ESSAY

LIBEL, THE "HIGHER TRUTHS" OF ART,
AND THE FIRST AMENDMENT

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During the 1960's, both the lay and professional publics became aware of the possibility that common law libel concepts could clash with—and run afoul of—the first amendment. Although *New York Times Co. v. Sullivan*¹ for the first time in our national history subjected state tort law to a searching constitutional critique, it was not in reality so revolutionary a decision as most commentators have maintained.² The creation of a so-called "constitutional privilege" negligently to misstate defamatory facts on matters of public interest about public officials, first enunciated in *Sullivan* and further developed in its progeny, was based upon certain sound (though not universally accepted) common law concepts. *Sullivan* only cast in constitutional terms an ongoing judicial attempt to balance the rights of free speech and press against the individual's interest in reputation.³ "Fair comment" doctrine, along with the minority view granting a privilege to libelous utterances made in good faith, without malice, and about public affairs, were raised to the level of constitutional imperative. In the 1960's, courts sought to encourage an "uninhibited, robust, and wide-open" atmosphere of public debate, so that now "[t]he law of defamation has in effect been rewritten"⁴ The emergence of new literary and scholarly forms of expression in the 1970's has sown seeds that promise to ripen into yet another re-evaluation of common law libel concepts in a contemporary setting.

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¹ 376 U.S. 254 (1964).

² P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 64 (1970). See Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1360-66 (1975).

³ "[T]he weapon adopted by the Court [in *Sullivan*] was one already prototyped in the common law." Eaton, *supra* note 2, at 1366.

⁴ *Buckley v. Littell*, 539 F.2d 882, 888 (2d Cir. 1976).

I. THE NEW LITERATURE

New forms of artistic, literary, and scholarly expression are to be found in all of the media, especially print and visual. In modern literature, our post-Freudian sensibility has attempted to grapple with the great problems of human existence and meaning by openly and frankly proclaiming that there are no boundaries between the private psyche and the public act.⁵ The quest for "higher truths" is a broad-based one that unabashedly subjects the lives of characters—both fictional and real—to incisive, at times scathing, analysis. Creative artists have used psychological insights and techniques to depict not only a fictional world, but to interpret a frequently bewildering reality. Indeed, to many serious artists, the bizarre nature of reality seems to be more interesting, more stimulating, and more worthy of exploration than any self-constructed fantasies.⁶

This development in the creative arts has had two offshoots: the cultivation of serious scholarly interest in psycho-biography and psycho-history,⁷ and an inevitable descent into popular culture.⁸

⁵ The modern literary sensibility betrays a "bitter impatience with the whole apparatus of cognition and the limiting assumption of rationality" and derives in part from "Freud, who focuses upon the irremediable conflict between nature and culture" and "the damage done the life of instinct." *THE IDEA OF THE MODERN IN LITERATURE AND THE ARTS* 16, 23 (I. Howe ed. 1967). "The traditional values of decorum, both in the general ethical sense and strictly literary sense, are overturned. Everything must now be explored to its outer and inner limits; but more, there are to be no limits . . .," *id.* 31, so that "[c]haracter . . . is regarded not as a coherent, definable, and well-structured entity, but as a psychic battlefield, or an insoluble puzzle" *Id.* 34. "As there had been a movement dedicated to recording the realities of the outer world in the 19th century, so it was necessary to recognize the 20th century's search for inner reality." L. EDEL, *THE MODERN PSYCHOLOGICAL NOVEL* v-vi (1964). These novelists had an "acute need to cope with inner problems and project . . . inner life before the world." *Id.* 12. "Freud had presented a paranoid version of the relation of the self to culture: he conceived of the self submitting to culture and being yet in opposition to it . . . [I]n respect of this 'paranoia' Freud is quite at one with literature." L. TRILLING, *Freud: Within and Beyond Culture*, in *BEYOND CULTURE* 117-18 (1965). For a general analysis of both the serious and popular literary reception to Freud in America, see F.J. HOFFMAN, *FREUDIANISM AND THE LITERARY MIND* (2d ed. 1957).

⁶ P. ROTH, *Writing American Fiction*, in *READING MYSELF AND OTHERS* 117-47 (1975).

⁷ Recent examples of psycho-history by America's leading practitioner of the mode are B. MAZLISH, *KISSINGER, THE EUROPEAN MIND IN AMERICAN POLICY* (1976); B. MAZLISH, *IN SEARCH OF NIXON* (1972). See also B. Brodie, *A Psychoanalytic Interpretation of Woodrow Wilson*, in *PSYCHOANALYSIS AND HISTORY* 118-19 (B. Mazlish ed. 1963) (Wilson's political failures attributed to his "compulsive and obsessive behavior" resulting from "serious loss of self-esteem which his father was inflicting on him"). Erikson's notable contributions to the field include E. ERIKSON, *GANDHI'S TRUTH* (1969); E. ERIKSON, *YOUNG MAN LUTHER* (1962). Luther has been of particular interest to psycho-historians. See N.O. BROWN, *LIFE AGAINST DEATH* 202 (1959). Both Brown and Erikson identify Luther's anal-compulsive personality with the genesis of his religious revelation.

⁸ Mario Puzo's best-seller *The Godfather* contained a character—a singer named Johnny Fontane—whose psyche was extensively probed. The resemblances between

In response to the first, new academic fields have grown; in response to the second, television has begun to explore the world, not by pallid documentary alone, but also by the creation of dramatic fictionalized productions. In the last three years, we have seen hypothesized dramas of the trial of Lee Harvey Oswald, and of four days in the lives of Oswald and Jack Ruby immediately preceding the assassination of former President Kennedy. The life of Martin Luther King has been the subject of a fictionalized documentary, and one "mini-series" explored the Watergate-like activities of a thinly-veiled President Richard Monckton. One may choose to distinguish psychological speculation about undisguised historical persons from the superficially fictional dramatization,⁹ yet surely both manifest the same modern impulse to expose the private mind to public scrutiny. There can be no question that public interest in such speculations and dramatizations will continue. There is also no question that much of this modern culture, popular and serious, runs headlong into the most fundamental tenets of libel law.

This Essay considers the collision between one particular art form—the novel of "faction"¹⁰—and libel, yet its general perspective is applicable to most of the formats mentioned above. I have chosen the novel of faction—indeed, one particular novel, *The Public Burning*, by Robert Coover—because it constitutes the best example I know of the myriad problems presented; it is also a clear portent of the future direction the creative novel in our time is likely to take. The book is an all-encompassing rendition of the 1950s trauma in American political and moral life. It centers on the

the fictional Fontane and the real life Frank Sinatra were barely disguised. Judy Garland was the (not very well concealed) subject matter of another best seller, *Valley of the Dolls*. Both *Godfather* and *Valley* became motion pictures. The world-renowned motion picture "Citizen Kane" was the unconcealed rendition of the life of William Randolph Hearst, and resulted in an "attempt to keep [it] off the screen by threats of boycott and of libel litigation." Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1317 & n.141 (1942). For F. Scott Fitzgerald's use of "real" persons in his classic novel *The Great Gatsby*, see H.D. PIPER, *THE GREAT GATSBY: THE NOVEL, THE CRITICS, THE BACKGROUND* 171-97 (1970).

⁹ See text following note 53 *infra*.

¹⁰ Unlike other literary forms, the novel generally is a device uniquely useful for representing fact and fiction as a single mode of experience. See R. SCHOLES & R. KELLOGG, *THE NATURE OF NARRATIVE* 58 (1966). One might describe the novel of "faction" as one that adheres fairly closely to historical fact as a foundation for psychological speculation about—or "mythologizing" of—the real persons and events it describes. This description accommodates not only *The Public Burning*, but also the book that may have spawned the term: Alex Haley's *Roots*. See L. Morrow, *Living With the "Peculiar Institution"*, TIME, Feb. 14, 1977, at 76.

famous case of Julius and Ethel Rosenberg. "Richard Nixon" and another, unnamed, narrator tell Coover's story in alternating chapters. Much of the novel is factual, and recites bits of courtroom testimony, political speeches, and some writings of the time; much is a phantasmagoria that reaches a sexual and dramatic climax when Julius and Ethel Rosenberg are electrocuted in Times Square. The electrocution is accompanied by a ritualistic and orgiastic display of both hatred for the victims and mindless reaffirmation of the American Dream. Famous political personages and other celebrities (along with, for instance, Sing Sing prison's little-known executioner) are portrayed as willing participants in the national exorcism of symbolic devils. Certain political figures—former Attorney General Herbert Brownell, Assistant Prosecutor Roy Cohn, and, of course, Judge Irving Kaufman—are depicted with greater specificity: they utilize (or at least know of or suspect) unethical means and tactics to convict and ensure the execution of the somewhat flawed martyrs.

"Nixon's" stream of consciousness reveals that he is the victim of personal insecurities and traumas, and of social and political forces beyond his comprehension. He is sympathetically depicted in part, but becomes accidentally involved in two major ludicrous and embarrassing (and probably libelous) situations: a bungled would-be seduction of the imprisoned Ethel Rosenberg, and his own victimization via a public act of sodomy committed by a mythical Uncle Sam.

Were the work solely "fantasy," the issues might be clearer. Unfortunately, the novel of faction derives its thrust from the liberal admixture of fact *and* fantasy. The reader cannot readily distinguish between the two, and even clearly symbolic events may be threaded with historical fact. While a bestseller such as E. L. Doctorow's *Ragtime* portrays deceased public figures, Coover's tome depicts many individuals still living; while Philip Roth's *Our Gang* and some television fictionalizations erect a flimsy curtain of changed names, Coover explodes his bombshells upon the heads of real people. The issues posed by his honesty (or is it innocence?) are not ephemeral; given the general state of American libel law they are not easy ones, either. The law has simply not yet decreed the immunity for libel defendants against all claims by public figures for which Justices Black, Douglas, and Goldberg once argued.¹¹ Although some commentators have found *Gertz v. Robert Welch*,

¹¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 296 (1964) (Black, J., concurring, joined by Douglas, J.); *id.* 298 (Goldberg, J., concurring).

*Inc.*¹² virtually to have abrogated the law of libel,¹³ *Gertz* only decided that damages can no longer be presumed in a libel suit premised on less than the *Sullivan* standard of liability for "malice." As recent cases demonstrate, even public figures may still prevail.¹⁴

It is clear that, on principles enunciated in *Sullivan* and elucidated in its progeny, creative works of fiction (and speculative works of scholarship) could be protected when clearly understood as such.¹⁵ In essence, psychological character probing is an educated guess about human motivation—an opinion. While such speculation is commonplace in the scholarly literature of psycho-history and psycho-biography, it also exists in the novel of fiction. A novel can either depict a fictional character, or attempt to reveal the deeper personality of an extant and real one.¹⁶ The invented action of a novel is nothing more than the author's opinion of what a character would do under certain circumstances. So long as the reader is warned that the matter is one of opinion, traditional defenses such as "fair comment" should be available regardless of the particular genre.¹⁷ While the Court has found no constitutional protection for the "calculated falsehood,"¹⁸ the cases have involved purported factual truth. In the cases where liability has been found for novelized depictions of otherwise real people, the gravamen of the wrong is the ill-concealed attempt to evade the laws of libel by "passing off" truth in an alleged fiction.¹⁹ The novel of fiction, as well as the other literary and scholarly forms mentioned, use truth to arrive at what is clear fiction: the author's opinion—the author's "higher truth." *The Public Burning* makes the matter clear by creating a pure and unabashed fantasy that lends an aura of unreality to even the seemingly literal facts presented.

