plaintiff<sup>108</sup> carries with it a corresponding risk of harm to the plaintiff. It is in the process of identifying this risk of harm that the resemblance between the plaintiff and the fictional character is most relevant.

The strength of the resemblance between the plaintiff and the fictional character can also serve as an indicator of the causal connection between the work of fiction and any harm allegedly suffered by the plaintiff.<sup>109</sup> In the case of harm to reputation, the resemblance must be strong enough for someone to be able, first, to make the initial connection between the fictional character and the plaintiff and, second, to attribute the fictional character's negative qualities to the plaintiff. For nonreputational harm, a certain minimum resemblance must be present so that the harm the plaintiff has allegedly suffered can be attributed to the publication of the work of fiction rather than merely to some idiosyncratic sensitivity on the part of the plaintiff.

The kinds of questions that should be asked to determine whether the fictional work caused the plaintiff's harm resemble, but are not identical to, the questions that are posed in the law of defamation. As long as the focus of a defamation action is on the harm to the reputation of the plaintiff, the relevant causation questions turn on the ability of someone other than the plaintiff to understand, and to act on the basis of, the resemblance between the plaintiff and the fictional character. As the scope of the tort action is expanded to include nonreputational

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to treat the "romantic incidents" of the the plaintiff's fictional counterpart as capable of bringing the plaintiff "into even a Puritan's ridicule or disesteem." *Id.* at 486. Not a great deal of imagination is required to conceive of a plaintiff who would regard any fictionalized "romantic incidents" of his or her life as matters that are not properly displayed on the screen or in print.

<sup>107</sup> See, e.g., *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979). In *Bindrim*, the plaintiff alleged that the defendant's novel falsely depicted him as using obscene language in the course of his therapy sessions.

<sup>108</sup> In *Bindrim*, the court concluded that the jury should decide "whether the literary incidents were understood by those readers who identified plaintiff with [the fictional character] as strictly fictional or as based on fact." *Id.* at 78 n.6, 155 Cal. Rptr. at 39 n.6.

<sup>109</sup> Relatively little attention has been paid to the issue of causation in actions for damages based on harm caused by works of fiction, perhaps because the cases are so frequently disposed of on other grounds. The remainder of this subsection proposes an approach by which the determination of causation varies according to the type of harm a plaintiff alleges.

harm, however, the reasonableness of the perception that the plaintiff is the model for the fictional character is properly tested from the perspective of the plaintiff as well as from the perspective of a segment of the audience.<sup>110</sup> Accordingly, the ability of some reader to identify the fictional character as the plaintiff is not the *sine qua non* that it is in a liability theory concerned solely with reputational interests.<sup>111</sup>

The nature of the link between the plaintiff and the fictional character provides guidance in assessing whether a plaintiff has introduced sufficient evidence to establish the causation element of the tort action. When the correspondence between the plaintiff and the character is based on resemblances of an individual nature,<sup>112</sup> the plaintiff will have a stronger claim for relief than when the resemblance is of a more institutional nature. The clearest case of an institutional resemblance is the situation in which a fictional character is depicted as holding a position that the plaintiff occupies or has occupied in the past.<sup>113</sup> This rough guideline is based, in large measure, on the recognition that institutional references based upon status or office may support a link to more than one particular person.<sup>114</sup> Thus, without further identifying characteristics, there would be no special reason to make the connection to a particular plaintiff.<sup>115</sup> Addi-

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<sup>110</sup> This shift does not mean, of course, that any plaintiff can make out a *prima facie* case simply by alleging that he or she believes that a character in a novel is patterned after him or her. As the text indicates, the perception of the resemblance must be reasonable. The reasonableness of a particular plaintiff's allegations can be tested against an objective standard.

<sup>111</sup> See note 32 and accompanying text *supra*.

<sup>112</sup> See, e.g., *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650 (2d Cir. 1966). In spite of the author's use of fictitious names in the novel *The Travelers*, the court noted 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." *Id.* at 651.

<sup>113</sup> This institutional resemblance may include, for example, being a sheriff of Franklin County, New York, see *Lyons v. New Am. Library, Inc.*, 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980); notes 115 & 118 *infra*, or being a beauty pageant contestant from the State of Wyoming, see *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 3112 (1983); note 16 *supra* and text accompanying note 116 *infra*.

<sup>114</sup> The potential reference to more than one person may not resolve the problem of whether the fictional publication has caused any harm. Instead, it may simply raise the issues that have been treated in the law of defamation as matters of group defamation. See RESTATEMENT (SECOND) OF TORTS § 564A (1976).

<sup>115</sup> The narrowing of the reference to a particular person might be accomplished by

tional identifying characteristics may be internal to the work of fiction, as when a fictional contestant in a beauty pageant and the plaintiff have the same talent contest entry and represent the same state.<sup>116</sup> Extrinsic factors may also supply the additional link necessary to make a connection between the plaintiff and the character, as when a personal or business relationship has existed between the author and the plaintiff.<sup>117</sup> Furthermore, because the focus is not limited to whether persons other than the plaintiff perceived the resemblance between the fictional character and the plaintiff, facts known to the plaintiff but not to the audience would be relevant in establishing the strength of the resemblance.<sup>118</sup>

### 3. The Nature and Extent of the Harm

The harm that a person can suffer as a result of the publication of a work of fiction may be viewed as a function of three sets of variables: the type of harm, its timing, and its magnitude. Each set of variables contains its own guiding principles for determining whether a particular plaintiff is alleging a harm that warrants legal redress.

#### *a. Type of Harm*

The types of harm that can be caused by works of fiction

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a fictional characterization that is set in a specific time, as with the investigation of the "Son of Sam" murders in New York. Thus, the sheriff of Franklin County *at that time* could have established the causal connection between the fictional characterization and the harm, if any, that he suffered. *But see* Lyons v. New Am. Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980) (reversing trial court's denial of motion to dismiss complaint).

<sup>116</sup> See *Pring v. Penthouse Int'l, Ltd.*, 7 MEDIA L. REP. (BNA) 1101 (D. Wyo. 1981); *see also* Note, *supra* note 45, at 113-15.

<sup>117</sup> See, e.g., *Geisler v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980) (business relationship); *Springer v. Viking Press*, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982) (personal relationship).

<sup>118</sup> The court in *Lyons v. New Am. Library, Inc.*, 78 A.D.2d 723, 432 N.Y.S.2d 536, apparently relied on the converse of this proposition. The court used the fact that the plaintiff knew that he had not participated in the "Son of Sam" murder investigation, which was the subject of the novel at issue, to support its finding of a lack of identification between the plaintiff and the fictional character. *Id.* at 724, 432 N.Y.S.2d at 538. This reasoning, of course, totally misperceives the risk of reputational injury that was created by the novel. Injury to reputation might occur if readers who did not know the facts known to the plaintiff attributed the unprofessional conduct of the fictional character to the person who held the office at the time of the investigation. *See* note 115 *supra*.



include both personal and relational harms. Each of these categories of harm can be subdivided into direct and indirect harms. Any one of the four resulting subcategories of harm — direct-personal, indirect-personal, direct-relational, and indirect-relational — could constitute the basis for compensable damage in a given case. Establishing each type of harm, however, depends on different kinds of evidence and requires some guarantee of genuineness before a plaintiff is permitted to recover damages for that particular kind of harm.

A fact pattern involving a hypothetical novel can be used to illustrate the different types of harm that can be caused by works of fiction. Suppose that a novel about a New York law firm contains an offensively stereotyped character — a black woman associate who had been a law review editor at an Ivy League law school. The novel depicts the associate as incompetent and as nearly functionally illiterate. Suppose further that the name of the law firm in the novel is phonetically similar to an actual firm. The plaintiff in our hypothetical fact pattern happens to be the only black woman associate with law review experience from her Ivy League law school employed by the actual firm, although she bears no other resemblance to the fictional character. Her perfectly natural emotional distress upon reading the novel would constitute *personal* harm that has been *directly* inflicted on the plaintiff. Accordingly, a compensation principle should recognize that credible evidence that the plaintiff actually suffered emotional distress suggests that the plaintiff deserves to recover for that personal harm. The kinds of distress for which the plaintiff ought to be compensated include the plaintiff's anger at being depicted as a functional illiterate, the sense of being used by the author if the author in fact knew the plaintiff, the unpleasantness associated with the anticipation that people will attribute the fictional character's negative characteristics to the plaintiff, and the sense of vulnerability and helplessness at being incapable of totally correcting the misperceptions that others might have of the plaintiff as a result of the work of fiction.<sup>119</sup>

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<sup>119</sup> It is probably worth reiterating at this point that I am developing a set of factors that are relevant to the analysis of liability. No single factor should be dispositive. Thus, in this example, if the close correspondence between the fictional character and the plaintiff was totally inadvertent and could not reasonably have been avoided by the au-

The plaintiff, of course, is not going to be the only one who reads the novel, or at least the publisher hopes that there will be a wider audience. An evaluation of the harm caused by the publication, therefore, must also take into account the novel's effect on others, which can cause the plaintiff both indirect personal injury and direct relational injury. An example of personal harm suffered as an indirect result of the fictional work is the embarrassment and distress suffered by the plaintiff as a result of remarks that are made to her by those who identify her with the character in the novel.<sup>120</sup> To recover for this indirect personal harm, the plaintiff should be required to offer evidence that such incidents actually took place.<sup>121</sup> Otherwise, mental anguish over the risk that such incidents might take place is better treated as a personal harm directly caused by the novel, and recovery is more appropriately included within that item of damages.<sup>122</sup>

Relational harms resulting from the publication of fiction most closely resemble those harms traditionally associated with the defamation model into which courts have tried to fit the action based on the publication of a fictional work.<sup>123</sup> Direct relational harm most obviously occurs when people who read the novel treat the plaintiff, because of the characterization, in a worse fashion than they otherwise would have.<sup>124</sup> There is, however, a less obvious sense in which a work of fiction can cause direct relational harm. Because relationships are reciprocal phenomena, the success of a relationship may depend as much on

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thor or the publishing firm, the fact that the plaintiff suffered harm of the sort described in the text might not support her recovery of damages for that harm.

<sup>120</sup> This kind of personal harm is distinguishable from reputational harm, which involves an adverse reaction by third persons toward the plaintiff as a result of the work of fiction. It is also distinguishable from direct personal harm, which results from the plaintiff's own encounter with the fictional work.

<sup>121</sup> Evidence of such incidents would also strengthen the argument in favor of the reasonableness of the perception that the fictional character is modeled on the plaintiff. See note 110 and accompanying text *supra*.

<sup>122</sup> See text accompanying note 119 *supra*.

<sup>123</sup> See notes 19-58 and accompanying text *supra*. I am using the term relational harm in a broader sense than Professor Anderson, who limits this category to reputational harm. See Anderson, *supra* note 24, at 765.

<sup>124</sup> For a general statement of this kind of harm in the defamation context, see RESTATEMENT (SECOND) OF TORTS § 559 (1976) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

the behavior of the plaintiff as on the attitude of the other party or parties to the relationship. Accordingly, a plaintiff's relations with others can be injured not only when the plaintiff is treated in a worse fashion, but also when the plaintiff behaves differently. It is perfectly plausible, therefore, that the publication might so affect the plaintiff's attitude about how the plaintiff is perceived by others that the plaintiff's professional and personal relationships would be affected adversely.<sup>125</sup>

Indirect relational injury arises from behavior adverse to the plaintiff on the part of people who have not read the novel but who are informed about it from another source.<sup>126</sup> The effects on the plaintiff of such behavior may appear to be similar to the direct relational harm that a plaintiff can suffer,<sup>127</sup> but the distinction is worth drawing because it points out the different risks to which the plaintiff is exposed. In the case of direct relational harm, the reaction of the reader, who may be the plaintiff or a third person, is shaped directly by the characterization in the novel. Any negative attributes of the fictional character, therefore, might be offset, in part, by such factors as the portrayal of the character's positive traits<sup>128</sup> or the sense of exaggeration that the work as a whole conveys.<sup>129</sup> Indirect relational harm, in contrast, lacks a direct link to the fictional portrayal of the character in the context of the novel and thus adds a sub-

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<sup>125</sup> Before recovery could be obtained for this sort of harm, a plaintiff would have to establish the reasonableness of his or her reaction to the fictional publication. A hypersensitive plaintiff should not be permitted to withdraw from normal relationships and then be permitted to attribute the harmful consequences of that withdrawal solely to the conduct of the defendants who published the work of fiction.

<sup>126</sup> The information may come from media accounts of the fictional work or may travel by word of mouth.

<sup>127</sup> For example, there may be the same kind of loss of esteem for, or deterrence from association with, the plaintiff resulting from indirect knowledge about the fictional characterization as would have resulted if the fictional work had been read by the person who has reacted negatively to the plaintiff.