¹² 418 U.S. 323 (1974). Cf. *Time, Inc. v. Firestone*, 424 U.S. 448, 460-61 (1976) (approving damages for personal humiliation and mental anguish at suit of non-public figure).

¹³ See, e.g., *Eaton*, *supra* note 2, at 1414.

¹⁴ E.g., *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

¹⁵ "Is there any basis for any inference on the part of rational readers or viewers that the antics engaging their attention are anything more than fiction . . . ?" *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 App. Div. 2d 452, 455, 256 N.Y.S.2d 301, 304, *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 508 (1965).

¹⁶ "[T]his has been the century of psychology; and the novel, as we know, has always been first and foremost 'psychological.'" L. EDEL, *supra* note 5, at 203.

¹⁷ "[C]riticism in the art world may be based on such intangibles as experience, taste, and feeling." *Fisher v. Washington Post Co.*, 212 A.2d 335, 338 (D.C. Ct. App. 1965).

¹⁸ *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

¹⁹ See notes 104 and 105 *infra*.

Works such as Coover's valuable exploration of the national psyche of the 1950's deserve more than the uncertain protection now afforded by our libel law. The balance of this Essay suggests that various presently-debated extensions of the first amendment, if applied to libel, could provide such immunity, yet the likelihood that such quantum leaps in legal theory will occur is small. The more fruitful approach I advocate is to cultivate, within the ambit of presently accepted doctrine, a greater sensibility of the role of the new psychological literature in our culture, and an understanding that such literature falls within traditionally accepted immunities from the libel action.

II. ADAPTING LIBEL LAW TO THE NEW LITERATURE

To understand fully how fiction can reveal "higher truth" deserving of constitutional protection, it is necessary briefly to mention the evolution of libel law and its increased sensitivity toward the right of free speech—and, certainly, artistic expression is a form of free speech.²⁰ Libel law has traditionally been a law of accretion; doctrines have been piled upon doctrines to create a sort of legal phantasmagoria.²¹ Since *Sullivan* can be viewed as both the culmination of a process of common law adjudication as well as the onset of a constitutional revolution, it is necessary to take a step backward fully to realize that landmark advances in libel law have occurred (a) by accretion and (b) in political contexts.

The first line of development, at least in American law, is grounded not in the realm of substantive change, but in the cognate one of procedure. Early in our history, the jury was given the authority to determine whether a particular utterance was libelous.²² The *Zenger* case was, of course, an anomaly for the early eighteenth century, and remained something of an isolated and lonely landmark for about a century. It is significant that the case involved the criminal prosecution of a critic of a governor of New York, and that it was but part of an ongoing political struggle. More than mere procedure was, of course, involved, for the history of liberty

²⁰ A poster is "a form of public interest presentation That the format may deviate from traditional patterns of political commentary, or that to some it may appear more entertaining than informing, would not alter its [constitutionally] protected status." *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 450, 299 N.Y.S.2d 501, 507-08 (Sup. Ct. N.Y. Co. 1968).

²¹ See Eaton, *supra* note 2, at 1349-63; Smith, Jones v. Hulton: *Three Conflicting Judicial Views as to a Question of Defamation*, 60 U. PA. L. REV. 365, 365-70 (1912).

²² See A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (S.N. Katz ed. 1963); L.W. LEVY, LEGACY OF SUPPRESSION 19 (1960).

has been largely a history of procedural victory for what we would now call due process of law.²³

While in England it may have been true that the maxim "the greater the truth, the greater the libel" prevailed in theory, early in our history—and again in the realm of political libel—a major substantive doctrine emerged: nothing less than the revolutionary concept of the defense of truth.²⁴ Even the detested Seditious Act of 1798—a blatantly partisan measure designed to punish a political party for its attempt to unseat the majority party—contained a provision recognizing the defense.²⁵ Of course, defamatory "opinions" were another matter: the law of libel still proscribed them, although they were not, and usually could not be, demonstrably true or false.²⁶

The third line of defense, articulated as a matter of constitutional principle in *Sullivan* (though not without common law precedent),²⁷ is limited protection of factual misrepresentations. *Sullivan* recognized that modern news gathering and dissemination techniques often lead to inadvertent or even negligent untruth, and that the defamed individual's interest in his reputation had to be measured "against the background of a profound national commitment to the principle that debate on public issues should be unin-

²³ "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.). This "safeguard" was not always evident in seditious libel cases before the American Revolution: "But juries, with the power of ruling on the guilt or innocence of alleged libels, proved to be as susceptible to prevailing prejudices as judges when they decided the fate of defendants who had expressed unpopular sentiments They could be relied upon to support freedom of speech-and-press, as in the Zenger case, only if public opinion opposed the administration." L.W. LEVY, *supra* note 22, at 131-32.

²⁴ Truth as a defense was late in coming. L.W. LEVY, *supra* note 22, at 133 (discussing *People v. Croswell*, 3 Johns. Cas. 336, 363-94 (N.Y. 1804)). Professor Levy believes that only in the Pennsylvania Constitution of 1790 did truth emerge as an acknowledged defense. *Id.* 202-03.

"The only reason why the law makes truth a defense is not because a libel must be false, but because the utterance of truth is in all circumstances an interest paramount to reputation" *Burton v. Crowell Pub. Co.*, 82 F.2d 154, 156 (2d Cir. 1936). Despite this, the court found liability where the "truth" of the matter could not be proved one way or the other—for the photograph held to be libelous was a "true" but obvious optical illusion and distortion that severely embarrassed plaintiff. See text accompanying notes 65-70 *infra*.

²⁵ Seditious Act of 1798, ch. lxxiv, § 3, 1 Stat. 596 (1798) (expired 1801), reprinted in J. SMITH, *FREEDOM'S FETTERS* 441-42 (1956).

²⁶ There are "many truths, important to society, which are not susceptible of that full, direct, and positive evidence, which alone can be exhibited before a court and jury." G. HAY, *AN ESSAY ON THE LIBERTY OF THE PRESS* 26-27 (1799), quoted in L.W. LEVY, *supra* note 22, at 272.

²⁷ Minnesota and nine other states had a "Sullivan privilege" under their fair comment doctrines prior to 1964. *Mahnke v. Northwest Pubs., Inc.*, 280 Minn. 328, 160 N.W.2d 1, 7 (1968).

hibited, robust, and wide open" ²⁸ *Sullivan* and its progeny engendered considerable judicial re-evaluation of some traditional problems (opinion and fair comment among them) in light of this "national commitment"; sometimes the re-evaluation occurred in non-constitutional terms.

A fourth line of defense again implicates procedure. Since *Sullivan*, defendants in libel cases have been encouraged to wield the weapon of summary judgment, in appropriate circumstances, to ensure that costs of libel suits, which are often intimidating, are minimized.²⁹ Thus, the judiciary, without much guidance from the Supreme Court, has sought to effectuate the theoretical protections offered by *Sullivan*. Problems of permissible amounts and types of damages, even to the successful plaintiff, are increasingly occupying judicial time, and limitations of as yet uncertain efficacy upon "presumed" and "punitive" damages have been imposed.³⁰

The complexities of libel law, already most bewildering, have markedly increased as a result of *Sullivan*; courts must grapple more sophisticatedly than they have in the past with the paradox of liberalized access to law for protection of reputation and a concomitant reluctance to defeat the public's right to know.³¹ Adding to the complexity is the realization that the conception of what is libelous varies from time to time and from community to community, so that the judiciary must attempt to understand the state of public opinion at a given moment in history. Also, libel law has always mirrored shifts in changing political, as well as social, mores.³²

²⁸ 376 U.S. at 270.

²⁹ See *Bon Air Motel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970); *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975) (summary judgment "the rule, and not the exception" in defamation cases). But see *Time, Inc. v. Firestone*, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting).

³⁰ While *Firestone* does not abrogate *Gertz*' holding that punitive damages can only be found where *Sullivan*'s standards have been met in all cases, can juries in fact assess punitive damages in the guise of damages for mental anguish? It appears that Eaton's conclusion that punitive damages will not be awarded "in all but a handful of cases" is at least questionable. See Eaton, *supra* note 2, at 1439-40.

³¹ While *Sullivan* was premised upon a preference for the right to know over common law libel, *Firestone* found a balance between the "public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances." 424 U.S. at 456.

³² "Even if these views [as to what is libelous] may soon be altered and are in truth only the mores of the times, they must be respected as criteria. If it were libelous per se in 1889 to write of a man as an anarchist . . . and libelous per se in 1915 to write of a man as a socialist . . . it is libelous per se in 1945 to write of a man as a Communist." *Spanel v. Pegler*, 160 F.2d 619, 622 (7th Cir. 1947). By 1968, when much of anti-Communist hysteria had passed, it was not libelous per se to write of a man that he followed a "party line" and "supports communist objectives." *McGaw v. Webster*, 79 N.M. 104, 440 P.2d 296, 297-98 (1968). A

Surely such complexity and rapid change in the law of libel exert a chill on free expression generally. Yet the inhibiting effect of the law's uncertainty will likely work its will most cruelly on the new literature and scholarship that demands freedom to speculate, to fantasize, to blithely (or savagely) intertwine the public and the private, the political and the sexual. Whether an over-cautious reading of the law or misperception of the art form be the cause, those who counsel writers of the new literature will surely commend restraint, and the result may be an unfortunate closing off of an intriguing world of insight and speculation.

We have seen libel law to be a creature of case law accretion and occasional doctrinal revision. Perhaps some such "leap forward" will come to the aid of the new literature.

The judiciary could find that *all* discussion of public political issues is absolutely privileged against libel claims, irrespective of the medium of discussion involved and irrespective of the nature of the discussion. This would entail adoption of the so-called Meiklejohn theory of the first amendment.³³ The theory logically could be extended to permit speculation about the sex lives of political figures, a step that even the most enthusiastic adherents of untrammelled public discussion might not be prepared to take.³⁴ In addition, such a sharp division between political and other public issues would run completely counter to those first amendment developments that seek to protect the public's right to know about matters of general, presumably non-political, interest.³⁵

charge of "leftism" leveled against the chairman of a grape boycott movement was sufficient to preclude summary judgment against plaintiff where the court was not sure whether plaintiff and family were public figures, and whether, under *Gertz*, defendant was negligent. *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 543 P.2d 1356 (1975). In 1967, in Minnesota, it was still libelous to call a prominent sociology professor a "Communist front member" who "collaborate[d] with a Communist and communist frontiers." *Rose v. Koch*, 278 Minn. 235, 154 N.W.2d 409, 415, 416 (1967) (case remanded to correct erroneous *Sullivan* instruction).

See also Riesman, *supra* note 8, at 1282, 1284 (1942) (regional differences may lead to abuse of libel law as weapon to silence political advocacy by "outsiders").

³³ A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

³⁴ "Purely private defamation has little to do with the political ends of a self-governing society" and "private conduct of a public official or private citizen" should still be subject to traditional rules. *New York Times Co. v. Sullivan*, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring).

³⁵ E.g., *Winters v. New York*, 333 U.S. 507 (1948) (first amendment extends to sensationalist magazines); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures as art form protected by first amendment); *Molony v. Boy Comics Pubs., Inc.*, 277 App. Div. 166, 98 N.Y.S.2d 119 (1950) (comic books are constitutionally protected as modern example of ancient art form of picture writing).

The application of Meiklejohn's approach to Coover's novel is troubling, for it would protect artistic speech only because (and so far as) it happens to be political speech. It might require winnowing political from non-political discourse in a book that patently tries to intertwine the two. Moreover, *The Public Burning* was written and received as a novel, not as a political tract. If the Meiklejohn theory would protect it only because of its fortuitous (if undeniable) political import, one is left feeling that other—less obviously political—works of psycho-history and psycho-biography are left in jeopardy. In short, this theory is useful but inelegant for present purposes; it protects works such as *The Public Burning* for the wrong reason.

A second possible solution is to immunize the printed word as such from libel claims when the work concerns matters of political—perhaps even a more generalized public—interest. There is much to be said for this approach, for, in today's society, the picture—especially the televised picture—has a provably greater impact and a greater capacity for “sting” than does the written word. Indeed, many of the cases to be discussed in the remainder of this Essay, especially the more recent ones, have involved the visual, rather than the written medium (indeed, these cases have mirrored plaintiffs' greater concern for the consequences of visual rather than written defamation where both media had presented the same material).³⁶ Of course, the courts have distinguished between the two media, at least for certain constitutional purposes, and have recognized the differing effects of film and print upon the public consciousness.³⁷ Adapting such distinctions to the law of libel could lead to the result that *The Public Burning* would pass muster as a novel, yet remain defamatory if produced as a motion picture or television special. Such a solution, though desirable from the novelist's point of view, is not likely to be adopted. The “sting” of the written word, especially in the mass media, is still of great judicial concern. There has been too little discussion of the relevance of the medium in the realm of libel,³⁸ although greater sensitivity has been

³⁶ See cases cited in note 44 *infra*.

³⁷ See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

³⁸ Instead, current dispute centers upon such issues as what events and which participants, as the subject matter of speech, entitle the speaker to *Sullivan* protection of negligent misstatement. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Gertz* looked to voluntary participation by the individual claiming libel in an event of “public controversy.” *Quaere*: What is an event of public controversy? How much general notoriety must a public figure command before he or she may be deemed a public figure for all purposes? *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), demonstrates that such questions are not apt to be easily or consistently answered.

shown in other areas of law.³⁹ There is still an overweening preoccupation with the protection of so called "private" conduct, at least in the law of libel.⁴⁰

A third approach is to afford immunity to novels and scholarship as exceptional modes of expression within the print medium. After all, the novel advertises itself as fiction—the product of one artist's imagination—while the newer academic disciplines label themselves speculation. Psycho-history would, in any event, be protected as fair comment to the extent that it is based upon scrupulous adherence to the facts.⁴¹ Wholesale immunization of particular *genres* of speech is not likely to be adopted for much the same reason that a new theory of freedom of the print medium from libel is unexpected: courts have been too solicitous of the reputational interests of private persons to assume that whole categories of expression deserve constitutional exception from libel liability.

No, it is more likely that increased judicial protection will occur slowly, essentially through the further refinement of common law defenses—defenses that are peculiarly relevant to the novel of faction. These defenses involve extant rules concerning sufficient "identification" of the person allegedly libeled, fair comment, and burlesque and parody as exceptions to the "ridicule" wing of libel. An understanding of the scope of these defenses, especially as they have responded to changing times, will clarify the problems posed by the novel of faction. If a constitutional decision—either wholly insulating that format or not—is eventually rendered, it will depend in large part upon a full understanding of these defenses.

³⁹ One looks naturally to copyright law. See, e.g., Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. REV. 1180, 1197 (1970) (unique expressiveness of photograph provokes special first amendment problems). One of the unsettled problems of copyright law is whether parody and burlesque renditions of a copyrighted work are saved from infringement by the fair use doctrine. Compare *Benny v. Loew's, Inc.*, 239 F.2d 532, 537 (9th Cir. 1956), *aff'd by an equally divided court sub nom. Columbia Broadcasting System, Inc. v. Loew's, Inc.*, 356 U.S. 43 (1958), with *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 352-54 (S.D. Cal. 1955). See Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225 (1962); Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585 (1956).

⁴⁰ "[T]o extend the *Times* doctrine to include every aspect of a person's private life is an unfavored extension" *Buckley v. Esquire, Inc.*, 344 F. Supp. 1133, 1134 (S.D.N.Y. 1972). "The publication in question related strictly to his public character. It made no reference to his private life" *Time, Inc. v. Johnston*, 448 F.2d 378, 380 (4th Cir. 1971) (article about one basketball player "destroying" the career of another).

⁴¹ A separate inquiry is *how many* facts need be available to raise a fair comment defense for psychological speculation.

III. PROTECTION FOR THE NEW LITERATURE UNDER EXISTING TENETS OF LIBEL LAW

A. Fiction and Libel

Fiction as an art form enjoys no immunity from traditional principles of libel. "Reputations may not be traduced with impunity [even] under the literary form of a work of fiction . . ." ⁴² Although there may be substantial difficulties in establishing that a particular fictional defamation was "of and concerning" the plaintiff, once that hurdle has been overcome, liability has followed. As one court bluntly put it, the remedy for the creative writer "is to abstain from defamatory words." ⁴³ Of course, the traditional fiction case has arisen in the context of the use of a fictionalized name in the *roman à clef* situation. ⁴⁴ Perhaps because so many of the leading

⁴² *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 65, 126 N.E. 260, 262 (1920).

⁴³ *Id.* at 64, 126 N.E. at 262 (citations omitted).

⁴⁴ An extreme case of liability for use of a fictional name similar to, though not identical with, plaintiff's occurred in *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920). A "sensational novel" depicting a character named "Cornigan" as an "associate of low and depraved characters" was actionable even though defendant "was unaware of . . . [plaintiff's] existence or that it was written 'of and concerning' any existing person." *Id.* at 62, 63, 126 N.E. at 262.

In *Callahan v. Israels*, 140 Misc. 295, 250 N.Y.S. 470 (Sup. Ct. N.Y. Co. 1931), plaintiff Neil Callahan, fictionalized as Ralph Halloran, had a good cause of action. The classic case is *Yousoupoff v. MGM Pictures, Ltd.*, 50 T.L.R. 581 (C.A. 1934), wherein the "real" "princess Natasha," a former Russian noblewoman, won the staggering sum of £ 25,000 based upon her depiction as either a rape or seduction victim of the notorious Rasputin prior to the Russian Revolution. Lord Justice Scrutton, in a *seriatim* opinion, held that a depiction of an imaginary person, a "mere type," would not be libelous, but that a publisher of a libel could lose if "evidence is produced that reasonable people knowing some of the circumstances, not necessarily all, would take the libel complained of to relate to the plaintiff. . . ." *Id.* 582-83. Lord Justice Scrutton dismissed MGM's argument that to say a woman was raped was not libelous with the acerbic observation "I really have no language to express my opinion of that argument" *Id.* 584. Lord Justice Green found that the depiction "could apply to no one but the plaintiff" and that "those who knew anything whatsoever" would identify plaintiff. *Id.* 585. Although some of the incidents were fictionalized, the "main fact" was that Prince Yousoupoff had killed Rasputin. Lord Justice Slesser added that a "substantial and reasonable" number of persons had to connect plaintiff to the portrayal and that rape depictions were libelous. *Id.* 587.

Hostility toward the mass media has been evident in some of the decisions. In *American Broadcasting-Paramount Theaters, Inc. v. Simpson*, 106 Ga. App. 230, 126 S.E.2d 873 (1962), the court found that plaintiff, who had been assigned to guard Al Capone at a time when Capone escaped, had a cause of action against a television company that had dramatized the incident but had not used plaintiff's name. The court noted that the program (an episode of "The Untouchables") was a "dramatization of a 'stale' news event . . ." and found that "the semi-fictional portrayal of a real life event is fraught with the possibility that the public, or at least that segment of the public that knows the plaintiffs, will believe that the presentation refers to the plaintiff." *Id.* at 239, 243, 126 S.E.2d at 879, 881. The startling aspect of the decision lay in the fact that the plaintiff was neither named nor depicted, thus giving rise to the question whether the program was "of

cases are old, the matter has rarely been analyzed in first amendment terms.

B. *The Use of a "Real" Name in a Fictional Context*

What happens when an author chooses a name for a fictional character, and the name coincides with that of a real (and outraged) plaintiff? The answer depends upon whether the author has intended to defame a real person through the medium of fiction (and is reasonably understood to have so intended) or has inadvertently chosen the name solely for the purpose of creating a fictional character.

The classic case is *E. Hulton Co. v. Jones*,⁴⁵ a 1910 English decision of the House of Lords that permitted one Artemus Jones to sue a publisher who had used that name in an apparently fictional work. The *Hulton* standard turned not on the author's intent, but on the public's reasonable understanding of that intent:

The tort consisted in the use of language which people might reasonably think to be defamatory of the plaintiff.

and concerning" him. In *Kelly v. Loew's Inc.*, 76 F. Supp. 473 (D. Mass. 1948), plaintiff, a naval officer, sued on account of his depiction in a motion picture, "They Were Expendable". The movie was based on a novel of the same name; the book "purports to be and in fact is a substantially accurate report of 'historical events.'" *Id.* 477. Although plaintiff was dramatized in the movie as a courageous man, he was also depicted as headstrong and undisciplined (a characterization at variance with that in the book). Despite the favorable portrayal:

[T]he law recognizes that the professional man's interest in not having added to his career imaginary facts that tend to lessen his colleagues' opinion of him, rises superior to the motion picture producer's interest in embellishing a true story with colorful episodes not plainly stamped as imaginary but designed to increased the popularity of the motion picture.

.
There were so many truthful elements . . . that the contrast in adherence to professional concerns also tended to be true. Thus the representation was an extreme of the maxim, "the greater the truth, the greater the libel."

Id. 486-87.

Plaintiff recovered \$3,000 on account of such depiction.

In *Warner Bros. Pictures, Inc. v. Stanley*, 36 Ga. App. 85, 192 S.E. 300 (1937), plaintiff, a former member of the Georgia Prison Commission, sued the makers of the famous movie "I Was A Fugitive From a Chain Gang," on account of the depiction of him as a bribe solicitor. The strange aspect of the case lay in the fact that plaintiff never even claimed that he was portrayed in the movie, but rather claimed that he was libeled in the book from which the movie was drawn. Since the book and movie were prominently identified together and since the author of the book also wrote the screenplay of the movie, the court found a sufficient nexus at least to preclude dismissal of the bribery allegation.

⁴⁵ 26 T.L.R. 128 (1909), discussed in Smith, *supra* note 21. For a remarkably similar American case, see *Kerby v. Hal Roach Studios, Inc.*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942).

The appellants could not be heard to say that they did not intend to injure or defame the plaintiffs, and the jury might find that the defendants acted in good faith. But these statements did not constitute a defence to the action.⁴⁶

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

American courts have relied upon the case without making it clear whether the finding of liability depended solely upon the publisher's failure clearly to designate the work as fictional, or whether, in addition, the plaintiff was required to demonstrate that the work was "of and concerning" him.⁴⁷ After all, how many Artemus Jones' can sue the publisher? In the absence of a defense for inadvertently defaming a person, perhaps several plaintiffs—all claiming that certain resemblances between the character depicted and themselves led to a reasonable belief among their acquaintances that each and every plaintiff was the subject matter of the account—would prevail.⁴⁸ Presumably, in a case such as this, the standard disclaimer that the work was purely fictional would be dispositive; of course, it would not be if the plaintiff could show that the author *intended* to defame him.