<sup>128</sup> In *Blake v. Hearst Publications, Inc.*, 75 Cal. App. 2d 6, 170 P.2d 100 (1946), the impressions created by cartoons, which were alleged to have harmed the plaintiff by depicting him as "degenerate, dissolute, disheveled, slovenly and unkempt," were substantially offset by the accompanying text, which described him as a patriot and hero for his counterespionage role that the cartoons were designed to illustrate. However, it should nevertheless be recognized that the cartoons themselves would create a risk of causing a negative impact unless the reader read the accompanying text. See also *Kelly v. Loew's, Inc.*, 78 F. Supp. 473 (D. Mass. 1948).

<sup>129</sup> See, e.g., *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), cert. denied, 103 S. Ct. 3112 (1983).

stantial risk of distortion and exaggeration in the subsequent communications about the work.<sup>130</sup>

Establishing each type of relational harm requires that the plaintiff produce different kinds of evidence. When relational harm results from how others treat the plaintiff, it is appropriate for a court to insist that the plaintiff produce evidence showing that someone else has identified the plaintiff with the fictional character. For this element of harm, then, the "of and concerning" inquiry could be borrowed from the law of defamation.<sup>131</sup>

When the relational harm is of the type in which the plaintiff's own conduct adversely affects the plaintiff's relationships with others,<sup>132</sup> the plaintiff would have to establish two factors. First, the plaintiff would have to show that the other person in the adversely affected relationship could have both identified the fictional character as the plaintiff and attributed the negative traits of the fictional character to the plaintiff. Second, the plaintiff would have to establish that the manner and extent of

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<sup>130</sup> For example, indirect knowledge of the *Penthouse* story that formed the basis of the *Pring* litigation may have left a lasting image in the minds of some people, extending no farther than a memory of the sexual antics of that baton-twirling Miss Wyoming. For this reason, the obvious exaggeration of a story, by itself, may not be a sufficient reason to dismiss a claim for relief without further analysis of the possible types of harm suffered by the plaintiff as a result of the publication.

<sup>131</sup> See notes 29-37 and accompanying text *supra*.

Because I would open the door to compensation for nonreputational injuries actually sustained by a plaintiff, my proposed scheme for analyzing liability would reduce the pressure on courts to make the kind of findings and assumptions made by the court in *Kelly v. Loew's, Inc.*, 76 F. Supp. 473 (D. Mass. 1948). The court in that case concluded that the audiences of two Boston theaters in which the motion picture at issue was shown believed that the fictional character was "substantially like" the plaintiff. *Id.* at 485. Those who made the connection between the plaintiff and the fictional character, however, probably would not have thought less of the plaintiff as a result of the fictional portrayal. In order to hold the publisher liable for libel, therefore, the court found it necessary to identify a subclass of potential viewers — naval officers — who would have a lower opinion of the plaintiff and to assume that some of the members of that subclass were in the audience of the two Boston theaters at the time the film was shown. *Id.* at 486. The facts in *Kelly* could have supported a finding of what I have labeled direct personal harm, see text accompanying note 119 *supra*, or indirect personal harm, see text accompanying notes 120-22 *supra*, without necessitating the cumbersome evidentiary findings made by the *Kelly* court to establish actual or potential reputational harm. As that case illustrates, the process of determining the legitimacy of the claim for relief for harm caused by the publication of fiction would be enhanced by using an analytical framework that directs attention to harm that was actually suffered, rather than one that encourages speculation about the possible impact on the reputational interests of the plaintiff.

<sup>132</sup> See text accompanying note 125 *supra*.

the changes in the plaintiff's conduct were a foreseeable result of the characterization in the novel and thus were not attributable predominantly to some peculiar sensitivity or insecurity of the plaintiff.<sup>133</sup>

*b. Timing of Harm*

The timing of the various kinds of harm just described poses significant difficulty only with regard to future harm. Introducing and evaluating evidence of past or current emotional distress and relational injury poses no greater problems in the case of harm caused by a work of fiction than in other cases, for example, that are tried on theories of intentional infliction of emotional distress or defamation.<sup>134</sup> That is not to say that the evidentiary problems involved in establishing past and current harm are insignificant. The point is, rather, that the problems encountered are neither different in kind nor greater in degree simply because they arise in a fictional publication case.

To assess future relational harms, relevant considerations would include the size of the publication's audience,<sup>135</sup> the duration of the publication,<sup>136</sup> the likelihood that future readers will make the connection with the plaintiff,<sup>137</sup> and the likelihood that the plaintiff will be vulnerable to relational injuries in the future.<sup>138</sup> As for future personal harm, the passage of time might

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<sup>133</sup> The factors described in the text are intended to restrict recovery for this kind of harm while still leaving open the possibility that, in a given case, a plaintiff who actually suffers this reciprocal sort of relational harm as a result of the fictional work has an opportunity to recover for the harm.

<sup>134</sup> See generally Smolla, *supra* note 21, at 18-21.

<sup>135</sup> The rationale for the relevance of this consideration is that an increase in the size of the audience normally involves a corresponding increase in the risk that the plaintiff will encounter adverse reactions as a result of the fictional characterization.

<sup>136</sup> The traditional law of defamation includes this factor as an element in resolving the pseudo-issue of whether a defamatory publication is libel or slander. See RESTATEMENT (SECOND) OF TORTS § 568(3) (1976). The rationale for including this factor as an element in assessing damages for future relational harm is that fictional works in a permanent form carry with them an increased risk of long-term harm to the plaintiff.

<sup>137</sup> As time passes, the class of persons knowing the extrinsic facts upon which the connection between the plaintiff and the fictional character depends is likely to be reduced in size. Thus, the risk of harm may decrease over time. Furthermore, when the references are of an institutional nature, see notes 113-16 and accompanying text *supra*, the group of people to whom the references apply is likely to increase in size with the passage of time.

<sup>138</sup> The life expectancy of the plaintiff would set the most obvious outside constraint on the likelihood that future relational harm will occur to the plaintiff.

well be expected both to strengthen the resistance of the plaintiff to emotional distress<sup>139</sup> and to distance the plaintiff from the identifying features of the fictional character.<sup>140</sup> If so, the likelihood of future personal harm occurring will decrease over time.

To speak of recovering for harm that continues past death is not totally fanciful, as Joel Feinberg has imaginatively pointed out.<sup>141</sup> In defamation law, it is currently recognized that a person has an interest in protecting his or her reputation from being lowered even in the eyes of people who cannot be identified.<sup>142</sup> Professor Feinberg argues that the rationale for not imposing a geographic restriction on the scope of a person's reputational interest is no more compelling than the rationale for lifting the temporal restriction tied to the length of a person's life.<sup>143</sup> Because some works of fiction may have a lasting potential to attract readers,<sup>144</sup> the proposed action for harm caused by the publication of fiction might be an even more appropriate candidate for such treatment than publications without this potential. Prudence, however, clearly dictates that the theory of liability proposed here should limit the possible recovery to past or current harm and to future harm that is likely to be suffered during the plaintiff's lifetime.<sup>145</sup>

### c. *Magnitude of Harm*

Having used the variables of the type of harm and the timing of harm primarily to determine *for what* the plaintiff should

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<sup>139</sup> Arguably, a plaintiff will become increasingly inured to the unpleasantness associated with the fictional characterization.

<sup>140</sup> As time passes, one would expect the former Miss Wyoming who sued *Penthouse* in *Pring*, see notes 15-16 *supra*, to have experiences and to develop characteristics or traits that would make her status as a beauty pageant contestant less significant to herself and to others.

<sup>141</sup> See Feinberg, *Harm and Self-Interest*, in *LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 285 (1977).

<sup>142</sup> See, e.g., Anderson, *supra* note 24, at 769-70.

<sup>143</sup> See Feinberg, *supra* note 141, at 305-08.

<sup>144</sup> Indeed, the success of a fictional work may be based, in large part, on the work's potential to attract an audience over an extended period of time.

<sup>145</sup> This limitation would be in keeping both with the general rule against liability for defamation of deceased persons, see *RESTATEMENT (SECOND) OF TORTS* § 560 (1976), and the common exclusion of defamation actions from the coverage of survival statutes, see *PROSSER AND KEETON*, *supra* note 28, § 126, at 943. But see *Canino v. New York News, Inc.*, 96 N.J. 189, 475 A.2d 528 (1984) (action for libel survives death of defamed person).

be entitled to recover,<sup>146</sup> the magnitude of harm may appear to be most appropriately used as a factor in determining *how much* the plaintiff should be entitled to recover. To the extent that this is so, the compensation principle should provide for a fairly direct correlation between the size of the recovery and the extent or magnitude of the personal and relational harms that a plaintiff has suffered.<sup>147</sup> In addition, the magnitude-of-harm factor can serve an important limiting function by identifying certain parties who are not sufficiently aggrieved or adversely affected by the publication of a work of fiction to be entitled to compensation, even though, admittedly, they have suffered harm as a result of the publication. Courts could, therefore, justifiably set a threshold level of harm below which no action for compensatory damages will lie.<sup>148</sup> Whether an action for nominal relief should be allowed depends, in large measure, on whether the plaintiff's use of the tort action simply to establish the wrongfulness of the defendant's conduct is an important enough goal to justify expending the judicial resources required to adjudicate the matter.<sup>149</sup>

### B. *Toward a Liability Principle*

A plaintiff who has successfully made out a *prima facie* entitlement to relief according to the factors of the compensation

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<sup>146</sup> See notes 119-45 and accompanying text *supra*.

<sup>147</sup> This suggestion is not intended to minimize the difficulties inherent in translating nonphysical personal harms into awards of monetary damages. However, a more forthright statement of the kinds of harm that can be suffered would reduce the incentive to inflate the values of certain categories of harm in order to disguise an award for other harms that may or may not be compensable.

<sup>148</sup> Cf. *Burton v. Crowell Publishing Co.*, 82 F.2d 154, 155 (2d Cir. 1936) (declaring that not "all ridicule . . . is actionable; a man must not be too thin-skinned or a self-important prig"). If courts decide to set such a threshold, they should make clear that they are doing so, instead of camouflaging under implausible rules what is essentially the same decision. See, for example, *Lyons v. New Am. Library, Inc.*, 78 A.D.2d 723, 432 N.Y.S.2d 536 (3d Dep't 1980), in which the court relied on a rule that liability will not attach to a false charge of professional incompetence if the charge is in reference only to a single incident.

<sup>149</sup> My own view is that although the judicial system ought to be available to compensate for harm, the societal interest in a wise use of limited judicial resources should preclude the availability of an action solely for nominal damages. That action should be precluded even if a plaintiff is willing to incur the cost of going forward with the claim and a defendant prefers to litigate rather than settle.

principle that I have outlined<sup>150</sup> is not thereby automatically entitled to relief from the particular party or parties who have been sued. As is true of a good deal else that befalls the individual in our complex and crowded society, the harm that a plaintiff has concededly suffered and that, in theory, the plaintiff ought not to have suffered without compensation may not be the legal responsibility of the particular defendant sued or, for that matter, of any defendant.<sup>151</sup> This section of the Article enumerates the relevant factors that a legal system ought to consider in constructing a liability principle for publishers of fiction. At this stage of the endeavor of fashioning a theory of liability, the constitutional restrictions on the imposition of liability will be assumed away temporarily,<sup>152</sup> thus allowing room for an unfettered analysis of the risk distribution and cost allocation implications of the decision to publish a work in a particular form. Moreover, by temporarily assuming away constitutional restrictions, one can identify the extent to which the tort theory can accomplish some or all of the ends currently being sought primarily through the constitutional protection of speech and the press.

Among the factors that should be considered in determining whether a defendant ought to be liable for harm caused by the publication of fiction are (1) the nature and purpose of the work, (2) the risk-bearing capacity of the defendant, (3) the work's artistic merit, (4) the degree to which the plaintiff is a target of the work, and (5) the extent to which statements about a fictional character would subject the publisher to liability for defamation if they were made explicitly about the plaintiff in a nonfictional context.

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<sup>150</sup> See notes 87-149 and accompanying text *supra*.

<sup>151</sup> Tort law contains a variety of no duty or limited duty rules, as well as privileges and immunities, that have the effect of protecting certain classes of defendants from liability or of excluding recovery for certain types of harm. The trend of modern tort law, however, seems to be away from such categorical limitations and exclusions. See generally PROSSER AND KEETON, *supra* note 28, §§ 53-64, at 356-450 & §§ 131-135, at 1032-75.

<sup>152</sup> This step is not taken because of a belief that constitutional restrictions have no bearing on the liability of a publisher of a work of fiction. Rather, the move is one that permits the development of factors that are relevant to a tort law determination of liability. With these factors more clearly identified, the constitutional dimensions of liability can then be layered back onto the tort law considerations of who should be liable and under what circumstances a plaintiff should be entitled to recover. See notes 278-87 and accompanying text *infra*.



## 1. The Nature and Purpose of the Work

A major conceptual difficulty in analyzing liability for harm caused by the publication of fiction arises from the many forms that such a publication can take, including the thinly-disguised autobiographical novel,<sup>153</sup> the *roman à clef*,<sup>154</sup> the essentially factual portrayal of events with large doses of imaginative additions,<sup>155</sup> the satirical exaggeration of a person's attributes or character,<sup>156</sup> the work depicting fantastic happenings at an identifiable event,<sup>157</sup> and the reporting that creates a composite character to convey a sharper image.<sup>158</sup> All of these forms of writing

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<sup>153</sup> The novel that formed the basis of the litigation in *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650 (2d Cir. 1966), could fit into this category. The court noted the tendency of first novels to be autobiographical. *Id.* at 651 n.3. A recent book review, however, in discussing the common assumption that first novels are autobiographical, noted the difference between fiction and the reporting of facts:

It is common, and probably unfair, to assume that a young writer's first novel is thinly veiled autobiography. If the writer is any good and is really a novelist by calling, considerably more will have happened even in the first book than a hasty disguising of fact. The choice of fiction is a step away from self, into a created world and empathy with imagined others. It is fair to say, however, that for many new writers the first step cannot be a very big one. A good novelist matures in much the way the human psyche does ideally, growing out of adolescent myopia toward a farsighted capacity for empathy with people different from oneself.

Gottlieb, *Manic Jo and Romantic Sam*, N.Y. Times, Oct. 7, 1984, § 7 (Book Review), at 9.

<sup>154</sup> The literary critic Joseph Shipley locates the *roman à clef* genre "along the journalism swamp" in company with other "books that rise from the current news." J. SHIPLEY, *IN PRAISE OF ENGLISH: THE GROWTH & USE OF LANGUAGE* 235 (1977). The novel *Bright Lights, Big City*, see J. MCINERNEY, *BRIGHT LIGHTS, BIG CITY* (1984), is in the genre of the *roman à clef*. Although it depicts thinly disguised members of the *New Yorker* magazine staff, it is difficult to believe that anyone "There At The New Yorker" would be so gauche as to sue.

<sup>155</sup> See, e.g., N. MAILER, *THE EXECUTIONER'S SONG* (1979).

<sup>156</sup> The work of political cartoonists may be the best illustration of works falling into this category.

<sup>157</sup> The *Penthouse* story, "Miss Wyoming Saves the World . . .," that gave rise to the litigation in *Pring*, see notes 15-16 *supra*, exemplifies this writing form.

<sup>158</sup> The Pulitzer Prize winning story about a young drug addict by Janet Cooke of the *Washington Post* that was discovered to be largely fabricated, see *The Pulitzer Prize Hoax*, *NEWSWEEK*, Apr. 27, 1981, at 62, or Alastair Reid's embroidering of the facts in some of his *New Yorker* reportings, see Rosenblatt, *Journalism and the Larger Truth*, *TIME*, July 2, 1984, at 88, may fall into this category. Graham Greene's assessment of his fictional journalist, Conder, aptly describes the author who utilizes this form of writing: "No story left his hands with the truth unheightened. Condemned to the recording of trivialities, he saw the only hope of a posthumous immortality in a picturesque lie which might catch a historian's notice as it lay buried in an old file." G. GREENE, *IT'S A BATTLEFIELD* 85 (Penguin ed. 1934).

have been, or could be, the subject of claims for relief, and each could reasonably be described as fiction. A category of reference, however, that includes works such as Proust's *Remembrance of Things Past*, Norman Mailer's *The Executioner's Song*, and *Penthouse* magazine's article entitled "Miss Wyoming Saves the World . . ." begs either to be narrowed or to have at least its essential attributes identified and analyzed. Although a number of commentators on the issue of liability have attempted to define fiction,<sup>159</sup> their definitions tend to be overly broad or self-referential<sup>160</sup> and thus are not terribly useful in determining whether the liability question deserves some sort of special consideration when the nature of the published work is fiction.<sup>161</sup>

a. "Pure" Fiction

The category of publication that is entitled to special consideration, although not necessarily to greater protection, appears to be distinguished by the same quality that Coleridge used in the early nineteenth century to describe what he called "poetic faith."<sup>162</sup> Coleridge's "willing suspension of disbelief for the moment"<sup>163</sup> provides the family resemblance<sup>164</sup> for the various kinds of publications that, for the purpose of determining liability, can be considered a pure form of fiction. Each of these kinds of work engages the reader in a cooperative "what-if" venture with the author. Unless there is some assurance that the reader and the author are engaged in the same enterprise, the suspension of disbelief is apt to be replaced by a suspicion either that what is being said is true or that the author has some ulte-

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<sup>159</sup> Franklin and Trager, for example, adopt a broad definition that "include[s] any communication in which the author explicitly or implicitly indicates that some or all of the information should not be taken literally." Franklin & Trager, *supra* note 30, at 206; see also Wilson, *supra* note 42, at 30 & 44-46.

<sup>160</sup> For example, Franklin and Trager's definition, see note 159 *supra*, allows the author of the work to define for himself or herself the terms under which the reader is supposed to approach the work and thus the terms under which the legal system is supposed to evaluate the claim of someone who alleges harm as a result of the work.

<sup>161</sup> Some commentators bypass the definition issue and proceed directly to a discussion of the significant role that fiction plays. See, e.g., Note, *supra* note 42, at 572-74.

<sup>162</sup> S. COLERIDGE, *II Biographia Literaria* 6, in 7:II THE COLLECTED WORKS OF SAMUEL TAYLOR COLERIDGE 6 (1983).

<sup>163</sup> *Id.*

<sup>164</sup> See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 67 (3d ed Anscombe trans. 1967).

rior motive for making certain statements. In either case, the reader's suspicion destroys the attitude of trust that the reader is entering a universe created by the author and is expected by the author to respond by suspending disbelief. The fictional work that creates the impression of partial or disguised truth awakens in the reader an uncertainty about whether to make the initial leap into disbelief. The reader whose uncertainty is aroused by the nature of the work may have to determine on an incident-by-incident basis whether the terms of the fiction venture obtain. Consequently, the reader is unsure whether to understand incidents as part of an imaginary world invented by the author or as part of the real world that the author is describing rather than inventing. The atmosphere created by the author, which leads the reader to approach the work with a particular attitude, will ultimately determine whether the reader approaches the work with a disbelief that will be suspended.

Inquiring into the nature of the work along these lines suggests that within the broad category of fiction, distinctions might be drawn based on the degree to which the work invites the reader to suspend an initial disbelief generated by its overtly fictional nature. The more closely that scenes in the work are tied to, or incorporate wholesale, actual people or events, the less likely it is that the reader will approach the work as something that requires a suspension of disbelief. Instead, this type of fictional work, which employs what are apparently reportorial rather than imaginative techniques, is likely to carry with it an invitation to play the read-the-author's-mind game, requiring the reader to guess when it is appropriate to set aside the belief that initially would attach to the work as a result of its inclusion of actual events. When a work elicits a reader's disbelief in only the fictional portions of the publication, instead of Coleridge's suspension of disbelief, the publisher has a less compelling claim that the fictional nature of the work in itself offers any significant protection from the work causing harm. A work that makes use of actual people or events creates a substantial risk that, within the work itself, the line between fact and fiction, or between reporting and inventing, will be difficult to locate with precision.<sup>165</sup> In such a case, the fictional nature of the work

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<sup>165</sup> The risk of incorrectly identifying fact and fiction, or reality and imagination, is not necessarily reduced by disguising fictional characters or events that are, in fact,

should not serve as a reason to avoid imposing liability.

An illustration of the point may clarify the distinction I am suggesting. Suppose that I set out to write a novel about the automobile industry that, in part, depicts an automobile company executive acting in a reprehensible manner. I can choose between at least two versions of the novel. In version A, the descriptions of the characters and the companies do not bear any special resemblance to existing automobile executives or firms. Certain background events, however, such as an oil embargo or an economic recession, may be real rather than imagined. In version B, the character whose conduct is portrayed so negatively is described as the second-in-command to a character who is patterned after Chrysler Chairman Lee Iacocca. The traits of the fictional corporate chairman correspond very closely to the traits of Iacocca's public personality, and the story describes the actual circumstances of Iacocca's leadership of Chrysler Corporation. The reader who identifies the truth of the Iacocca characterization has no particular reason to suspend that belief when considering the reprehensible, second-in-command character. Having brought the reality of Chrysler and Iacocca into the novel, I have created a much higher risk of harm to actual persons than if I had written version A of the novel. Accordingly, if I choose to write version B, I should be less entitled to rely on the fictional nature of the work as a limitation on liability than if I had chosen to write version A.

*b. Purpose of the Work*

While a quasi-factual work of fiction may expose the publisher to a higher risk of liability than a work of "purer" fiction, the purpose of the work may weigh in the publisher's favor. In

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based on reality. The reader who understands the reference to the actual events or people may simply assume that a minimal disguise was adopted for purposes of avoiding a lawsuit. See notes 220-27 and accompanying text *infra*.

Franklin and Trager note that one of the features distinguishing fiction from nonfiction is that the author of fiction "conveys to his audience that the material is fiction, created from his mind, and is not to be taken literally." Franklin & Trager, *supra* note 30, at 222. The point being developed in the text is that in at least some types of fiction, the message that the author conveys is ambiguous enough that the distinction fails to provide a persuasive reason for treating the work differently from factual material that is not defamatory on its face but requires extrinsic facts to enable the reader to understand how the plaintiff was harmed.

particular, when a work of fiction is intended to convey social commentary about public issues, greater latitude should be given to the publisher.<sup>166</sup> A satirical treatment of public officials, for example, would fall within the class of works that deserves some additional protection from liability.<sup>167</sup>

Such protection, however, should not rise to the level of absolute privilege. The bounds of a limited or qualified protection may be breached by a publisher whose work goes unnecessarily beyond the public role or activities of the fictional character that resembles the plaintiff.<sup>168</sup> For example, a satirical essay depicting a President, who is a former actor, as being totally ignorant about nuclear weapons should, despite any exaggeration, be considered privileged commentary about public issues. In contrast, an essay that depicts the same President performing an unnatural act with a chicken would be less deserving of privilege because it is difficult to justify such a scene as a necessary part of the social commentary.<sup>169</sup>

The preceding example may illustrate how the purpose-of-the-work factor could have been taken into account when ana-

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<sup>166</sup> Works that can be characterized in this way arguably fall squarely within the rationale of *New York Times* constitutional protection of speech and the press. See note 63 *supra*. There is no reason why that rationale cannot be incorporated into the framework of analysis of the underlying tort liability issue, as long as one recognizes that a constitutional restriction acts as a constraint on a jurisdiction's discretion to disregard, or give insufficient weight to, that rationale.

<sup>167</sup> See generally Silver, *supra* note 78, for an extended analysis of the liability problems presented by Robert Coover's novel, *The Public Burning*, in which many American political figures are depicted with great specificity in ludicrous, "and probably libelous," situations. *Id.* at 1068.

<sup>168</sup> I am not advocating that the privilege extend only to fictional accounts of the public portions of a character's life or activities. The private life or activities of a public official may provide valuable clues to the character and ability of the official and play a useful role in rounding out the reader's picture of the public person. The key to the privilege should be the extent to which the fictional characterizations or events serve the function of the work as a commentary on public issues. That determination does not have to be made on a dichotomous privilege/no privilege basis, but instead could be made on a sliding scale basis that would indicate whether the work was entitled to more or less protection.

<sup>169</sup> Again, it may be helpful to point out that this factor is one of many that would be used in analyzing liability. The thrust of the public issue commentary factor is a consideration of whether the nature and purpose of the work entitles the publisher to some additional protection. A negative decision would eliminate or reduce the strength of a reason for *not* imposing liability but would not, by itself, indicate that liability *should* be imposed.

lyzing *Pring v. Penthouse International, Ltd.*<sup>170</sup> It is not implausible that an initial claim could have been made by the defendants that the short story involved in that case was a commentary on a significant public issue. The Miss America Pageant may be an important symbol of the concept some people have of the role of women in our society,<sup>171</sup> although I suspect that, as social commentary, an accurate and meticulous reporting of the actual event might have been just as effective as, if not more devastating than, the story actually published by *Penthouse*. Given the limited number of people who participate in the Miss America contest and the geographical identification of the contestants by state, a parody of the contest does create a risk that the fictional characters will correspond, to some degree, with actual participants. The simple fact is that there have been Misses Wyoming in the pageants. To obtain the verisimilitude of the story, however, and to sharpen its satirical edge, the author's decision to use real, rather than imaginary, states to describe the fictional contestants is justifiable. As long as the characters and events depicted in the story convey a commentary on the social issues raised by the pageant, the purpose of the work should offer some protection against liability in an action brought by any or all of the real Misses Wyoming.<sup>172</sup> The social commentary protection against liability, however, would be properly diminished when the events and characterizations depicted in the work go beyond social issues and pose a risk of harm that outweighs the social commentary benefits accruing from the work.<sup>173</sup>

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<sup>170</sup> See notes 15-16 *supra*.