Where a work is both fictional and intended to be such, courts have increasingly refused to rule in favor of plaintiffs bearing the same name as that of the fictional character. The process of artistic creation is a complex one that often involves the creation of characters bearing some resemblance to people the artist has known. "It is generally understood that novels are written out of the background and experiences of the novelist. The characters portrayed

⁴⁶ 26 T.L.R. at 129.

⁴⁷ See *Powers v. Durgin-Snow Pub. Co., Inc.*, 154 Me. 108, 144 A.2d 294 (1958); *Walker v. Bee-News Publ. Co.*, 122 Neb. 511, 240 N.W. 579 (1932); *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 65, 126 N.E. 260, 263 (1920) (danger is equal "whether such injury is the result of defendant's evil disposition towards [plaintiff] or a mere concatenation of adventitious circumstances.").

⁴⁸ See *Peck v. Tribune Co.*, 214 U.S. 185 (1909) (inadvertent use of plaintiff's picture in advertisement was "of and concerning" her and libelous); *Bridgwood v. Newspaper P.M.*, 194 Misc. 750, 87 N.Y.S.2d 482 (S. Ct. Queens Co. 1949) (fact that words were intended to and did refer to existing person does not require conclusion that they were not defamatory of another), *rev'd on other grounds*, 276 App. Div. 858, 93 N.Y.S.2d 613 (1949).

are fictional, but very often they grow out of real persons The acorn of fact is usually the progenitor of the oak, which when full grown no longer has any resemblance to the acorn."⁴⁹ Although this generalization has no necessary connection with the use of the *name* (in contrast to the depiction of other information) of a person, one court even recognized an artistic freedom to use part of a "real" name in the depiction of a fictional character.⁵⁰

The choice of fictional name—common or uncommon—for a fictional character has been protected, even where, by pure accident, a person bearing the same name as well as other identifiable characteristics of the fictional character, sued.⁵¹ This protection has not

⁴⁹ *People v. Scribner's Sons*, 205 Misc. 818, 821 (Magis. Ct. Kings Co. 1954) (dismissing criminal complaint by Joseph Maggio, the alleged model for the character of Angelo Maggio in "From Here To Eternity" for violation of right to privacy). Complainant served with James Jones, the author of the book and movie at issue, and claimed that certain scenes in the work did actually occur and involved him, but that other scenes were fictionalized.

⁵⁰ *Id.*

⁵¹ In *Clare v. Farrell*, 70 F. Supp. 276 (D. Minn. 1947), the court held that a newspaperman who had the same name as the name of the leading character, a writer, in a novel about the latter's "sordid experiences" had no cause of action. Although the name of the novel was also that of plaintiff, the court noted that "it is quite apparent from a reading of the book that it was intended as a work of fiction." *Id.* 277. Since all Minnesota cases "state the test of libel in terms of intent" and since the "story was intended to be entirely fictional . . .," and falsity was admitted by plaintiff, it was not "of and concerning" him. *Id.* 278, 277. Even if the author had been negligent, plaintiff could not have prevailed. Bewilderingly, the court found that had the author intended "to write of and concerning the plaintiff, the result . . . would appear to be no different." *Id.* 277. *Jones v. Hulton*, 26 T.L.R. 128 (1909), and *Harrison v. Smith*, 20 L.T.R. (n.s.) 713 (1869), were distinguished on the ground that the authors intended to write of real people. There would be liability if the intent were to write about a real person, a "fictional" name were used, and another person bearing that name sued.

In *Smith v. Huntington Pub. Corp.*, 410 F. Supp. 1270, 1272 (S.D. Ohio 1975), the court held that, in a situation involving a "remarkable set of facts" the use of some real names in a newspaper story labelled fictional was not libelous. The "remarkable set of facts" were that the story, undoubtedly defamatory, used names of real people, in a small town, identified the age the child plaintiff correctly, and identified the mother as a participant in a drug abuse program. Citing *Clare*, the court-declared test was whether an average reader "might reasonably believe that the article concerned the plaintiff on the basis of the age, residence, and name." *Id.* 1273. The "fictional" label attached to the piece, while not a complete defense, raised the issue whether "a reasonable person could reasonably believe that the article referred to the plaintiff." *Id.* 1274. Applying Illinois' "innocent construction rule" the court relied upon "the obvious and plain meaning of the [disclamatory] words therein" to grant summary judgment for defendant. *Id.*

Prior to *Sullivan*, in *Wheeler v. Dell Pub. Co.*, 300 F.2d 372 (7th Cir. 1962), the Seventh Circuit found that plaintiff, allegedly depicted in a novel, "Anatomy of a Murder," a "fictionalized version" of a famous trial, could not recover since "any reasonable person who . . . was in a position to identify Hazel Wheeler with [the fictional] Janice Quill would more likely conclude that the author created the latter in an ugly way so that none would identify her with Hazel Wheeler." Since "suggestion is not identification," the depiction was not "of and concerning" plaintiff even though the "fictional locale is fairly identifiable with the actual." *Id.* 376, 375.

been extended to publications where it is not clear that the name is fictional and is intended to be fictional.⁵² In the latter case, the *Hulton* rationale has prevailed. With this one exception, modern libel law has largely repudiated the doctrine that it "is not so much who was aimed at as who was hit"⁵³ in the case of fiction.

The seemingly reasonable result thus reached, however, does not contemplate—or protect—a work of fiction like *The Public Burning*. No doubt Coover intended to write fiction, yet his selection of named historical personages as principal characters was hardly inadvertent, and the developments noted above—which immunize writers of fiction from suit by real people fortuitously named—simply will not be sufficient.

C. Names and Symbols: "Real" Names in Hypothetical Contexts

An inevitable attribute of fiction is the use of real names (and the persons they represent) to depict not only actual, but often symbolic, conduct. Thus, for instance, a reader of *The Public Burning* could reasonably conclude that the "Richard Nixon" depicted therein is an amalgam of the real Richard Nixon and a symbolic addition. The amalgam poses special problems for the law of libel. Presumably, a parody of Richard Nixon—wherein Nixon's known speech and conduct are mimicked or exaggerated—would be protected as fair comment.⁵⁴ In contrast, the choice of Richard Nixon as a vehicle for a wide-ranging commentary upon various aspects of American life may simply be deemed to be too arbitrary a symbol to withstand a claim of defamation.⁵⁵ After

⁵² E.g., *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942).

⁵³ *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 63-64, 126 N.E. 260, 262 (1920).

⁵⁴ If not, then a generation of humorists, including Lenny Bruce and David Frye, would have been put out of business. If not, then Gore Vidal's play, "An Evening with Richard Nixon And . . ." would have been subject to liability. Interestingly, the play only used Nixon's real words; the true comedy (and savagery) came in the physical portrayal of Nixon. A leading American novelist, Philip Roth, parodied Nixon's style in *Our Gang*: "Our Gang is out to destroy the protective armor of 'dignity' that shields anyone in an office as high and powerful as the Presidency But rather than accept his 'official' estimate of himself, which we see for Mr. Nixon is very regal indeed, I prefer to place him in a baggy-pants burlesque skit. It seems to me more appropriate." P. Roth, *On Our Gang*, in *READING MYSELF AND OTHERS* 46-47 (1975).

That such expression deviates from traditional forms of political commentary or may appear more entertaining than informative does not alter its protected status. *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 449-50, 299 N.Y.S.2d 501, 507-08 (Sup. Ct. N.Y. Co. 1968). See also *Winters v. New York*, 333 U.S. 507, 510 (1948).

⁵⁵ In a similar context, defendant claimed that his work did not infringe plaintiff's copyrighted song but merely burlesqued it. The court rejected this defense: "Defendants may have sought to parody life, or more particularly sexual mores and

all, why pick on a living person? Why not create a fictional one, if the object is to comment upon a broad phenomenon? If Coover could create a mythical figure to sodomize "Richard Nixon," why could he not create an equally mythical American politician, not called Richard Nixon, to be the object of the sexual act? Yet choosing among such options constitutes a significant part of the creative process. It is the general statement condensed into and suggested by one familiar personality that lends the book its driving force, and no wholly fictional character could embody as persuasively the contradictions and illnesses of the American psyche of the 1950's. Indeed, Nixon is portrayed as being as much a victim as a perpetrator of the anti-communist hysteria of that era. In that role, he is at times sympathetic, at times ludicrous, at times calculating and devious, but always complex.⁵⁶ What is lost in sharply-focused satire is gained in the ability to generate an image of a whole society in one character.

The novel of faction is not unique in its refusal to acknowledge a distinction between the public self and the private self. It is a phenomenon of the modern novel, and, indeed, of modern popular culture as well. Television talk shows, popular magazines, and confessional best sellers by celebrities exemplify the trend toward self (at times, even shameful) exposure.⁵⁷ "Serious" best sellers about Richard Nixon speculate about his marital sex life, and other books probe his mind.⁵⁸ Although Nixon was unique in his willingness to expose otherwise private aspects of his life⁵⁹—perhaps to the point of his waiving any claim to privacy—there is an "inherent difficulty . . . in determining which characteristics of a public figure, particularly of a public official, do in any way affect his public posture and consequently, his public activities."⁶⁰ Certainly, in a

taboos, but it does not appear that they attempted to comment ludicrously upon . . . " a song, that which provided the vehicle for the parody. *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 453 (S.D.N.Y. 1976).

⁵⁶ After discovering that the prosecution had to do "a lot of backstage scene-rigging . . .," the fictional Nixon regrets that the Rosenbergs had to die. R. COOVER, *THE PUBLIC BURNING* 81, 84 (1977). When he meets Ethel Rosenberg, he uses her first name with "feeling" and realizes that "I really didn't want her to die"; they end the scene by crying together. *Id.* 433, 442.

⁵⁷ See D.J. BOORSTIN, *From Hero to Celebrity: The Human Pseudo Event*, in *THE IMAGE* 45-76 (1962).

⁵⁸ E.g., C. BERNSTEIN & R. WOODWARD, *THE FINAL DAYS* (1976); C. BERNSTEIN & R. WOODWARD, *ALL THE PRESIDENT'S MEN* (1974); J. DEAN, *BLIND AMBITION* (1976).

⁵⁹ R. NIXON, *SIX CRISIS* (1962).

⁶⁰ Naughton & Gilbertson, *Libelous Ridicule by Journalists*, 18 CLEV. ST. L. REV. 450, 455 (1969).

post-Sullivan world, the developments of both popular and serious culture argue for legal recognition of the blurring of traditional lines between the inner and the outer selves.

If both popular and serious culture sanction an inquisitiveness about public figures' private lives, then the scope of artistic license must be delineated more broadly than it has been. Community standards have always been relevant to a determination of precisely what is libelous and courts have often recognized that such standards may leave much to be desired: "[T]he segment of the public which thinks odiously of a plaintiff because of the facts stated in the [defendant's] publication . . . [need not be] 'right-thinking' [so long as] it be 'substantial' and 'respectable.'" ⁶¹ Thus, "the community in truth is not highly judicial as to the factors which in combination form the opinion or reputation of a man held by his fellow men." ⁶² Although this axiom has often been utilized to find liability in the case of ambiguous utterances, it also suggests that there is a sense of irony within our own psyches that appreciates—perhaps craves—crass insult of those in high positions. How different is the literary deflation of historical persons from the more generally-directed—and therefore non-libelous—satire of, say, Jonathan Swift?