<sup>171</sup> Indeed, one critic has said that the Miss America pageant is "[a]s much an affront to feminism as vivisection is to animal rights." Kellman, *Facework*, 239 *NATION* 622 (Dec. 8, 1984) (reviewing R. TOLMACH-LAKOFF & R. SCHERR, *FACE VALUE: THE POLITICS OF BEAUTY* (1984)). Further, he has found in the fact that "the pageant is now more popular than ever . . . a graphic reminder that ancient notions and uses of beauty die hard." *Id.*

<sup>172</sup> A useful distinction might be drawn between the object of the social commentary, which should not have to be disguised or blunted, and the participants in the events upon which the commentary is being made, who should be protected from an unnecessary risk of unreasonable harm.

<sup>173</sup> One commentator has criticized the United States Court of Appeals for the Tenth Circuit for its failure, in *Pring*,

to address the issue of identification, . . . provid[ing] no guidance as to the quantity or quality of parallels necessary to satisfy the "of and concerning" test. Consequently, the significant questions remain unresolved: Had *Penthouse* merely changed Charlene's title from Miss Wyoming to Miss New

## 2. Risk-Bearing Capacity of Defendant

Some risk of harm to others is associated with almost every activity that is performed in a society such as ours in which people are so dependent upon, and affected by, the conduct of others. Publishing, particularly the publishing of fiction, should have no special claim to immunity from an analysis of risk-bearing capacity.<sup>174</sup> Cries of censorship — self-imposed or external — are necessarily rendered less plausible if an analysis establishes that a defendant is both a better risk-bearer than the potential victim<sup>175</sup> and better able to spread the risk in a way that diminishes or even eliminates its impact.<sup>176</sup>

### a. Loss Spreading

One way in which a publishing enterprise can spread a risk of loss is to pass on the actual or the projected liability it faces as part of the cost of doing business.<sup>177</sup> An individual author

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Jersey, or made her a contestant in a year other than 1978, would Pring's case have been dismissed on a motion for summary judgment? The answer to such questions could have provided valuable assistance to authors and publishers anxious to avoid defamation litigation.

Note, *supra* note 45, at 114-15 n.114.

This commentator's questions are better analyzed not simply in terms of identification but rather in terms of whether the risk of harm to the 1978 Miss Wyoming was offset by the benefit of this particular method of commenting on the Miss America pageant. Furthermore, because the superficial fictionalization of the content of a work merely to avoid defamation liability is relevant to the question of publisher liability under my proposed tort theory, *see* notes 220-27 and accompanying text *infra*, an appropriate response would also be to examine the significance of, or reasons for, the changes hypothesized by the commentator.

<sup>174</sup> This statement should not be read as an assertion that publishing, or more specifically the publishing of fiction, is not a valuable activity that is entitled to substantial protection. The inquiry, instead, encompasses what protection is needed, how much protection should be afforded, and at what price the protection comes.

<sup>175</sup> This question is separate from that of which party is best able to reduce or eliminate the risk. *See* notes 183-91 and accompanying text *infra*.

<sup>176</sup> The question is whether the consequences of the harm that occurs from the publication of fiction are rendered less severe when they are shifted from the victim to one of the parties in the publishing enterprise. With regard to an action for monetary damages for nonpecuniary harm, the question is further complicated by the recognition that an award of money is, at best, an imperfect substitute for the restoration of such items of loss as a victim's prepublication mental state, which was free from the anguish or distress inflicted by the work of fiction.

<sup>177</sup> The rationale is that the price paid by the readers or viewers of a fictional work would reflect some incremental increase corresponding to the harmful potential of the work. In this way, the costs of the harm inflicted by the publishing activity, which might

may not realistically be expected to engage in such passing on of liability costs,<sup>178</sup> but as long as the work of fiction is published as a commercial venture,<sup>179</sup> there is no reason why the publishing firm should be treated in a way that encourages it to externalize the costs of the harms that are caused by its activities.<sup>180</sup>

Although the ability to pass on the costs of liability attached to works of fiction may point to the commercial publishing firm as the most appropriate party upon which to impose liability, other factors are relevant. Loss spreading through insurance against the costs of liability may be a more efficient way of handling and spreading the risk of loss.<sup>181</sup> Organizations such

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otherwise have been borne by the person upon whom a fictional character is patterned, would ultimately be borne by the viewers and readers, who have obtained the benefit of the activity in the form of information and entertainment.

<sup>178</sup> The individual author would not ordinarily have the ability to spread the risk of loss in this manner. The author who sells publication rights to a work is not likely to be in a sufficiently strong bargaining position *vis-à-vis* the publishing firm to have his or her publishing contract include payment to the author of a sum that reflects the author's potential liability for the harm the work might cause. While not determinative of the liability question, the author's inability to pass on these costs suggests that the search for a loss spreader should be expanded beyond the class of authors.

<sup>179</sup> "Commercial" is not to be confused with "for profit." If the audience is paying for the fictional work, then the price paid by the audience should reflect the cost of the harm the work causes. The fact that a work is published by a nonprofit firm, therefore, would not undercut the argument that the publishing firm may be the best loss spreader.

<sup>180</sup> The premise underlying the externalization argument is that when the costs of the harm inflicted by the publishing activity are borne by those who suffer the harm, the liability rules of the tort system are needed to correct the market distortion involved in the externalization by imposing liability on the publisher, the cost of which could then be passed on to its consumers. See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 144-50 (1970). This premise is subject to challenge on the ground that, in a given case, the harm may be attributable not to the publishing activity but rather to the activity engaged in by the victim. Dean Calabresi frames this idea in terms of the "what-is-a-cost-of-what" issue. *Id.* at 133. When a plaintiff alleges that a fictional characterization of the plaintiff's *public* activities has caused the plaintiff to suffer harm, that harm can be considered the plaintiff's cost of engaging in the activity. This reasoning may provide an economic rationale for the decreased potential for recovery afforded to public official and public figure defamation plaintiffs. See note 5 *supra*.

<sup>181</sup> The purpose of insurance is to distribute losses associated with an activity among a pool of individuals or entities engaging in the activity. Insurance thus allows individual members of the pool to pay a smaller but definite amount, in the form of insurance premiums, in exchange for avoiding the risk of exposure to responsibility for paying larger, indefinite amounts in the form of damage awards. Insuring against losses does not, of course, have any causal relationship to fostering the risky activity, at least as long as the moral hazard problem is avoided. See A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 54-55 (1983) (moral hazard problem occurs when insurance coverage has effect of increasing likelihood of loss or of making amount of loss greater because insured, relying on coverage, takes fewer precautions against loss). To the contrary, insuring



as the Association of American Publishers, the National Writers Union, or The Authors League of America might explore the possibility of underwriting such insurance or of establishing mutual insurance companies for authors.<sup>182</sup>

*b. Loss Prevention*

Another important aspect of risk-bearing capacity that is relevant to the determination of liability is the ability to prevent the loss. When the author's use of the plaintiff as a model for a fictional character is a fact that the publishing firm neither knows nor has reason to know, the loss prevention capacity rests entirely with the author.<sup>183</sup> There may be instances, however, in which loss prevention requires resources or expertise possessed only by the publishing firm. For instance, the ability to check for inadvertent similarities to actual people<sup>184</sup> and to determine the designation under which a work appears<sup>185</sup> are both matters over which the publishing firm is best able to exercise some loss prevention control.<sup>186</sup> The failure to take readily available loss prevention measures is properly an extremely significant factor in determining the liability of an author and a publishing firm.<sup>187</sup>

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against losses may bring into the picture a third party, an insurer, that has a financial interest in reducing the risks created by the activity.

<sup>182</sup> Such insurance can be distinguished from insurance that either protects only the publishing firm or is part of a publishing contract package requiring the author to indemnify the publishing firm.

<sup>183</sup> In *Springer v. Viking Press*, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982), for example, the loss prevention capacity might have rested entirely with the author if the publishing firm was unaware of the connection between the prostitute character named Lisa in the novel and the plaintiff, Lisa Springer, whose relationship with the author had ended on bad terms. See note 39 *supra*. The loss prevention argument against liability in this instance applies only to the publishing firm, not the author.

<sup>184</sup> For example, in *Allen v. Gordon*, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't 1982), a character in the defendant's novel was a Manhattan psychiatrist named Dr. Allen. A check of the Manhattan telephone directory might have revealed that there was only one psychiatrist in Manhattan with the same name as the fictional psychiatrist.

<sup>185</sup> The publishing firm should ordinarily be expected to have the last opportunity to reduce the risk of harm that might be caused by the fictional publication by controlling references to the nature of a work, the extent and content of any advertising, and the presence of disclaimers.

<sup>186</sup> When the author is aware of the correspondence between the plaintiff and the fictional character, the question that might arise is whether the publishing firm should also have been aware of that connection. See, e.g., *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920); note 212 *infra* (discussing *Corrigan*).

<sup>187</sup> Conversely, when the elimination of a risk of harm involves substantial effort, the failure to undertake those efforts ought not to be viewed as a factor pointing toward

Admittedly, there is a risk that forcing the publisher to bear the costs of harm caused by fiction will drive publishing firms from the field of publishing fiction.<sup>188</sup> If the result of imposing liability on the publisher were only to eliminate the publication of works whose harm far outweighed any possible benefit, some might view the imposition of liability on the publisher as an indirect way of achieving a desirable social goal.<sup>189</sup> However, the tasks of predicting and assessing liability<sup>190</sup> are not likely to be accomplished with such precision as to guarantee that the publication of only the utterly valueless work is deterred.<sup>191</sup>

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liability. Compare *Clare v. Farrell*, 70 F. Supp. 276 (D. Minn. 1947) (character in novel had same name as plaintiff, but there was essentially no reason for author or publishing firm to be aware of similarity) with *Salomone v. Macmillan Publishing Co.*, 77 A.D.2d 501, 502, 429 N.Y.S.2d 441, 443 (1st Dep't 1980) (Kupferman, J., concurring) (publishing firm probably could have discovered, without undue effort, existence of plaintiff who corresponded to fictional character appearing in parody of earlier work) and note 40 *supra* (discussing *Salomone*).

<sup>188</sup> In theory, this result should occur only with those firms that have a disproportionate share of liability. As the costs of the harm caused by those firms' publications are incorporated into the price of their publications, the firms that have lower costs of harm may develop a competitive advantage. The severity of the impact on the industry as a whole might be affected by such matters as the ease with which the public would substitute other publications for fiction (product substitution) and the likelihood that public demand for fiction would be influenced by changes in prices (price elasticity of demand). Assuming that consumers do not treat publications as interchangeable commodities, and that the demand for fiction is inelastic relative to price, the marginal price increase attributable to the costs of liability for harm caused by fiction would have a relatively slight impact on the industry. The impact would be greater if one or both of those assumptions were reversed.

<sup>189</sup> One might view some of the litigation against the *National Enquirer* as designed, in part, to raise the financial stakes of publication beyond the point at which the enterprise is profitable. The danger of this kind of strategy, however, lies in the substantial litigation expenses that can be incurred even in a successful defense of a meritorious publication. See Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 USFL Rev. 1, 13-22 (1983). The prospect of inflicting litigation costs on the defendant can, of course, become a tactical weapon in the hands of plaintiffs who may object to a particular publication on purely ideological grounds.

<sup>190</sup> The distinction between predicting and assessing liability reflects the fact that different actors may have to evaluate the plaintiff's claim at various stages in the proceedings. The decision of the parties to litigate, settle, or drop claims will depend on a prediction of how the various factors that affect liability will be resolved if the claims are litigated. The assessment of liability is the province of the legal and factual decision makers who are called into play if the claims are litigated.

<sup>191</sup> If the prediction of the defendants errs on the side of caution, publications may be deterred or withdrawn even though potential litigation might have terminated in favor of the defendants. When the assessment of liability is perceived as random or largely uncontrollable, the task of prediction becomes even more difficult. Furthermore, should the factfinders' assessments of liability be influenced by factors that are not sup-

The risk that tort liability will deter the publication of fiction that should be published leads some commentators to advocate a blanket prohibition against liability.<sup>192</sup> The self-censorship fears engendered by the advocacy of unlimited liability provide a fairly strong measure of support for an absolutist interpretation of the first amendment.<sup>193</sup> However, an alternative solution — and, I believe, a more responsible one — is to shape the remedies that are available once liability has been determined, with the expectation that remedies defined more carefully and more narrowly will reduce the risk of unduly adverse consequences of liability.

One line of attack is to demonetize the essentially unquantifiable elements of damage.<sup>194</sup> In the case of defamation, I have proposed elsewhere that a recovery of presumed damages to reputation be replaced with a remedy of repair.<sup>195</sup> Under this proposal, a publisher that devotes to the correction of the plaintiff's image an amount of resources equivalent to the resources used to defame the plaintiff would be entitled to a presumption that unproven harm to reputation has been eliminated by the publisher's efforts. Professor Franklin has proposed a more drastic alternative in the form of an election by a plaintiff to pursue an action for restoration of reputation in place of an action for damages caused by defamation.<sup>196</sup> Both Professor Franklin's proposal for an action for restoration of reputation and my proposal for a remedy of repair attempt to relieve the negative pressure that the prospect of substantial monetary awards for unproven harm can impose on decisions to publish.