To ask a satirist to be in good taste is like asking a love poet to be less personal. Is *The Satyricon* in good taste? Is *A Modest Proposal*? Swift recommends the stewing, roasting, and fricaseeing of one-year old children How nasty and vulgar that must have seemed Imagine how this went down in polite society: "A child will make two dishes at an Entertainment for Friends; and when the Family dines alone, the fore or hind quarter will make a reasonable dish, and seasoned with a little Pepper or Salt will be very good Boiled on the fourth Day, especially in Winter" Now that's considered Literature. It's called Swiftian. Back in 1729 it probably seemed, to a lot of Swift's contemporaries, bad taste and worse.⁶³

Finally, the judiciary should be aware of the hypocrisy factor: juries may well find liability for works they publicly abhor but

⁶¹ *Herrmann v. Newark Morning Ledger Co.*, 49 N.J. Super. 551, 555, 140 A.2d 529, 531 (1958). Plaintiff was depicted as a supporter of municipal employees' right to plead the fifth amendment, and as sympathetic toward communists: "We must take public opinion and mental reactions as we find them in living society, not as one might visualize them in a Utopia." *Id.* at 558, 140 A.2d at 532.

⁶² *Lyman v. New England Pub. Co.*, 286 Mass. 258, 262, 190 N.E. 542, 544 (1934).

⁶³ P. ROTH, *supra* note 54, at 47.

secretly enjoy. Proper instructions regarding actual rather than ideal community standards would probably be required in order to preclude such a result, especially in cases involving serious works of art.⁶⁴

Although there have been no reported cases involving factionalization, insofar as that format obviously distorts what is known and clearly creates the verbal equivalent of an optical illusion about a person, it strongly resembles the situation in *Burton v. Crowell Publishing Co.*⁶⁵ In that case, a distinguished Second Circuit panel concurred with Judge Learned Hand's finding that a picture of plaintiff (in an advertisement) holding a saddle in such a way as to make it appear that the pommel was an extension of his genitalia was "grotesque, monstrous, and obscene"⁶⁶—and libelous. Although "[n]obody could be fatuous enough to believe any of these things; everybody would at once see that it was the camera, and the camera alone, that had made the unfortunate mistake . . . [so that the ad was] patently an optical illusion . . .,"⁶⁷ the resulting picture exposed the plaintiff to overriding ridicule. This would augur badly for ludicrous depictions in the novel of faction, except that Judge Hand shrewdly noted that the portrayal resembled "a verbal utterance which expressly declared that it was false."⁶⁸ The latter, he observed, could be "so guarded [as not] to carry any sting, but the same is not true of caricatures" ⁶⁹ For Judge Hand, one

⁶⁴ It is hardly an ideal world in which juries are asked to employ "community standards" to such questions as whether a work is a "true parody or a mere subterfuge," Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. BAR REV. 1130, 1152 (1955), or whether a character is merely being held up to ridicule or, rather, being used as a vehicle for "higher truths." It seems unlikely that the guidelines will be any more specific than those sanctioned in the "serious literary . . . value" inquiry in obscenity cases. *Miller v. California*, 413 U.S. 15, 24 (1973). See *Hamling v. United States*, 418 U.S. 87 (1974).

⁶⁵ 82 F.2d 154 (2d Cir. 1936). See also *Dall v. Time, Inc.*, 252 App. Div. 636, 300 N.Y.S. 680, *aff'd*, 278 N.Y. 635, 16 N.E.2d 297 (1937), in which *Time* magazine had analogized the suicide of a prominent foreign public official to the hypothetical suicide of plaintiff, a well-known American. Defendant argued that the "purely imaginary and supposed parallel tragedy . . . was published without malice solely for the purpose of comparison. . . ." *Id.* 682. Despite the fact that it was "obviously fictitious, a mere figment of the writer's imagination. . .," *id.* 685, the result was to expose plaintiff to ridicule, and the presentation was deemed to be libelous.

⁶⁶ 82 F.2d at 154.

⁶⁷ *Id.* 155.

⁶⁸ *Id.*

⁶⁹ *Id.* "Such a caricature affects a man's reputation . . . the association so established may be beyond repair; he may become known indefinitely as the absurd victim of this unhappy mischance." *Id.*

See also *Zbyszko v. New York American, Inc.*, 228 App. Div. 277, 239 N.Y.S. 411 (1930) (photograph of well-known wrestler placed next to "hideous looking"

picture was indeed worth a thousand words. Would a plethora of "verbal utterances" be "so guarded" in a serious and complex work of literature so as to constitute something more than caricature? Not so in 1936 or a few years later, but perhaps it would be today. Ten years after *Burton*, a derogatory and untrue picture, when considered in the context of an article that was both true and favorable to the plaintiff, was held not to be libelous, in *Blake v. Hearst Publications, Inc.*⁷⁰ The case demonstrates that any creative work—including a work of faction—must be judged as a whole in ascertaining whether an isolated passage is libelous.

D. The "Of and Concerning" Requirement

One possible defense to an action attacking a novel of faction is the assertion that the symbolic portrayal in question is not "of and concerning" the plaintiff. The "of and concerning" requirement posed a substantial dilemma for plaintiffs in the traditional fiction cases, which dealt with works that did not utilize the complainants' real names. In such a case, the plaintiff must demonstrate "considerable truth" in order to create the requisite identification with the ostensibly fictional character, while simultaneously claiming defamatory falsity.⁷¹ This curious paradox has had the effect of affording considerable protection to publishers.⁷²

ape in article contending that the man was "[n]ot [f]undamentally [d]ifferent from the [g]orilla in [p]hysique," *id.* at 278, 239 N.Y.S. at 412, held libel *per se*.

⁷⁰ 75 Cal. App. 2d 6, 170 P.2d 100 (1946). Plaintiff was a counter-espionage agent in World War II, and a cartoon depicting him as disheveled and in a disguise, though not accurate, accompanied a favorable article. "Obviously, the cartoons were not meant to be a true portrayal of [plaintiff's] . . . physical appearance, but rather were intended to represent the part he played as a counter-spy." *Id.* at 11, 170 P.2d at 103.

⁷¹ Cases on this point, demonstrating the decisiveness of factual nuances, are legion. For example, in *Wright v. R.K.O. Radio Pictures*, 55 F. Supp. 639, 640 (D. Mass. 1944), a motion picture derived from a novel changed just enough names and incidents to be immune to a libel claim. "The motion picture omitted or changed a lot of details which might have served to tie up [plaintiffs'] . . . characters with the characters in the book." A critical finding was that there was no evidence that anyone in plaintiffs' community thought that the movie characters "portrayed or identified those plaintiffs." *Id.* 641.

The Fourth Circuit, in a post-*Sullivan* opinion, found that an "obvious work of fiction" in a magazine article that utilized names of actual streets and places did not identify plaintiff sufficiently to be "of and concerning" him, since the person depicted was of a different age and there was no parallel between the real and the fictional character. *Middlebrooks v. Curtis Pub. Co.*, 413 F.2d 141, 143 (4th Cir. 1969). The court cautioned that "of course the fictional setting does not insure immunity when a reasonable man would understand that the fictional character was a portrayal of the plaintiff." *Id.* See P. WITTENBERG, DANGEROUS WORDS 87-92 (1947).

⁷² Thus, a "wholly fictional . . . 'narration of imaginary events' " consisting of the "portraiture of imaginary characters" with "no attempt . . . directly or inferentially

In non-fictional treatments, the "of and concerning" requirement has presented problems similar to those involving the "inadvertent" identification situations. Is the publication "of and concerning" the mistakenly named person (often where his name uncannily resembles that of the intended person) or is the work "of and concerning" the intended person? If the former, should some negligence principle be applied, or should the publisher shoulder the risk of mistake under all circumstances? The difficulty is, of course, compounded by the fact that a "real person" was named, and may be further complicated by the fact that what is known about that person may bear some resemblance to the facts furnished in the depiction. Oliver Wendell Holmes simply applied the common law rule that the "inevitable consequence" of a libelous publication was to defame the person actually named.⁷³ For Holmes, liability "in tort for the natural consequences of a manifestly injurious act" dictated the results.⁷⁴ Holmes' opinion was a dissenting one in a case where the majority found that the publication was, in fact, "of and concerning" only the intended person.⁷⁵ The interesting issue is, of course, whether *anyone* bearing the name in question (a large number of potential plaintiffs, if the name were a common one) could sue, at least where there were other resemblances. Could both the person actually named and the person intended have sued for libel had the statement been false as to both? Since the majority of jurisdictions ruling on this issue have adopted Holmes' view, the question is not an idle one.⁷⁶

to create any other impression . . .," and with no resemblance between plaintiff and any character, precluded recovery when plaintiff's business name was fleetingly used in a television crime drama. *Landau v. CBS*, 205 Misc. 357, 360, 128 N.Y.S. 2d 254, 257 (Sup. Ct. N.Y. Co. 1954) (quoting 4 New English Dictionary 187 (Oxford 1901)) (citations omitted).

⁷³ *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 301, 34 N.E. 462, 465 (1893) (dissenting opinion). The article had stated that "H.P. Hanson," the plaintiff, a real estate broker, was in prison when it intended to name "A.P.H. Hanson," also a former real estate broker.

⁷⁴ *Id.* at 303, 34 N.E. at 465.

⁷⁵ The court feared that any person named "H.P. Hanson" could sue so that "one who has justifiably published the truth of a person might be liable to several persons of the same name, of whom the language would be untrue." *Id.* at 299, 34 N.E. at 464 (opinion of the court).

⁷⁶ See, e.g., *Whitcomb v. Hearst Corp.*, 329 Mass. 193, 107 N.E.2d 295 (1952) (mistake in magazine article as to the identity of an American soldier court-martialed in Germany); *Coats v. The News Corp.*, 355 Mo. 778, 197 S.W.2d 958 (1946) (mistaken use of plaintiff's picture in article about jailbreak by person with same name as plaintiff); *Laudati v. Stea*, 44 R.I. 303, 306, 117 A. 422, 424 (1922) ("The question is not who was aimed at, but who was hit."); *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920). See generally W. PROSSER, *TORTS* § 113 (4th ed. 1971).

If the novel of faction were to be classed with the cases of reportage that generated the broad, objective "of and concerning" test, it would be unsheltered in the realm of libel. There are reasons, however, why the characters in a book like *The Public Burning* should not be considered to be "of and concerning" their real-life namesakes. First, it is error to assume that, because a work of faction impresses one as somewhat "historical" or "realistic," it is any less fictional than the purest fantasy or romance.⁷⁷ Coover's mode of expression—his naming of names—is but one novelist's device for representing reality; it is a device to engage the reader; it is a literary genre. For the law to approach it any differently than it does conventional fiction⁷⁸ would be to construct a distinction without a difference. A second and related point derives from the fundamental principle of literary criticism that a first-person narrator is not to be identified with the real-life author. Indeed, the ironic distance created between author and *persona* can be one of the most telling effects of any fiction. Just as a first-person narrator is not the author, a named third person narrator—"Richard Nixon"—is not (to the literary, if not the legal mind) the historical person. The distance between the speculative "Nixon" of *The Public Burning* and the historical person is obvious and pointed; what makes good literary sense should have some legal relevance.

E. False Comment as Fair Comment

The novel of faction is a form of social and political criticism. Often, the author describes opinions in the form of fictionalized facts, since that form of expression is inherent in the novel as an

⁷⁷ Professors Scholes and Kellogg operate under this same principle in describing 19th century fiction:

The novel's great virtue lay in finding a way to combine the tragic concern for the individual with the comic concern for society. That the novelists called this impulse "realism" and felt that they had arrived at the ultimate way of representing "reality" must not deceive us. Theirs was simply a new decorum, more easily achieved in narrative than drama, and itself subject to alteration as new ways of conceiving of the individual and society became available. The new sciences of psychology and sociology had their inevitable effect on the artistic representation of the individual and society, providing new schemes of meaning and new kinds of plotting for the use of narrative artists; but they also disputed with art for the control of the representation of actuality, driving both narrative and dramatic art ultimately away from essentially mimetic or realistic formulations.

R. SCHOLES & R. KELLOGG, *supra* note 10, at 231. The psychological novel, and Coover's similar exposure of personal and national psyches, are the end point of the process described by Scholes and Kellogg. That such present modes are also "simply a new decorum" should be obvious.

⁷⁸ See text accompanying notes 51-53 *supra*.

art form. Speculation about motives is rife, as it is in psycho-history and psycho-biography. To understand whether the novel of fiction is fair comment, it is necessary to understand the origin of the rule and modern developments surrounding it.

At least a century and a half prior to *Sullivan*, the courts had recognized that prohibition of criticism of public figures or creative or performing artists could lead to a virtual monopoly in the realm of ideas. As one early court put it:

[Authors] should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinions respecting it. This would tend to perpetuity of error.⁷⁹

The common law privilege in its majority formulation is said to have encompassed only statements of opinion, with a substantial minority of courts extending the privilege to false statements of fact made without malice about public servants.⁸⁰ Some cases maintained that vituperative opinion might be libelous even if premised on true facts.⁸¹ In any event, tradition has given way to something approaching *carte blanche*, at least as to vigor of expression,⁸² and what might be called an ethic of free competition in ideas has steadily developed into a quasi-constitutional protection for strongly-worded criticism of public or artistic affairs. Under the

⁷⁹ *Carr v. Hood*, 1 Campb. 354, 357 (1808), *quoted in* *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1047 n.4 (S.D.N.Y. 1975), *aff'd mem.* 538 F.2d 309 (2d Cir. 1976). Among the myriad pre-*Sullivan* common law fair comment cases are *McCarthy v. Cincinnati Enquirer, Inc.*, 101 Ohio App. 297, 136 N.E.2d 393 (1956) (newscaster leading local antifuoridation campaign is "public figure" of whom facetious criticism is protected as fair comment) and *Hartmann v. Boston Herald-Traveler Corp.*, 323 Mass. 56, 61, 63, 80 N.E.2d 16, 19 (1948) (articles condemning peace movement during wartime protected, as "[f]air comment may be severe and may include ridicule, sarcasm, and invective.").

⁸⁰ *W. PROSSER, supra* note 76, at 819-20. The minority rule evolved into the constitutional privilege. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸¹ *E.g.*, *Maidman v. Jewish Publications, Inc.*, 54 Cal. 2d 643, 649, 355 P.2d 265, 268, 7 Cal. Rptr. 617, 620 (1960). The court held that "[c]omments, opinions and criticisms may be defamatory even though based upon true or privileged statements of fact. The publisher is liable unless the comments themselves are privileged." Thus, an editorial containing "sarcasm and derision" about a particularly tender subject—a lawyer's knowledge of his own religious practices—was found to be actionable libel. *Cf. Miami Herald Pub. Co. v. Brautigam*, 127 So. 2d 718 (Fla. Dist. Ct. App. 1961) (absolute factual truth predicate to invoking privilege for vitriolic comment on public official).

⁸² *Beauharnais v. Pittsburgh Courier Pub. Co.*, 243 F.2d 705, 706, 708 (7th Cir. 1957) (calling plaintiff, outspoken racial segregationist, "sinister" and "more dangerous than the nation's worst gangster," is fair comment despite "strong language").

influence of *Sullivan*, increasing amounts of hyperbole and vituperation, formerly libelous, have been judicially transmuted into the category of protected opinion.⁸³ Even if the statement that a plaintiff's book is pornography implies that the plaintiff is a pornographer, the implication is protected.⁸⁴ Formerly rigid elements—especially those of absolute factual truth and “fairness” whereby only the public acts of the politician or the works of the artist could be legitimately criticized, and not his private life—have given way to newer, more flexible distinctions.⁸⁵ Some factual misstatement is

⁸³ See *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970) (“blackmail,” used as term of obvious hyperbole, constitutionally protected); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (“fascist” protected as opinion, though “liar” as applied to journalist is not); *Time, Inc. v. Johnston*, 448 F.2d 378, 384 (4th Cir. 1971) (use of figurative, hyperbolic speech by press protected); *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1048 n.5 (S.D.N.Y. 1975) (phrase “seeming hypocrisy” aimed at plaintiff's book protected as fair comment). But see *Edwards v. National Audubon Soc. Inc.*, 556 F.2d 113, 121 n.5 (2d Cir. 1977) (“paid liar” defamatory *per se*).

Prior to *Sullivan*, hyperbole directed at public figures was not always protected. *Lightfoot v. Jennings*, 363 Mo. 878, 254 S.W.2d 596 (1953); *Crosby v. Rockland County Citizen Pub. Co.*, 232 N.Y.S.2d 819 (Sup. Ct. Westchester Co. 1962), *mod. sub nom. Crosby v. Reilly*, 20 App. Div. 2d 561, 246 N.Y.S.2d 59 (1963).

⁸⁴ *Buckley v. Vidal*, 327 F. Supp. 1051 (S.D.N.Y. 1971).

⁸⁵ In *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A.2d 251 (Ct. Spec. App. 1975), *cert. denied*, 426 U.S. 907 (1976), the court noted that opinions *per se* were not immunized by *Sullivan* or *Gertz*. A newspaper that had rated a local school principal unsuitable for his job and had stated the standards for such judgment prevailed. “[T]he Supreme Court broadened the possible scope of the fair comment defense. It did not create an absolute privilege for all expressions of opinion.” *Id.* at 530, 343 A.2d at 262. Rather,

When such commentary is *not* based upon stated facts or upon facts otherwise known or readily available to the general public, it is treated as a factual statement and possible constitutional immunity is determined on that basis. Where the statements, however, are . . . based upon stated or readily known facts, their objective truth or falsity depends on the veracity of these underlying facts. Therefore, any determinations with regard to falsity or the presence of actual malice must look to the stated or known facts which form the basis for the opinion

Id. at 533, 343 A.2d at 264.

Kapiloff has been interpreted to mean that “[o]pinions based on false facts are actionable only against a defendant who had knowledge of the falsity or probable falsity of the underlying facts.” *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977). Thus, a publisher or a writer quoting someone else and who, in fact, has no knowledge or suspicion of falsity, is protected, at least where the published “allegations were not of such an extraordinary nature as would suggest a high probability of falsity.” *Id.* “Where a passage is incapable of independent verification, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for the truth.” *Id.* 914.

Even after *Sullivan*, one court found that an opinion about the value of a work of art must be based upon either known facts or facts readily available to the reader to whom the opinion is addressed, but that the critic is not required to state the facts under these circumstances. *Fisher v. Washington Post Co.*, 212 A.2d 335 (D.C. Ct. App. 1965).

increasingly permissible, and, indeed, for certain kinds of opinions, no factual basis need be stated at all.⁸⁶

A rule akin to "fair comment" has been developed to protect the dramatization and fictionalization of events of great public interest, in invasion of privacy cases.⁸⁷ In *Leopold v. Levin*,⁸⁸ both the motion picture and the novel *Compulsion*, based upon the famous Leopold-Loeb case (involving the notorious and wanton murder of a child in 1924) were immunized against an invasion of privacy claim brought by one of the killers. The similarities between *Compulsion* and the novel of fiction are substantial; the only difference is that *Compulsion* did not use the real names of the parties. In denying recovery to the plaintiff, the court alluded to the fact that "[w]hile . . . [*Compulsion*] was 'suggested' by . . . [the original case, it was] evidently fictional and dramatized . . .,"⁸⁹ a description that applies forcefully to the novel of fiction. The subject matter of *Compulsion* was one of "enduring public attention . . . [and] . . . an American *cause celebre*. . . ."⁹⁰ Despite the fictitious additions (going beyond the names of the killers), "the core of the novel and film and their dominating subjects were a part of the plaintiff's life which he had caused to be placed in public view."⁹¹ Fiction inevitably involves a judgment as to the "core of the work"; in *The Public Burning*, the "core" is the Rosenberg case, a matter certainly as notorious as the Leopold-Loeb killing. The *Levin* decision also found that the "fictionalized aspects of the book and motion picture were reasonably comparable to, or conceivable from facts of record . . . or minor in offensiveness when viewed in the light of such facts."⁹² Given the heavily "factual" context of *The Public Burning*, the same can be said of it. Other factors that supported the finding that no invasion of privacy had occurred were (a) the evident nature of the "fictional and dramatized materials," and (b) the fact that those materials "were not

⁸⁶ See *Golden North Airways, Inc. v. Tanana Pub. Co.*, 218 F.2d 612, 627 (9th Cir. 1954).

⁸⁷ These cases often verge on libel. Usually, the only difference is that the privacy action does not litigate reputational interests. A merger between the two theories may be accelerated by the Supreme Court's application of *Sullivan* to both, see authorities cited note 95 *infra*, and by *Firestone's* generous allowance of non-reputational damages, 424 U.S. at 460-61.

⁸⁸ 45 Ill. 2d 434, 259 N.E.2d 250 (1970).

⁸⁹ *Id.* at 445, 259 N.E.2d at 256.

⁹⁰ *Id.* at 441, 259 N.E.2d at 254.

⁹¹ *Id.* at 443, 259 N.E.2d at 255.

⁹² *Id.*, 259 N.E.2d at 256.

represented to be otherwise.”⁹³ The sheer mass of fact in *The Public Burning* may make it difficult to sort out historical fact from the author’s creations, yet this is so simply because fact and fiction together have become subject to the author’s personal vision; an implicit statement of the book is that factual history, stripped of its mythological component, does not tell the full story. The symbolic nature of the whole remains evident. Since, in *Levin*, the depictions were “substantially creative works of fiction,” the knowing or reckless falsity tests of *Time, Inc. v. Hill*⁹⁴ were held not even to be applicable to this particular literary form. Of course, *Levin* involved privacy rather than libel, but the thin line between the two should not justify a radically different result.⁹⁵ Indeed, the *Hill* privacy test is the same as the *Sullivan* libel test,⁹⁶ and the court held it to be simply irrelevant to a work of creative fiction.

Has a rule that might be termed the “any comment” test replaced the conceptual inadequacies of the fair comment formulation?⁹⁷ The expansion of fair comment to its outermost boundaries has not yet formally transformed it into a new doctrine; one has

⁹³ *Id.* at 445, 259 N.E.2d at 256.