In terms of actual harm that is caused by fiction, the loss to

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posed to intrude into the decision-making process, the reliability of the litigation process as a way of identifying publications with no social value becomes questionable. See note 203 *infra*.

<sup>192</sup> See, e.g., Note, *supra* note 42. But see Franklin & Trager, *supra* note 30, at 218-21 (arguing against absolute protection for fiction).

<sup>193</sup> The argument is essentially as follows: As go *Hustler* and *Penthouse*, so go *The Atlantic Monthly* and *The New Yorker*. The argument depends on a purposeful refusal to look for meaningful and legitimate distinctions.

<sup>194</sup> The most obvious candidate for inclusion in this category is mental distress. Harm to reputation that is not reflected in monetary losses to the plaintiff provides another illustration.

<sup>195</sup> See LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779, 788 (1984).

<sup>196</sup> For a complete discussion of Professor Franklin's alternative approach, see Franklin, *supra* note 189, at 29-49.

the plaintiff may far outweigh the capacity of a defendant to pay damages, particularly when the defendant is either a marginally successful publisher or an individual author. For these defendants, a method to achieve a satisfactory compromise between the victim's right to compensation and the economic viability of the defendant would be to tie the size of the award to factors such as the size of the audience that the work has reached, the permanence of the form of publication, the financial resources of the publishers who have been found liable, and the commercial success of the particular work that injured the plaintiff.<sup>197</sup>

### 3. The Artistic Merit of the Work of Fiction

Inquiries into artistic merit are admittedly fraught with peril, and a liability theory that makes any pretense of trying to achieve some measure of administrative convenience introduces the evaluation of artistic performance as a factor in determining liability only at a substantial risk. Nevertheless, there is a distinction between an artistic endeavor and the recording of words on paper.<sup>198</sup> A work that is totally devoid of imaginative effort may not be totally without value, but it should warrant less consideration for a special protection from liability for the harm

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<sup>197</sup> These factors should be considered for the purpose of determining the amount of damages that a defendant who has been found liable should be required to pay. The damages would still be compensatory in nature, but the size of the award would explicitly take into account factors, such as the defendant's wealth, that are normally taken into account in determining punitive damages. See generally M. MINZER, J. NATES, C. KIMBALL & D. AXELROD, 5 DAMAGES IN TORT ACTIONS § 40.73 (1984). A wide range of discretion is tolerated in the calculation of monetary awards intended to compensate for nonpecuniary harms. Invoking the factors suggested in the text would serve as a means of keeping damages awards at the lower end of the range and thus of relieving some of the monetary pressure that could act as a deterrent to the publication of fiction.

<sup>198</sup> See Ransom, *Poetry: A Note in Ontology*, in R. STALLMAN, CRITIQUES AND ESSAYS IN CRITICISM 30 (1949). Ransom describes the artistic endeavor in the following terms:

Art always sets out to create an "aesthetic distance" between the object and the subject, and art takes pains to announce that it is not history. The situation treated is not quite an actual situation . . . but a fictive or hypothetical one . . . . Kant asserted that the aesthetic judgment is not concerned with the existence or non-existence of the object, and may be interpreted as asserting that it is so far from depending on the object's existence that it really depends on the object's non-existence.

*Id.* at 40-41. One of the more sophisticated efforts to bring literary theory to bear on the question of liability for defamation arising from realistic fiction is found in Note, "Clear and Convincing" *Libel: Fiction and the Law of Defamation*, 92 YALE L.J. 520, 534-37 (1983).

that it causes.<sup>199</sup>

Introducing the artistic merit of a work of fiction as a relevant consideration in deciding whether the publisher should be liable may appear to be an incongruous step for one who is unwilling to recognize greater constitutional protection for fiction than is currently being afforded. I offer two observations by way of explanation. First, artistic merit is offered as a factor to consider rather than as a liability-defeating trump. The legal decision maker needs to be aware of both the potential impact of the work<sup>200</sup> and the implications of a decision to impose liability on the author or the publishing firm.<sup>201</sup> Inserting into the liability theory a consideration of artistic merit creates an opportunity for the defense to present arguments concerning the value of the particular work and the possible destructive effects of a finding that the author or the publishing firm is liable.<sup>202</sup>

The second reason for introducing the concept is that a finding of artistic merit suggests that there is some intrinsic value in the work itself and, by implication, in the conduct of the publishers. The harm being inflicted on the plaintiff may thus be a cost that is associated with some benefit that flows from the particular publication. Constitutional protection, on the other hand, may be given to an act that lacks any worth whatsoever, in order to create an environment in which valued acts can take place.<sup>203</sup> The Constitution may be the refuge of the scoundrel whose asocial or antisocial behavior is protected not

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<sup>199</sup> I am not suggesting that works lacking or deficient in artistic merit (however one might define that concept in a particular setting) are entitled to no protection or are special targets of liability for the harm that they cause. Rather, when special protection is sought because of the nature or purpose of the fictional work, *see* notes 153-73 and accompanying text *supra*, the lack of artistic merit may operate as a reason for resisting such added protection.

<sup>200</sup> Thus, it would be appropriate to consider the "higher truths" being served by fiction. *See* Silver, *supra* note 78.

<sup>201</sup> The legal decision maker should consider the adverse consequences that might follow from the alternative decisions regarding the imposition of liability. Judgments against publishers could create an undesirable deterrent effect on future publication decisions. Judgments against injured plaintiffs, however, may be interpreted as encouraging irresponsible behavior on the part of authors or publishing firms.

<sup>202</sup> Those arguments seem to be irrelevant to the issues that would otherwise comprise either the *prima facie* case or the defenses to a traditional defamation action based on a work of fiction.

<sup>203</sup> *See generally* Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. Rev. 685 (1978).

for its own sake but for the sake of other, beneficial, conduct. Artistic merit is a quality that we may recognize and protect for its own sake. This distinction seems to be relevant when deciding not whether to permit or forbid the conduct but rather whether a particular defendant is someone on whom liability for damages ought to be imposed.

#### 4. Whether Plaintiff is a Target

The factor that points more clearly than any other toward liability is an intent on the part of the defendant to cause harm to the plaintiff. When the author's purpose in publishing the work of fiction is to subject the plaintiff to ridicule or embarrassment, the legal system's response probably ought to begin not with an inquiry into whether the defendant should be held liable, but rather with an inquiry into whether some reason exists for *not* holding the defendant liable.<sup>204</sup> As with other tort actions based on an intent to inflict a particular harm, the defendant's publication of a work of fiction may be privileged<sup>205</sup> or the plaintiff's harm may not be something that we want to compensate.<sup>206</sup> Proof of an intent to injure the plaintiff, however, should satisfy the need to offer a liability principle and, in a practical sense, should oblige the defendant to come forward with a reason for not being held liable.

One consequence of the significance attached to this factor may be a need to distinguish between the liability of the author

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<sup>204</sup> Such an inquiry would have been an appropriate starting point in *Springer v. Viking Press*, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982), for example, and in *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 68, 126 N.E. 260, 270 (1920). Professor Wilson takes a weaker approach to this factor when she includes as one element of her three-pronged test for liability in fiction the question whether the characterization was intended to defame the plaintiff. See Wilson, *supra* note 42, at 43, 46-48. I would, of course, not limit the inquiry to an intent to defame, due to the unduly narrow focus on the reputational injury such an inquiry may produce. See notes 23-40 and accompanying text *supra*.

<sup>205</sup> The author of the novel at issue in *Corrigan*, see note 212 *infra*, for instance, might have asserted a privilege to comment on the official conduct of public officials.

<sup>206</sup> The plaintiff may not have suffered harm, either relational or personal, that meets the threshold level below which recovery ought not to be available. See notes 148-49 and accompanying text *supra*. The facts of *Springer*, 90 A.D.2d 315, 457 N.Y.S.2d 246, see notes 38-39 *supra*, for instance, raise some questions about how severely the plaintiff was actually harmed. Because the case was decided on motions for summary judgment, it is not possible to know whether the plaintiff could have established that she had met the threshold requirement.

and the liability of the publishing firm that puts the work before the public. The sort of desire to injure the plaintiff that can be labeled as "malice"<sup>207</sup> is likely to be found only at the level of the individual author, rather than at higher levels in the publication chain.<sup>208</sup> Therefore, if malice were a relevant consideration — as in whether to award punitive damages<sup>209</sup> — the inquiry might well reveal that this factor supplies a liability principle applicable only to the author.<sup>210</sup>

Intent can be established in tort law without having to go so far as to prove that the defendant wished to harm the plaintiff. When the defendant acts with knowledge that the consequences are substantially certain to harm the plaintiff, that state of mind is deemed to constitute intent.<sup>211</sup> Intent of this sort could be attributed to defendants other than the author of the work. When the author's references to an actual person are only thinly disguised by the fictional characterization and the publishing firm is on notice as to both the subject of the reference<sup>212</sup> and the

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<sup>207</sup> "Malice" as used in the text does not refer to "actual malice" as the Supreme Court used it in *New York Times*. See note 5 *supra*. Rather, it refers to common-law malice or ill will. See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974) (distinguishing "common-law malice" from *New York Times* actual malice).

<sup>208</sup> The authors of the allegedly defamatory works at issue in both *Corrigan*, see note 212 *infra*, and *Springer*, see notes 38-39 *supra*, had poor relationships with the respective plaintiffs. These relationships, at least in part, motivated the authors to create characters that were based on the respective plaintiffs, who were falsely depicted in a derogatory fashion. While there may have been negligence on the part of personnel employed by the publishing firms in those cases, attributing the authors' ill will to the publishing firm is unwarranted.

<sup>209</sup> See notes 218-21 and accompanying text *infra*; see also *Corrigan v. Bobbs-Merrill Co.*, 229 N.Y. 58, 65-66, 126 N.E. 260, 262-63 (1920) ("From an intent to injure . . . follows the rule that exemplary damages . . . may also be awarded."); note 212 *infra*.

<sup>210</sup> When the publishing firm and the author are indistinguishable, as may be the case in the *Falwell-Flynt* litigation, see note 96 *supra*, the desire to harm the plaintiff might be established as to both defendants.

<sup>211</sup> See RESTATEMENT (SECOND) OF TORTS § 8A (1963 & 1964).

<sup>212</sup> See *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920). The plaintiff in *Corrigan*, a New York City magistrate named Corrigan, frequently sat in Jefferson Market Court. *Id.* at 62, 126 N.E. at 263. One chapter in the novel at issue — which was listed in the table of contents as "Justice - a la Corrigan" but was referred to in the text as "Justice - a la Cornigan" — recounted the judicial activity of a fictional city magistrate named "Cornigan" who frequently sat in Jefferson Market Court. *Id.* at 62-63, 126 N.E. at 263-64. The plaintiff brought an action for libel against the publisher and the author of the novel. During the trial, witnesses described a connection between one of the publisher's managers and the novelist. The New York Court of Appeals addressed the possibility that the manager had learned of the nature of the book and the author's animus toward the plaintiff and held that the knowledge of the publishing firm's man-

harm that publication is substantially certain to cause, no reason exists for distinguishing between the author and the publishing firm in determining whether the plaintiff was a target of the work.<sup>213</sup> The publishing firm is protected to some extent by the subjectivity of the requirement that the firm know that harm was certain to follow publication, but this protection is limited in two respects. First, the defendant's state of mind — what the defendant actually knew would be substantially certain to follow — is a matter of fact, and while the defendant's testimony about lack of knowledge is relevant, such testimony is subject to disbelief and thus is not conclusive.<sup>214</sup> Second, a number of jurisdictions have adopted the view that individuals are presumed to know the natural consequences of their actions; thus, a subjective knowledge that injury will occur might be presumed in spite of a defendant's testimony to the contrary.<sup>215</sup>

If punitive damages are ever appropriate in an action based on the publication of fiction, the fact that the plaintiff is the target of the work is the best evidence of the state of mind that supports such a remedy.<sup>216</sup> My strong inclination, however, is to use this factor only as a critical element in deciding whether to hold the defendant liable. The remedial function of the tort action should be kept as a purely compensatory matter, even when the plaintiff is a specific target of the work of fiction and the object was to harm the plaintiff. The adverse consequences of an

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ager would be imputed to the firm only if the manager acquired that knowledge while acting in an official capacity for the firm. *Id.* The court also held, however, that a jury could conclude that the publishing firm's chief manuscript reader should have been on notice, because of the "vituperative" tone and style used to describe a magistrate sitting in a real court, that the author was acting beyond whatever leeway was granted by an "author's license." *Id.*

<sup>213</sup> If the plaintiff's status as a target of the author is established, but it is determined that the publishing firm had exercised reasonable care, then the effect of the target factor ought to be limited to the author. In *Springer*, see notes 38-39 *supra*, evidence of precisely what action the publishing firm had taken to determine whether the novel contained references to persons the author intended to harm would have been relevant to the determination of both the plaintiff-as-target factor and the loss-prevention factor discussed in notes 183-87 and accompanying text *supra*. With no further reason to suspect that a character actually refers to a person who could be harmed by the publication, the firm's receipt of a negative answer from the author to inquiries along these lines should be a significant factor operating in favor of the publishing firm.