⁹⁴ 385 U.S. 374 (1967). A pre-*Sullivan* case refused to find an invasion of privacy when a television network broadcast a “fictionalized dramatization based on the plaintiff’s conviction and pardon.” *Bernstein v. N.B.C.*, 129 F. Supp. 817, 819 (D.D.C. 1955). Although the “incidents were fictionalized for dramatic effect” and the actor portraying plaintiff resembled him as he looked twenty years prior to the program, plaintiff had no cause of action because

[i]f the telecast adhered to the facts, plaintiff has no cause of action, for there was no actionable invasion of his privacy by use of incidents in his life without identification. If the telecast was more fiction than fact, plaintiff cannot complain, for there was no identification of him as the central figure by defendant and nothing defamatory.

Id. 837 (footnote omitted). As in *Levin*, plaintiff’s name was not used. Unlike *Levin*, there was not even a suggestion that the portrayal was based upon plaintiff’s case. Since plaintiff had not sued for defamation, an interesting question is whether the last sentence quoted above would have precluded such an action for failure to meet the “of and concerning” requirement.

⁹⁵ See note 87 *supra*. Should *Sullivan* be applicable to “false light” invasion of privacy? See Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968); Silver, *Privacy and the First Amendment*, 34 FORDHAM L. REV. 553 (1966).

⁹⁶ 385 U.S. at 390-91.

⁹⁷ See W. PROSSER, *supra* note 76, at 820. In *Hogan v. New York Times Co.*, 313 F.2d 354 (2d Cir. 1963), the Times was held liable for describing a police raid upon a dice game as a fiasco and “keystone comedy.” The court found the evidence sufficient for a jury to find that the “Times’ sole purpose in publishing the article was to amuse its readers at the expense of plaintiffs.” *Id.* 356. The court even suggested that the story was not newsworthy, had only “entertainment value,” and that there was “no need that the story be written at all.” *Id.* A dissent contended that “the evidence must demonstrate that the Times’ sole purpose was to amuse its readers” and that, in this case, there was a “legitimate additional purpose.” *Id.* 358 (emphasis in original). The dissenting judge argued that it was “important to maintain unimpaired the privilege of poking fun at public officials.” *Id.*

only to read the *Goldwater* case to ascertain this.⁹⁸ Yet, it must also be remembered that *Goldwater* involved not a work of creative art, but a claim of clinical mental illness set out in the magazine *Fact*. Certainly, the edges of fair comment have become blurred in cases involving public figures, and there appear to be few remaining edges when creative art is considered.⁹⁹

It is ironic that the victor in the *Goldwater* case was the subject of unremitting satire—both verbal and pictorial—during his disastrous presidential campaign in 1964. Apparently, affixing the “scientific” label of insanity to his *persona* was an actionable event, while depicting his public policies as insane was not. The staple fare of satirists such as Russell Baker and Art Buchwald has, of course, been to sweep broadly, if gently. In times of great public passion, satire becomes bitter, caustic, and vituperative. The mordant satirist is regarded by his contemporaries as an exemplar of bad taste. To the satirist who “stings,” it is the world that is in bad taste. In the case of a Swift, a Molière, or an Orwell, history often agrees. Fair comment appears adequately to protect formal

⁹⁸ In *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), plaintiff, a United States Senator, sued *Fact* magazine for publishing an allegedly libelous article about him during a presidential campaign in which he was the Republican Party nominee. A group of psychiatrists was asked whether he was “psychologically fit” to be president and the “highly selective” results of that poll, purporting to find mental illness, were “edited” by defendants to impute such illness. Defendants’ use of secondary sources to support their findings was held not to be protected under *Sullivan*. The court cited two reasons for this. First, defendants either knew the secondary sources were “inherently improbable,” or had “obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports.” *Id.* 337. Second, one of the defendants had “added certain innuendos” to the quoted material, and “quoted other statements out of context in order to support his predetermined result.” *Id.* Since a false account of insanity or mental illness, even of public officials, is libel *per se*, plaintiffs, having proven a knowingly false account under *Sullivan*, prevailed. He was awarded \$1.00 compensatory damages, \$25,000 punitive damages against defendant Ginzburg, and \$50,000 punitive damages against the magazine.

Where clinical findings (or purported clinical diagnoses) of mental illness are not involved, loose accusations in the course of public debate may be protected. “We do not believe that the . . . viewers [of a television news program noted for controversy and pungency] would understand the words ‘paranoid’ and ‘schizophrenic’ to refer to an actual physiological or mental affliction of . . . [plaintiff].” *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314, 1329 (W.D. Pa. 1974).

⁹⁹ In *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. N.Y. Co. 1968), the court found that a commercial poster of a presidential candidate was protected against a claim of invasion of privacy (in the form of invasion of the right of publicity). Public officials or participants in the public arena “have traditionally been the fairest of all game for unbridled, unrestrained public comment and criticism ranging from the ridiculous to the scurrilous. Limitations upon the permissible in political expression are almost nonexistent.” *Id.* at 449, 299 N.Y.S.2d at 507. The poster was held to be “a form of public interest presentation That the format may deviate from traditional patterns of political commentary or that to some it may appear more entertaining than informing, would not alter its [constitutionally] protected status.” *Id.* at 450, 299 N.Y.S.2d at 507-08.

criticism of even bitter expression, but there is a conflict between fair comment and the "ridicule" wing of libel.

F. The "Ridicule" Wing of "Hatred, Ridicule, and Contempt"

The requirements for *prima facie* libel are traditionally met by an allegation that a person's reputation has been diminished by ridicule.¹⁰⁰ While "mere ridicule is not libelous . . . ridicule that injures Reputation—that has a tendency to deprive a man of normal social relations—is libelous."¹⁰¹ Since ridicule often refers to a characterization of a person rather than a statement of defamatory fact, it is permitted somewhat more leeway than is normally accorded solemn charges that engender hatred. A certain thick skin is needed in society. Also, ridicule, burlesque—deflation of the high, the mighty, and the pompous—has been, and remains, a unique art

¹⁰⁰ W. PROSSER, *supra* note 76, at 742-43 (citing cases). See, e.g., *Fowler v. Curtis Publ. Co.*, 78 F. Supp. 303, 304 (D.D.C. 1948); *Berry v. City of New York Ins. Co.*, 210 Ala. 369, 98 So. 2d 290 (1923) (irony may be libelous as form of ridicule); *Powers v. Durgin-Snow Publ. Co.*, 154 Me. 108, 144 A.2d 294 (1958) (plaintiff made out to be "odd or unusual character"); *Triggs v. Sun Printing & Publ. Ass'n*, 179 N.Y. 144, 71 N.E. 739 (1904) (parody of Romeo and Juliet ridiculing English professor is actionable).

One court found that humor could be divided into three categories: that which is intended to defame and can be readily so understood, that which does not intend to defame but which is susceptible to defamatory interpretation, and that which neither intends to defame nor is reasonably susceptible of such an interpretation. A statement that a well-known singer was an "iron-clad singing member of the Mafia" fell into the second category, but was not defamatory where all realized it was a joke. *Arno v. Stewart*, 245 Cal. App. 2d 955, 958, 54 Cal. Rptr. 392, 394 (1966).

The standards used in identifying "ridicule" are often elastic. For example, a woman's honor was protected in *McFadden v. Morning Journal Ass'n*, 28 App. Div. 508, 51 N.Y.S. 275 (1898), from a story alleging that plaintiff and another woman engaged in a rowing race to win the favor of a man. The somewhat fusty opinion found that plaintiff was depicted as "ridiculous, immodest, and forward . . . [which portrayal gave rise to the] suggestive suspicion that the woman guilty of such behavior was loose in conduct and ready for adventure, without regard to the becoming modesty of a woman." *Id.* 280. The court awarded plaintiff \$3,000 for libel *per se* (there being no proof of special damages) on the theory that "humor at the expense of the plaintiff, in holding her up to public ridicule" was actionable. *Id.* Similarly, in *Kirman v. Sun Printing & Publ. Co.*, 99 App. Div. 367, 91 N.Y.S. 193 (1904), an entirely fictitious story about a marriage which did not take place due to the groom's failure to appear "ridiculed" the alleged bride sufficiently to create liability.

¹⁰¹ R. PHELPS & E. HAMILTON, *LIBEL* 50 (1966). Ridicule "must be more than a jest, more than a mere shaft of humor; it must carry some kind of sting that harms a person's reputation." *Id.* "It is indeed not true that all ridicule . . . is actionable; a man must not be too thin-skinned or a self-important prig; but this advertisement [a photograph suggesting that a saddle pommel was an extension of a man's genitalia] was more than what only a morbid person would not laugh off; the mortification, however ill-deserved, was a very substantial grievance." *Burton v. Crowell Publ. Co.*, 82 F.2d 154, 155 (2d Cir. 1936).

form.¹⁰² Perhaps ridicule differs from other modes of libel in its clear signal that the matter described is not, and often cannot be, true.¹⁰³ If libel is a "passing off" of the false as true, then ridicule does not generally deceive.¹⁰⁴ Where it does deceive—in the "false

¹⁰² "[W]hile burlesque is a comparatively modern form of art dating to the late sixteenth or early seventeenth century, parody has been recognized as a distinct artistic creation almost from the very beginning of literature, dramatic or other." Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1133 (1955). For example,

poetical parody was cultivated by the Romans. Cervantes' *Don Quixote* began as a parody on the Spanish novel of chivalry

In the eighteenth century, Marivaux parodied the *Iliad*, and the works, ideas and methods of expression of Corneille, Racine, Voltaire, Rousseau and Beaumarchais, to name only the great, were parodied mercilessly

In English literature all the great poets from Chaucer onward wrote parodies.

Id. 1134-35.

¹⁰³ Plaintiff, in reality, is suing on account of "hurt feelings" rather than reputation. After all, the more bizarre and fabulistic the fictional depiction, the less likely is it that plaintiff would be scorned or his reputation jeopardized. The traditional rule is, of course, that a publication that "may be unpleasant . . . may annoy or irk . . . subject him to joke or to jest or to banter . . . even to the extent of affecting his feelings . . . in itself is not enough" where reputation is unaffected. *Cohen v. New York Times Co.*, 153 App. Div. 242, 138 N.Y.S. 206, 210 (1912) (false death notice, even if intentionally placed, not actionable). "The law seeks to compensate for damage to the person, the reputation, or the property of an individual. It cannot and does not undertake to compensate for mere hurt or embarrassment alone." *Flake v. Greensboro News Co.*, 212 N.C. 780, 788, 195 S.E. 55, 61 (1938) (mistaken placement of plaintiff's photo in advertisement for vaudeville show; she had consented to use of picture in magazine with sexual overtones). Yet, where an outrageous misrepresentation is present, at least one court has found that "[t]he gravamen of the wrong in defamation is not so much the injury to reputation, measured by the opinions of others, as the feelings, that is, the repulsion or the light esteem, which those opinions engender." *Burton v. Crowell Publ. Co.*, 82 F.2d 154, 156 (2d Cir. 1936).

The breadth of permissible damages for libel recognized by *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), may require re-evaluation of the entire question.