<sup>214</sup> See PROSSER AND KEETON, *supra* note 28, § 8, at 35-37.

<sup>215</sup> See, e.g., *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388 (1979).

<sup>216</sup> See *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 66-67, 126 N.E. 260, 263 (1920).



erroneous imposition of punitive damages,<sup>217</sup> combined with a court's ability to match compensatory damages to the magnitude of a plaintiff's harm,<sup>218</sup> reduces the justification for punitive damages.<sup>219</sup>

##### 5. Fiction as an Evasion of Defamation Liability

Having made the argument for wresting the fictional publication tort action out of the grasp of defamation theory<sup>220</sup> and having identified the considerations that should be relevant in such a tort action,<sup>221</sup> my reluctance to reintroduce defamation law into this analysis may be understandable. However, this last factor — whether fiction is being used to evade defamation liability — does address a legitimate concern about how legal rules affect behavior. If a publisher of fiction would almost certainly be subject to liability for defamation for statements made explicitly about the plaintiff, the legal system ought to consider carefully what effect such exposure to liability might have on the publisher's behavior. A consideration of different kinds of behavior in reaction to the threat of liability for defamation will demonstrate the significance of this factor and illustrate how it should operate in the fictional publication context.

A publisher facing the prospect of liability for defamation may respond in two ways. First, the publisher could modify the work to reduce the likelihood of its being defamatory and causing harm.<sup>222</sup> Second, the publisher could alter the work so that, whatever harm it may cause, the publisher will be able to claim some common-law or constitutional privilege to defame.<sup>223</sup> The

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<sup>217</sup> If the fact finder or legal decision maker errs in deciding that the plaintiff was a target of the defendant, the imposition of punitive damages would distort the attempt to make the price of the publication reflect its true cost, which includes the risk of harm the publication poses to others.

<sup>218</sup> The ability to achieve this match might be reduced somewhat if the size of the compensatory damages award was tailored to take into account the financial impact on the defendant of the obligation to pay. See note 197 and accompanying text *supra*.

<sup>219</sup> If the ability of the tort action to accomplish its remedial function remains hampered by a restrictive approach to the legally cognizable harms caused by works of fiction, the reluctance to impose punitive damages could well be overcome.

<sup>220</sup> See notes 19-72 and accompanying text *supra*.

<sup>221</sup> See notes 82-219 and accompanying text *supra*.

<sup>222</sup> This sort of modification was implied by the questions raised by one commentator regarding the description of the Miss America contestant in the story at issue in *Pring*. See note 173 *supra*.

<sup>223</sup> The minor name changes in cases such as *Middlebrooks v. Curtis Publishing Co.*,

value judgment with which I approach the analysis of this factor is that the first course of conduct is to be preferred to the second, and evidence that a publisher has failed to take that course should weigh in the plaintiff's favor in establishing the liability of the publisher. Furthermore, if fiction were considered *per se* privileged, and the publisher thus absolutely protected from liability for defamation, the legal rule would most likely create no more than an incentive for the publisher to make changes that are merely superficial or cosmetic, that is, changes that are designed to invoke the privilege rather than to reduce the risk of harm.<sup>224</sup>

Posing the question of how the legal evaluation of a work of fiction would differ if the statements had been made about the plaintiff brings attention to bear explicitly on the degree of care that has been exercised by the publisher to protect those who might be injured by the work. This concern may well be addressed adequately by the other factors outlined in this section of the Article.<sup>225</sup> Furthermore, focusing too narrowly on this issue may involve the courts in too intrusive an investigation into the motives of authors and publishing firms.<sup>226</sup> Nevertheless, to

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413 F.2d 141 (4th Cir. 1969) (plaintiff named Larry Esco Middlebrooks; character in story published by defendant named "Esco Brooks") and *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920) (plaintiff named Judge Corrigan; character in novel was judge named "Corigan" or "Cornigan"), *see* note 212 *supra*, are examples of this sort of alteration. The fictional work may be entitled to a privilege on some basis other than its status as fiction. *See, e.g.*, note 205 and accompanying text *supra*.

<sup>224</sup> Attaching the label "fiction" to the story at issue in *Pring* or including such obviously fantastic events as levitation by fellatio, *see* notes 15-16 *supra*, may be tactics designed to do no more than bring the work within the protection of a fiction privilege. Employing such devices, however, will not necessarily reduce the risk of harm to the plaintiff's reputation. If the tort action for harm caused by the publication of fiction is expanded to include personal harm and relational but nonreputational harm, *see* notes 117-31 and accompanying text *supra*, the fact that there have been trivial alterations in the identity of the fictional character designed to avoid a defamation claim but not at all to avoid these other harms would not work in the defendant's favor in an assessment of liability for the nonreputational harms caused by the publication. *Springer*, *see* notes 38-39 *supra*, might have illustrated this point had the facts been developed in the course of a trial.

<sup>225</sup> *See* notes 174-91 & 204-19 and accompanying text *supra*.

<sup>226</sup> The concern is that future litigation strategy rather than the prevention of harm would become the predominant legal issue that affects the publisher in deciding whether and in what form to publish a particular work of fiction. If the attempt to avoid liability for defamation were made an explicit factor in the determination of liability, the conduct of the publishers might become too focused on locating and being on the nonliability side of some defamation liability boundary. The focus ought to be instead on reducing the

the extent that evidence concerning this factor is discernible from the record of the defendant's conduct that is otherwise developed, the fact that a publisher has superficially altered a potentially defamatory work merely to avoid liability, rather than having exercised a reasonable amount of care to reduce the risk of harm presented by the work,<sup>227</sup> should be a matter of at least some relevance to the question of liability.

### III. THE USES OF EXISTING TORT THEORIES

Having set out what I consider to be the framework within which the liability for harm caused by fiction ought to be analyzed, I feel an obligation, nonetheless, to conduct a brief review of how some existing tort theories might be adapted to fit the case of fictional publication, however horrifying such an exercise may be to first amendment theorists.<sup>228</sup> These theories fall into three main groups: the infliction of emotional distress, the invasion of privacy, and a form of products liability theory based on misrepresentation. Within each group, the applicability of the most likely claims for relief will be analyzed, and the factors that might keep each from being the ideal way of assessing liability will be identified.

Judicial decisions in different jurisdictions reflect varying treatment of theories other than defamation. Rather than trying to trace the various local quirks in the development and applica-

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risk that the publication will cause harm.

<sup>227</sup> The proponents of change in legal rules have a responsibility to consider how the changes may produce counterintuitive effects on the behavior of the parties subject to those rules. An example of such an effect can be found in the reaction to the corollary of the *New York Times* actual malice rule that was recognized in *Herbert v. Lando*, 441 U.S. 153 (1979), to the effect that the editorial process is subject to the discovery process in order to learn whether the defendants acted in a way that could be characterized as actual malice. *Id.* at 165, 170-77. One "newswatcher" recently described the phenomenon of "the press [being] tempted to operate like a fly-by-night bookie, keeping no records that might later embarrass it." Griffith, *Truths Heard and Unheard*, *TIME*, Dec. 10, 1984, at 86. To avoid the risk that publishers might refuse to look carefully at the possibility that a publication could cause harm, out of some misguided belief that their legal position would be strengthened if they appear never to have considered the possibility of liability, it may be preferable to apply this factor to evidence that is developed generally to address the loss prevention and risk reduction capabilities of the defendants. See notes 174-97 and accompanying text *supra*.

<sup>228</sup> See Van Alstyne, *First Amendment Limitations on Recovery From the Press — An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793, 809-14 (1984).

tion of these tort theories, the following discussion relies almost exclusively on the form of each of the actions as set out in the *Restatement (Second) of Torts*, recognizing that the *Restatement* version of the theory may be substantially modified in any given jurisdiction. My objective is to explore both the limitations and the potential of existing tort law categories for treating liability for fictional publication, not to provide an exhaustive survey of what courts are actually doing with any given theory.

#### A. *The Infliction of Emotional Distress*

Under some circumstances, the tort actions for infliction of emotional distress could stand alone as vehicles for the recovery of damages for harm caused by the publication of fiction. The similarity to the reputational interests protected by defamation theories of liability is a matter of some historical significance, but the paramount role of reputation in a face-to-face society may have been replaced by a recognition of the increased importance of personal stability and emotional tranquility in a more impersonal world. Not so many years ago, a person's chances of self-fulfillment probably depended most heavily on how the person was perceived by others. In today's society, however, a sense of emotional equilibrium and well-being may have become just as vital to the achievement of personal goals.<sup>229</sup> It is this equilibrium that can be upset by a fictional portrayal of a person's character or experiences, and the emotional distress tort actions can play an important role in redressing such harms.<sup>230</sup>

##### 1. Intentional Infliction of Emotional Distress

The use of fiction to cause mental suffering to another may be either a direct or a tangential motive of an author. When such suffering occurs, the victim should be able to establish a prima facie case under section 46 of the *Restatement (Second)*

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<sup>229</sup> See generally C. LASCH, *THE MINIMAL SELF: PSYCHIC SURVIVAL IN TROUBLED TIMES* (1984); C. LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1979).

<sup>230</sup> The emotional distress claim is distinct from the defamation claim and may provide a basis for recovery even when there has been a determination that the defendant is not liable for defamation. The jury reached this conclusion in the Falwell-Flynt litigation. See Battiatia, *Federal Jury Says Flynt Did Not Libel Falwell*, Wash. Post, Dec. 11, 1984, at A7; see also note 96 *supra*.

of Torts.<sup>231</sup> However, because of the concern that illegitimate claims might not be readily detected and screened out of the litigation process, the adjudication of a claim for the intentional infliction of emotional distress has turned into a struggle over adjectives.

To recover under this tort theory, a plaintiff must establish that the defendant's conduct is "extreme and outrageous" and that the emotional distress suffered by the plaintiff rises to the level of "severe."<sup>232</sup> Although the *Restatement* comments and illustrations attempt to pour some content into the key modifiers,<sup>233</sup> the range of conduct and reaction covered by these adjectives can be contracted or expanded by courts in response to a variety of underlying factors and issues that may never actually surface in the opinions.

A pair of hypothetical determinations that could have been reached in two actual cases should illustrate the manner in which such imprecise statements of the elements of the tort action can mask the accomplishment of various hidden agendas. In *Springer v. Viking Press*,<sup>234</sup> the author's use of the plaintiff's first name for the character of a prostitute was conduct that, in the circumstances of the relationship between the plaintiff and the author,<sup>235</sup> the author must have known would be distressing to the plaintiff. A decision that the plaintiff's reaction did not reach the threshold required for the tort action — for example, that the plaintiff's distress was "serious" but not "severe" — would be a way of protecting the literary endeavors of this and other authors from unwarranted attacks. Such protection may well be justified, but it should be given openly and with an acknowledgment that the protection is being afforded in spite of the legitimacy of the plaintiff's claim that she has suffered harm.

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<sup>231</sup> Section 46 provides:

Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 (1965).

<sup>232</sup> *Id.*

<sup>233</sup> See *id.* comments g-i (characterization of conduct as extreme and outrageous); *id.* comment j (severity of emotional distress).

<sup>234</sup> 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982).

<sup>235</sup> See notes 38-39 *supra*.

The second example involves a possibility that ought to be more troubling to publishers than to the class of potential victims because the biases are reversed. In *Pring v. Penthouse International, Ltd.*,<sup>236</sup> a determination that the conduct of the author and the magazine publisher was "extreme and outrageous" might be directed more at the general tone of the publication as a whole than at the specific piece of fiction at issue in the case. "Getting *Penthouse*," therefore, may be the underlying motivation for determinations that the elements of the intentional infliction of emotional distress have been met.

There is, perhaps, a barely perceptible understanding that the pro-author bias of the first example is likely to be revealed in the decisions of judges, while the anti-publisher bias of the second example emerges in the conclusions reached by juries. Although these assumptions may be grounded in reality at particular times and places,<sup>237</sup> to rely on the hope that the dominant decision maker on a particular issue will reflect one's own biases is a risky and unprincipled way in which to approach the use of a legal theory. A much more preferable course of action would be to restrict theories such as intentional infliction of emotional distress and the other theories described in this section to the uses for which they were developed and to resolve the conflict between the interests of the publishers of fiction and their victims by a theory specially tailored for that task.

## 2. Negligent Infliction of Emotional Distress

Only if existing doctrine were substantially modified could a claim for the negligent infliction of emotional distress serve as a likely theory of liability for harm caused by the publication of fiction. When a defendant has neither physically injured the plaintiff nor intended to cause emotional distress, the tort system has been reluctant to recognize a claim for mental distress standing alone.<sup>238</sup> Yet, in theory, there is no reason why this

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<sup>236</sup> 695 F.2d 438 (10th Cir. 1982), cert. denied, 103 S. Ct. 3112 (1983). See notes 15-18 *supra*.

<sup>237</sup> The \$25 million award of punitive damages by the jury in *Pring* may be a good example. See note 16 *supra*.

<sup>238</sup> See RESTATEMENT (SECOND) OF TORTS § 313(1) (1963 & 1964) ("unintended" emotional distress requires proof of either "illness or bodily harm"); *id.* § 436A (emotional distress resulting from negligence requires proof of "bodily harm or other compensable damage").

claim could not be adapted to the fictional publication setting.

The essence of negligence is the failure to exercise a level of care that would protect a foreseeable class of persons from an unreasonable risk of a foreseeable type of harm.<sup>239</sup> When a publisher changes the name of a character in a novel so that the character, a New York City psychiatrist, has the name of the only actual psychiatrist by that same name in New York City,<sup>240</sup> such conduct fits squarely within the definition of negligence. The risk that at least some distress will occur as a result of having one's name used in a novel for a character practicing one's profession is foreseeable. Similarly, it is foreseeable that the class of psychiatrists practicing in the city in which the novel is set could be affected adversely by the publication. When the reference in the novel points to the name of a single member of that class, the risk of harm cannot be ignored by the defendant. Negligence is not the failure to eliminate all risk; it is only the failure to eliminate unreasonable risks. For about forty years, the determination of the unreasonableness of a risk has been accomplished by balancing the cost of preventing the harm against the expected harm that is likely to occur.<sup>241</sup> When the cost of preventing the harm is as inexpensive as checking the professional listings in the New York City telephone directory, a step taking less than a minute for someone in the publisher's office, very little foreseeable harm would be needed to make the failure to take such a simple precaution negligent.

### B. *The Invasion of Privacy*

The heading of this subsection is probably more accurately stated as the *invasions* of privacy. One phenomenon of tort law in this century has been the emergence of markedly different claims for relief under the general umbrella of privacy inva-

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<sup>239</sup> This definition of negligence is an amalgam of the three major strains in the dominant tort law concept of negligence that prevails today: (1) the foreseeability of the victim, see *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); (2) the unreasonableness of the risk, see *RESTATEMENT (SECOND) OF TORTS* §§ 291-293 (1963 & 1964); and (3) the foreseeability of the type of harm, see *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

<sup>240</sup> See *Allen v. Gordon*, 86 A.D.2d 514, 446 N.Y.S.2d 48 (1st Dep't 1982); see also *Franklin & Trager*, *supra* note 30, at 230.

<sup>241</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

sion.<sup>242</sup> The policy bases and logic of this development are well outside the scope of this Article. Nonetheless, a review of the elements of three of the privacy tort actions will demonstrate their apparent applicability to harms caused by fiction.

### 1. Publication of Private Facts

The *Restatement* version of the privacy torts includes a cause of action for publicity given to a matter concerning the private life of the plaintiff.<sup>243</sup> The major limiting factors are the requirements that the publicity be of a highly offensive nature<sup>244</sup> and that the matter publicized not be of legitimate concern to the public.<sup>245</sup> These elements could be satisfied fairly easily by a work of fiction.

The example that was used earlier to illustrate the expectation-of-confidentiality factor in the tort action proposed in this Article<sup>246</sup> also illustrates how a novel can fit within the contours of the publication of private facts tort claim. Suppose that an author whose marriage is deteriorating writes a novel about the marriage. Not content to engage in an endeavor that sheds light on the human condition and the marital institution, the author includes characteristics and events patterned on the author's spouse. Events that would be highly offensive to a reasonable person, such as intimate conversations or actions between the spouses, are not appropriate matters for public display, even in the context of a work of fiction.

At the heart of this tort action is a recognition that individuals are entitled to have some measure of control over the flow of personal information to the public at large. Due to the nature of our society, however, a good deal of this control has already

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<sup>242</sup> An article by Dean Prosser provided the greatest influence in identifying the various claims and gathering them under the privacy umbrella. See Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

<sup>243</sup> Section 652D of the *Restatement* provides:

§ 652D. Publicity Given to Private Life

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>244</sup> See *id.* comment c.

<sup>245</sup> See *id.* comment d.

<sup>246</sup> See notes 94 & 98 and accompanying text *supra*.



been surrendered; much of what we do and say is accessible to at least some segment of the population. Individuals are more likely, therefore, to value whatever privacy they retain. If the protective function served in the past by physical barriers and space has been largely replaced by the anonymity of the individual, some legal redress for the public display of private facts becomes a critical part of a civilized society.

Publicity about even those incidents that an individual is careful to protect from public disclosure may not be sufficient to establish a tort claim under this theory. The right to privacy is tested by an objective standard of offensiveness, which is an imprecise standard at best.<sup>247</sup> Furthermore, the public's legitimate interest in disclosure may outweigh the privacy interest of the individual. The image created by or for a public official, for example, might properly be unraveled by a disclosure revealing quite a different personality when the official is out of the public's view. If the public interest standard for what is of legitimate public concern were to be treated more like a public curiosity standard,<sup>248</sup> the protection afforded the plaintiff by this privacy action would be substantially contracted.<sup>249</sup>

## 2. Appropriation

While the private facts privacy claim is based on the nature of what is disclosed, the appropriation privacy action is a broader-based protection of the right to control the exploitation of the individual.<sup>250</sup> Analogies to a property right have, in some cases, limited the claim for relief under this theory to a commer-

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<sup>247</sup> See *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 876, 483 P.2d 34, 44 (1971). In *Briscoe*, the court imposed a requirement that the plaintiff pursuing this tort theory must prove "that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive."

<sup>248</sup> See *id.* at 537, 93 Cal. Rptr. at 872, 483 P.2d at 40 (contrasting public "interest" with public curiosity).

<sup>249</sup> See *id.* at 534, 93 Cal. Rptr. at 869, 483 P.2d at 37 ("Loss of control over which 'face' one puts on may result in literal loss of self-identity . . . , and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.").

<sup>250</sup> Section 652C of the *Restatement* provides:

Appropriation of Name or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

RESTATEMENT (SECOND) OF TORTS § 652C (1977).

cial use of the plaintiff's name or photographs.<sup>251</sup>

There are instances, however, in which a work of fiction might fit within the scope of this tort action. Should an author write a novel based on the life of a prominent person, that person's ability to market his or her own story might be adversely affected. There does not, however, seem to be anything uniquely tied to fictional accounts that produces this harm. Entirely factual accounts of such episodes as the Martin Marietta-Bendix corporate takeover attempt, for example, may have reduced the marketability of the insiders' accounts of the event. Nevertheless, being preempted by the publication of some other factual or fictional account of a story that a person wants to publish at a profit may not be a loss that the legal system ought to redress in the context of a tortious harm.

There is another sense in which it might be appropriate to consider the publication of a work of fiction as an appropriation. When a person recognizes that a fictional character has been patterned after himself or herself, one of the natural reactions is likely to be a visceral sense of having been used. Although this reaction is possible when the relationship between the author and plaintiff is impersonal and the author merely bases the character on a detached study of the plaintiff who serves as a model, it is particularly likely to occur when the plaintiff and the author have had a more personal or intimate relationship. Incorporating the plaintiff into the work of fiction in the latter case can reflect a dehumanizing employment of the plaintiff as grist for the fiction mill, rather than a respect for the plaintiff as an individual whose relationship to the author is important in its own right. The use of the appropriation privacy tort to redress this kind of harm would be certain to invoke criticism,<sup>252</sup> but raising the issue in this fashion should at least serve to call for a sharper focus on exactly what is objectionable about the use of a plaintiff as a character in a work of fiction.

### 3. False Light Privacy

A plaintiff who has been placed before the public in a highly offensive false light has a claim for invasion of privacy under

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<sup>251</sup> See generally Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637 (1973).

<sup>252</sup> See Van Alstyne, *supra* note 228.

existing tort law.<sup>253</sup> Given the latest pronouncements of the United States Supreme Court, to establish a false light privacy claim arising out of a matter of public interest, the plaintiff must establish that the defendant's fault with regard to the false light in which plaintiff was placed constituted at least recklessness.<sup>254</sup> The movement in defamation law from a focus on the content of the publication<sup>255</sup> to the status of the plaintiff<sup>256</sup> as the trigger for the application of the *New York Times* actual malice standard<sup>257</sup> has not yet taken place in false light privacy actions.<sup>258</sup>

Because false light privacy is so closely analogous to defamation,<sup>259</sup> many of the criticisms that I have raised concerning defamation theory would apply as well in a critique of the false light privacy action.<sup>260</sup> Accordingly, this discussion is abbreviated to avoid repetition. There is, however, an important advantage to proceeding with a false light claim as opposed to a defamation claim. In a claim for false light privacy, the overriding concern shifts from the reputational interests of the plaintiff<sup>261</sup> to the plaintiff's interest in being portrayed accurately and inoffensively before the public.<sup>262</sup>

### C. *Products Liability*

A number of the judicial decisions in fiction cases have

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<sup>253</sup> Section 652E of the *Restatement* provides:

Publicity Placing Person in False Light

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (1977).

<sup>254</sup> See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

<sup>255</sup> See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-44 (1971).

<sup>256</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>257</sup> See note 5 *supra*.

<sup>258</sup> See note 253 *supra*.

<sup>259</sup> See L. ELDREDGE, *supra* note 23, at 301-05; see also RESTATEMENT (SECOND) OF TORTS § 652E comment b (1976).

<sup>260</sup> See notes 42-58 and accompanying text *supra*.

<sup>261</sup> See notes 23-41 and accompanying text *supra*.

<sup>262</sup> See PROSSER AND KEETON, *supra* note 28, § 117, at 864.

drawn attention to the standard disclaimer language that often accompanies works of fiction.<sup>263</sup> Rather than relieving the publisher of responsibility for any harm caused by the publication,<sup>264</sup> a disclaimer on a work of fiction that in fact incorporates the plaintiff in the portrayal of a character may serve as the basis of a tort claim predicated on the public disclosure of false information about the product being marketed. There can be no doubt that publishers are selling consumer products.<sup>265</sup> To establish a product-related claim for relief against a publisher, a plaintiff must be able to fit the sales transaction and subsequent injury within the confines of a products liability theory. The *Restatement (Second) of Torts* section 402B action for misrepresentation might provide an analogy for such a theory.<sup>266</sup> What makes the use of a products liability theory particularly appealing, or appalling, depending on one's point of view, is the ease with which strict liability has emerged as the dominant theory of liability in the last twenty years.<sup>267</sup> Even a constitutional overlay prohibiting strict liability might not reduce the risk of liability

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<sup>263</sup> See, e.g., *Geisler v. Petrocelli*, 616 F.2d 636, 638 (2d Cir. 1980); *Kelly v. Loew's Inc.*, 76 F. Supp. 473, 485 (D. Mass. 1948); *Clare v. Farrell*, 70 F. Supp. 276, 280 (D. Minn. 1947); *Allen v. Gordon*, 86 A.D.2d 514, 515, 446 N.Y.S.2d 48, 49 (1st Dep't 1981).

<sup>264</sup> See cases cited in note 263 *supra*.

<sup>265</sup> See, e.g., 15 U.S.C. § 2052(a)(1) (1982); 15 U.S.C. § 2301(1) (1982).

<sup>266</sup> Section 402B of the *Restatement* provides:

Misrepresentation by Seller of Chattels to Consumer

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation . . . .

RESTATEMENT (SECOND) OF TORTS § 402B (1965).

The extension of this tort theory to the case of harm caused by the publication of fiction would involve (a) expanding the kind of harm suffered from physical to personal and relational harms, see notes 117-31 and accompanying text *supra*, and (b) recognizing that the harm attributable to the product could be suffered by someone other than a consumer of the product.

Professor Smolla's way of treating the harms caused by the publication of fiction is to modify the *New York Times* actual malice standard to focus on the publisher's "knowledge or reckless disregard that the ordinary reasonable reader would conclude that the author intended the reader to understand the events described in the work as depictions of real life events." Smolla, *supra* note 21, at 87-88 (emphasis omitted). The analogy to the products liability claim is revealed even more clearly by Professor Smolla's statement that the "focus [is] primarily on the question whether the author has intentionally or recklessly . . . misled the reader into treating fiction as . . . fact." *Id.* at 88 n.418 (emphasis in original).

<sup>267</sup> See generally R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* (1980).

to proportions with which publishers would be comfortable.

Let me make absolutely clear that I am not seriously proposing the use of a products liability theory to redress harm caused by the publication of fiction. Rather, my point is directed at those who employ the tactic of raising the level of apprehension about the fragility of protection of speech and press. If the constitutional and common-law constraints on liability for injury-producing conduct are perceived as being so tight that responsibility for harms is choked off, then the natural reaction is going to be to shift the focus to an arena in which a popular sense of justice can receive a fuller airing. The analysis of liability proposed in Section II of this Article reflects an effort to thwart the attempts to denigrate the role of fiction or to remove all protection from such works. The proposed liability theory, therefore, opens up an opportunity to identify and assess the full range of considerations and interests involved in the fictional publication case and provides for a fair and just balancing of these competing interests.