¹⁰⁴ "Passing off" under certain circumstances may be libelous. Where an advertisement used an imitation of the famous voice of a well-known entertainer, one court found that "[a] charge that an entertainer has stooped to perform below his class may be found to damage his reputation." *Lahr v. Adell Chem. Co.*, 300 F.2d 256, 258 (1st Cir. 1962). Since it is true today (even if it was not in 1962) that many prominent entertainers do commercials, this particular formulation of the libel rationale may be less persuasive now. See *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973). The court also alluded to the inferiority of the imitation and noted that a "manifestly inferior" one would be actionable. 300 F.2d at 259. Clearly, this rationale would survive contemporary standards. Since plaintiff had sued for invasion of privacy (actually invasion of a right to publicity) and unfair competition (the court found that a passing off was involved for this purpose), the matter is dictum. It is significant that post-*Lahr* decisions have emphasized *Lahr's* singular quality of voice, that made his situation not just a difference of degree but a difference in kind, in distinguishing other claims of passing off and finding them non-actionable. *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970) (television commercial using famous singer's voice imitation, in absence of competition between plaintiff and defendant and without copyright, held

attribution" cases—courts have moved unerringly to find liability.¹⁰⁵

Ridicule takes many forms; it may often be in "bad taste," a judgment that is invariably subjective. *Sullivan* recognized that, at least in commenting upon the acts of public officials, "caustic" speech "not always in good taste" is deserving of constitutional protection.¹⁰⁶

Ridicule is also unique in that it always involves falsity. To apply the *Sullivan* tests—tests premised on the speaker's regard for the truthfulness of his statement—to ridicule is plainly ludicrous. For instance, it would ban travesty—"a grotesque or debased imitation or likeness," an art form that puts "high, classic characters into prosaic situations, with a corresponding stepping down of the language."¹⁰⁷ Indeed, even the most gentle satire, since it is not true and is known by the artist not to be true, would be jeopardized. Although the courts have immunized certain forms of false statements, they have done so in cases of errors either of "ideas" themselves (there are, constitutionally speaking, no "false ideas") or of errors of purported fact. While the Warren Court's tolerance of factual misstatements in *Sullivan* may fruitfully be compared to the Burger Court's disenchantment with them in *Gertz*, any distinctions are irrelevant to the problems of intentional errors purveyed by ridicule.¹⁰⁸

non-actionable); *Davis v. Trans-World Airlines*, 297 F. Supp. 1145 (C.D. Calif. 1969).

Dean Leon Green has said that "perhaps the most comprehensive term in which the libel concept can be expressed is that of *misrepresentation* of the victim's personality." GREEN, MALONE, PEDRICK AND RAHL, *INJURIES TO RELATIONS* 373 (1959) quoted in *Netterville, Copyright and Tort Aspects of Parody, Mimicry, and Humorous Commentary*, 35 S. CAL. L. REV. 225, 260 n.150 (1962).

¹⁰⁵ The false attribution cases involve a "passing off" by one person of the name (or distinctive character) of another in a context that would lead to lowered public esteem of the person allegedly named. Thus, *Lahr and Kerby* are clearly in this realm, see note 104 *supra*. In the false authorship cases, there must be an imputation that the work allegedly produced was inferior. *Ben-Oliel v. Press Publ. Co.*, 251 N.Y. 250 (1929); *Gershwin v. Ethical Publ. Co.*, 166 Misc. 39, 1 N.Y.S.2d 904 (N.Y. City Ct. 1937). If the work is not inferior or does not otherwise lead to lowered public esteem, it may nevertheless be an invasion of privacy. See *Thompson v. G.P. Putnam's Sons*, 40 Misc. 2d 608, 243 N.Y.S.2d 652 (Sup. Ct. 1963).

¹⁰⁶ 376 U.S. at 269.

¹⁰⁷ D. McDONALD, *PARODIES* 557 (1966).

¹⁰⁸ "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth produced by its collision with error.'" *New York Times v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting J.S. Mill's *On Liberty*). Whatever the meaning of this statement, it clearly does not apply to later Court condemnations of "calculated falsehood."

The law of libel has made only a superficial distinction between ridicule that "bites" and gentler forms; yet it is apparent that the literature of faction will require a deeper and more sophisticated understanding.¹⁰⁹ The law, in general, has not carefully distinguished between satire, parody, burlesque, and travesty. True parody, for instance, "involves an imitation of the distinct style of an author, usually turning the style toward an inappropriate or ludicrous subject."¹¹⁰ It mimes the original style and is often "written out of admiration rather than contempt."¹¹¹ Since it is a somewhat exaggerated mimicry, and, in essence, is meaningful only to the extent that it is accurate, it probably would be fully protected under the evolving rules of fair comment. Thus, insofar as *The Public Burning* mimics Nixon's distinctive style and turns it toward "an inappropriate or ludicrous subject," the result is parody. The only real issue concerning parody is whether it can readily be interpreted as such or whether it is being "passed off" as the work of the parodied author; certainly, no one reading the literature of faction can possibly believe that Richard Nixon (or anyone else parodied) wrote or spoke the passages attributed to him.

Much of the literature of faction is travesty—"a grotesque or debased imitation or likeness," the casting of "characters into prosaic situations, with a corresponding stepping down of the language."¹¹² It is, historically, a low form of comedy—and, perhaps, less legally protectible than true parody. In *The Public Burning*, Nixon is often depicted in "prosaic situations," including those involving an attempt to wipe excrement from his shoe and his discomfort at the prospect of seducing Ethel Rosenberg.¹¹³ Since these situations involve embarrassment rather than true offensiveness, it would seem that even minimal constitutional or fair comment protections should be appropriate.

Burlesque, a more advanced art form than travesty, also performs an almost directly opposite function. While travesty trivializes, burlesque ludicrously exaggerates. It "aims at eliciting

¹⁰⁹ But see *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 452 (S.D.N.Y. 1976): "[T]he law permits more extensive use of the protectible portion of the copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original", quoting *Columbia Pictures Corp. v. NBC*, 137 F. Supp. 348, 354 (S.D. Cal. 1955). But, "[f]or the purposes of this opinion, the fine distinctions between burlesque and parody are ignored." 425 F. Supp. at 453 n.17.

¹¹⁰ D. McDONALD, *supra* note 107, at 557, 560.

¹¹¹ *Id.* xiii.

¹¹² *Id.* 557.

¹¹³ R. COOVER, *supra* note 56 at 264, 432.

laughter by caricature of the manner or spirit of serious works, or by ludicrous treatment of their subjects."¹¹⁴ Indeed, burlesque is often the subject matter of copyright infringement litigation, and has even been specially protected in those situations.¹¹⁵ Burlesque is linguistically the equivalent of ridicule, and is at once the art form that carries the greatest "sting" and the one most recognized as deserving of some constitutional protection.¹¹⁶ Much of the real controversy about the novel of fiction revolves about its elements of burlesque rather than travesty or parody. Indeed, *The Public Burning* itself is a form of fabulism or super-burlesque, and a flight not into the higher atmosphere of burlesque but into a literary stratosphere. It should be noted that most of the defamation questions not pertaining to Nixon directly but to the reams of celebrities named by Coover are connected to this particular event. The event is purely and unabashedly symbolic and the celebrities' names are used as pure symbols to depict an almost other-worldly concatenation of forces bearing down on destruction of the Rosenbergs as exorcism of our national devils. At this point, frenzy substitutes for humor and the orgiastic nightmare is capped by the sodomization of Nixon by an entirely mythical Uncle Sam.

Just as the magnitude of the event—the public execution of the Rosenbergs—rises beyond the conventions of humor and comment, so the use of names as "symbols" rises beyond the categories of libel law. While many of the incidental possible libels that dot the novel can be analyzed in terms of the conventional categories, the ultimate vision (or is it hallucination?) of the artist cannot. There is a "sting," but the sting is directed not at the historical

¹¹⁴ D. McDONALD, *supra* note 107, at 557-58. See *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 452 n.16 (S.D.N.Y. 1976).

¹¹⁵ "The law regarding fair use has been interpreted in various ways depending on the art form at issue. In burlesque, 'the law permits more extensive use of the protectible portion of the copyright work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original.'" *MCA, Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976) (quoting from and endorsing *Columbia Pictures Corp. v. NBC*, 137 F. Supp. 348, 354 (S.D. Cal. 1955)).

¹¹⁶ Parody has received substantial protection in the realm of copyright infringement. "[A]s a general proposition, we believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism." *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964) (emphasis in original). Citing the "historic importance and social value of parody and burlesque," the court held protected a "Mad Magazine" burlesque of a famous song writer's lyrics. Even the great interest in copyright protection was subordinated to "the greater public interest in the development of art, science and industry," at least where the parody recalled or conjured up the original without taking too much of it. *Id.* 544. See generally notes 39, 109 *supra*; M. NIMMER, COPYRIGHT § 145 (1976).

actors who participate in the phantasmagoria, but at the basis of the American national identity. It may well be that the plethora of names and the sheer density and intensity of the author's depiction and vision will immunize (or should immunize) his work from individual libel judgments. Had Coover chosen to limit his range of vision, had he chosen one celebrity to bear the weight of his onslaught, had he not painted Richard Nixon as a complex combination of sympathetic and sordid traits but more simply, had he written "of and concerning" Nixon or Kaufman or Cohn (or, for that matter, Bob Hope or Red Skelton, or . . .), the legal questions involved would have been more readily resolved. Since the author's message about our national character—a message that is constitutionally protected—completely transcends its medium (the use of celebrities' names which are, in themselves, symbols),¹¹⁷ this particular work of fiction deserves legal immunity from liability. It must be recognized that this is the kind of "hard case" that often makes, not bad, but rather, inadequate, law. The next author may not be as possessed of his demons so as to carefully distinguish between the *persona* and the symbolic meaning of the names used; the next author may not as clearly depict names as vehicles, or combine pity and sympathy with contempt to create a rounded "Richard Nixon"; the next author may choose to remain at ground or atmosphere level, rather than ascend to the realm reached by Robert Coover. While it may be difficult to predict judicial reaction to this or future cases dealing with faction, it is clear that modern literature will increasingly present unprecedented legal problems. There will be a next author and there will be some adjudication on the permissible limits to which he can go. Hopefully, exploration of these limits will be enhanced by an understanding that "vigorous, wide open, and robust" debate can take the form of creative art as well as scholarly discourse, and that some breathing space must be allowed to those artistic, literary, and

¹¹⁷ "Is there any basis for any inference on the part of rational readers or viewers that the antics engaging their attention are anything more than fiction . . . ?" *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 App. Div. 2d 452, 455, 256 N.Y.S.2d 301, 304 (1965), *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 508 (1965). The movie at issue, "John Goldfarb, Please Come Home," bears an uncanny resemblance to *The Public Burning*. It was a "broad farce" that contained no reasonable inference of any connection to the real Notre Dame.

It is always wise to remember a quote from Holmes: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918). This language was quoted in a libel case to preclude liability for language which, at one time, would have been regarded as egregiously defamatory. *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314, 1338 n.14 (W.D. Pa. 1974).

scholarly forms that press for recognition in our time. This is not to say that, presented with a libel action, the court's choice should always be for the artist. Rather, our goal should be to expose the often subtle ways that mechanical application of the law may ignore the writer's craft and constrain artistic freedom.¹¹⁸ Only then may we weigh the interests at stake more precisely and, one hopes, choose more wisely.

¹¹⁸ What Leon Edel has said of scientists is also true of lawyers and judges: It may, indeed be difficult for a man trained in science to accept a type of fiction which contains discontinuity and which scrambles its data; which . . . seems to be all clutter and chaos; but this is the way of consciousness, and one would have been even more surprised if the literary sensibility of our time had ignored the attempt of fiction to use symbolist methods and approach the condition of poetry.

L. EDEL, *supra* note 5, at 202.