#### IV. KEEPING LIABILITY IN PERSPECTIVE

Those who write and publish works of fiction are not well served by the techniques of exaggeration of the problem or of simplistic parroting of constitutional language as a substitute for a careful and critical analysis of the issues that are raised and of the various solutions that have been proposed. Nor are they likely to profit from an ostrich-like response to a community sense of uneasiness about a lack of accountability of any institution that is capable of inflicting serious harm on individuals.

Those who detect problems in the current melding of defamation law and fiction are not thereby cast into the posture of suggesting that fiction has no value or that it is entitled to no constitutional protection. But if fiction is to receive the protection it needs in order to flourish and carry on its deeper, truth-telling function,<sup>268</sup> the grounds on which those who publish fiction can be held accountable for the harm they cause must be delineated with precision.

The respective decision-making responsibilities and capabilities of judges and juries must be recognized as well. Courts

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<sup>268</sup> See Llosa, *supra* note 51, at 1.

must establish and enforce the legal and constitutional boundaries of liability, whether for defamation or more generally for injury caused by fiction. Within these boundaries, juries should be trusted to impose liability on those who engage in tortious activities and to award pecuniary damages that accurately reflect the community's perception of and judgment about the costs those activities unjustifiably inflict on the injured plaintiffs.<sup>269</sup>

Before one takes too seriously the alarmist predictions of those who oppose any expansion of liability in the speech context, the factors that operate to limit liability ought to be considered. Such factors can be divided into pragmatic and constitutional limitations on liability.

#### A. *Pragmatic Limitations*

The prospect of tort liability cutting off the creative flow of imaginative works is a reason to give serious thought to the costs associated with imposing liability. However, even if a liability theory along the lines outlined in Section II of this Article should be put into practice, there is no particular reason to suspect that the chilling effects would be so extensive that the legal system should retreat from the attempt to identify the appropriate cases for the imposition of liability. Among the most compelling reasons to doubt the magnitude of the adverse effect on the writing and publishing of fiction are some pragmatic limitations on the desirability of pursuing a claim for damages caused by the publication of fiction.

Not every person who detects some resemblance between himself or herself and a fictional character is going to sue,<sup>270</sup> not

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<sup>269</sup> Although it is fashionable to denounce juries in defamation cases, a couple of recent cases reveal that juries may be able to understand perfectly well what is at stake in such cases. The award of \$1 in damages to William Shockley in his action for defamation based on a comparison made in *The Atlanta Constitution* between his racial theories and those of Nazi Germany and the award of \$200,000 for the infliction of emotional distress, half of which was punitive damages, to Jerry Falwell in his action against Larry Flynt and *Hustler* magazine, see Battista, *supra* note 230, are relatively reassuring counter-examples to those who might believe that juries cannot be trusted in cases in which such important rights and interests are at stake.

<sup>270</sup> At the Symposium on October 20, 1984, a number of panelists and members of the audience recounted stories of people detecting resemblances between themselves and fictional characters when no such resemblance was intended by the author. As these stories indicated, the attitude of the person who notes the resemblance may be to feel flattered rather than injured.

everyone who sues will recover,<sup>271</sup> and not everyone who recovers will be awarded massive sums of money.<sup>272</sup> If the reported appellate cases are at all reliable as a guide, the prospect of recovery has been low in a fiction case treated as a defamation or invasion of privacy action. One may, of course, speculate about an increase in litigation as a result of both a plaintiff's success in a well-publicized case and plaintiffs' attorneys becoming better informed about the opportunities that a claim of this sort offers.

A factor that may reduce the threat of massive and crippling liability for the publishers of fiction is the potential adverse consequences that such litigation might have on the allegedly injured party. If there is publicity about the litigation, the size of the audience that will connect the fictional character to the plaintiff may be dramatically expanded, particularly if the plaintiff is in all other respects not a public figure.<sup>273</sup> Furthermore, if liability were limited to only the false portrayal and characterization of the plaintiff, the accuracy of the fictional portrayal of the plaintiff's characteristics or of incidents in which the plaintiff participated would be an issue of contention at the trial; thus, the risk of exposing the plaintiff to further embarrassment or humiliation would be increased.<sup>274</sup>

Should the natural disinclination toward the publicity associated with this kind of lawsuit not have a deterrent effect on the rate of litigation, and should the experience gathered in the administration of an increased caseload of these actions raise serious apprehensions about the lack of control over the decision-making process, the first corrective measure that should be taken is to impose limitations on the remedies available to suc-

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<sup>271</sup> The obstacles that face a plaintiff trying to recover for harm caused by the publication of fiction are formidable, even under a theory of liability such as the one proposed in this Article.

<sup>272</sup> The prospect of massive awards will be considerably reduced by the relatively simple step of disallowing the recovery of punitive damages and of replacing that element of damages with the recognition of a comprehensive array of actual harms for which the plaintiff can be compensated.

<sup>273</sup> It is surely reasonable to suspect that the number of people who connected Lisa Springer with the character Lisa Blake in the novel, *State of Grace*, see notes 38-39 *supra*, was fairly small and that the litigation and any associated publicity would have widened considerably the size of the audience able to make the connection between the plaintiff and the character.

<sup>274</sup> See Anderson, *Avoiding Defamation Problems in Fiction*, 51 BROOKLYN L. REV. 383, 396 (1985). Professor Anderson suggests that defendants can exploit a tactical opportunity through wide-ranging discovery about the plaintiff. See *id.*

cessful plaintiffs.<sup>275</sup> Only after experience demonstrates with "convincing clarity"<sup>276</sup> that the social costs of liability under a theory fashioned along the lines suggested in this Article far outweigh the benefits that accrue to those who have been and would be injured by the publication of fiction<sup>277</sup> should there be a resort to a substantial limitation on the ability to attach liability to the publication of a fictional work that causes harm.

## B. *Constitutional Limitations*

The constitutional restraints within which publisher liability must be determined have, for the most part, been excluded from the development of a functional theory of liability in Section II of this Article. Before succumbing to the more drastic fears concerning the effects of imposing liability on a publisher for the harm caused by the publication of fiction, one must understand how extensive the constitutional protections are, even under a minimalist interpretation of the first amendment. These constitutional protections fall into two categories: limitations on liability and limitations on remedies.

### 1. *Limitations on Liability*

The major constitutional limitations on liability that almost certainly apply to the tort action based on fictional publication involve truth and opinion. True statements about the plaintiff will not subject the publisher to liability for harm to reputation.<sup>278</sup> The fact that references to the plaintiff on whom the fictional character is patterned are oblique or tangential should not deprive the defendant of this constitutional protection.<sup>279</sup>

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<sup>275</sup> See notes 148-49, 194-97, & 216-20 and accompanying text *supra*.

<sup>276</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964).

<sup>277</sup> Because this determination demands a broader perspective than is likely to be associated with the disposition of any particular case, the legislature may be the appropriate body to consider arguments for reform along these lines.

<sup>278</sup> The reputational harm element of injury caused by the publication of fiction is the attribute that makes this action most analogous to a defamation action. See notes 23-28 and accompanying text *supra*. A plaintiff should not be permitted to affect the scope of constitutional protection afforded the defendants simply by substituting a different label for what is essentially the same harm. *Cf. Burton v. Crowell Publishing Co.*, 82 F.2d 154, 156 (2d Cir. 1936) ("The only reason why the law makes truth a defense is . . . because the utterance of truth is in all circumstances an interest paramount to reputation.").

<sup>279</sup> To hold otherwise would be to afford publishers of fiction less constitutional pro-



When the alleged harm is personal rather than reputational, a more problematic constitutional question is presented. I would be unwilling to state without qualification that true statements in a fictional disguise could never serve as the basis for recovery for an injury such as emotional distress. Publishing information about a plaintiff that is factually accurate could, under some circumstances, be determined to have absolutely no value whatsoever.<sup>280</sup>

An accommodation, therefore, might be reached in the form of the following constitutional requirement: a defendant will not be liable for harm caused by the publication of a fictional work unless the plaintiff proves that the fictional portrayal of the plaintiff, which would otherwise be actionable, is (a) false, or (b) true, but of such a nature that no social value is attached to the publication. The second part of this requirement places a substantial hurdle before the plaintiff who has been accurately portrayed in a fictional work. However, the requirement properly leaves open the possibility of liability in the most egregious case of an unjustifiable violation of a plaintiff's legitimate interest in the confidentiality of certain details, characteristics, or incidents of his or her life.

Expressions of opinion could receive even more extensive constitutional protection than the protection afforded truth. The social value of opinion, and the corresponding lower risk of harm presented by opinion that is clearly discernible as such, should combine to produce a rule that there is no liability for works of fiction that are simply expressions of opinion about the plaintiff,

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tection than is given to defendants who injure the reputation of another through factual communications. For the argument against giving less constitutional protection to fiction, see Franklin & Trager, *supra* note 30, at 217-18.

<sup>280</sup> Cf. D. BOGEN, *BULWARK OF LIBERTY: THE COURT AND THE FIRST AMENDMENT* 67 (1984). Professor Bogen notes that:

If the Court in the future upholds a law permitting liability for true statements, it is likely to require the law to focus on the *context* in which the statements are made rather than categorically suppressing such statements. An example would be a law which prohibits the identification of rape victims, where the victim's identity is not part of the public record of trial, for the sole purpose of inflicting humiliation or suffering. The statement would be punishable only if made vindictively with no intent to further discussion.

*Id.*

Professor Bogen's idea is readily transferable to the fictional publication setting. True statements in a fictional disguise need not be categorically *protected*. Instead, liability for nonreputational harm could depend on a contextual analysis of the publication.

regardless of how harmful those opinions may turn out to be.

The extent of a constitutional requirement of fault is extremely unclear in the context of fiction. A prohibition of strict liability may well be constitutionally mandated in this setting. The question then becomes what level of fault the Constitution requires a plaintiff to establish in order to hold a publisher of fiction liable. Because of the nature of the proposed tort action outlined in Section II of this Article, it would seem to make the most sense to require a showing that the defendant was at least negligent with respect to the risk that the fictional publication would cause harm to the plaintiff.<sup>281</sup> Whether additional protection needs to be given to publishers who create a risk of injury to public officials or public figures<sup>282</sup> depends on whether one believes that the factors offered in the development of a theory of liability provide sufficient protection in themselves, when viewed in the light of the other constitutional protections described in this section.

## 2. Limitations on Remedies

The Constitution affects not only the potential liability of the defendant, but also the remedies that may be employed after the liability of the defendant has been determined. The constitutional prohibition of punitive damages absent a showing of *New York Times* actual malice<sup>283</sup> should be extended to fictional publication cases, although, as I asserted earlier, an even better course of action would be to ban punitive damages entirely.<sup>284</sup>

Presumed damages probably have no legitimate role to play in the fictional setting,<sup>285</sup> as long as the prohibition of presumed damages is not misunderstood as a prohibition of a presumption of harm.<sup>286</sup> Presumed harm could legitimately serve as the basis for a projection of actual damages for harm that is foreseeable

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<sup>281</sup> A number of the pre-*New York Times* opinions contained a common-law, rather than a constitutional, standard to this effect. See, e.g., *Clare v. Farrell*, 70 F. Supp. 276, 279-81 (D. Minn. 1947).

<sup>282</sup> This additional protection would be consistent with the development of constitutional protection for defamatory speech. See note 5 *supra*.

<sup>283</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1974).

<sup>284</sup> See notes 217-19 and accompanying text *supra*.

<sup>285</sup> Such damages are proscribed in the defamation context absent a showing of *New York Times* actual malice. See note 5 *supra*.

<sup>286</sup> See *LeBel*, *supra* note 195, at 784-88.

but not presently identifiable.<sup>287</sup>

Finally, the Constitution would surely prohibit the fashioning of relief that directly prevents the defendant from putting or keeping the work of fiction before the public.<sup>288</sup> The interest of the individual plaintiff is adequately served by the action for damages,<sup>289</sup> and any societal interest in preventing harm from occurring rather than merely compensating for the harm that occurs must be furthered indirectly through the deterrent effect that liability for damages would be expected to have.

### CONCLUSION

Each of the parties in an action for damages for harm caused by the publication of a work of fiction is likely to have legitimate interests that are entitled to some protection. The legal system is obligated to strike a balance between those competing interests. It is my belief that this balance is currently being struck excessively in favor of the defendants. My hope is that a more careful and less emotionally charged identification of what is at stake, and a more thorough investigation of the factors that ought to be relevant to a determination of liability, will spark an interest in fashioning both a liability theory and a set of corresponding remedies that more fully take into account the interests of victims and provide a more realistic sense of fair play.

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<sup>287</sup> See notes 134-40 and accompanying text *supra*.

<sup>288</sup> See *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981).

<sup>289</sup> See *Miss America Pageant, Inc. v. Penthouse Int'l, Ltd.*, 524 F. Supp. 1280, 1282 (D.N.J. 1981).