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ARTICLES

GUESS WHO? REDUCING THE ROLE OF JURIES IN DETERMINING LIBEL PLAINTIFFS' IDENTITIES

NAT STERN[†]

INTRODUCTION

During the nomination hearings for now-Justice Brett Kavanaugh, considerable attention was drawn to a high school friend's memoir featuring a fellow student named "Bart O'Kavanaugh."¹ By the memoir's account, "O'Kavanaugh" in one episode blacked out—apparently from alcohol—on his return from a party.² For any number of possible reasons, Justice Kavanaugh did not bring a libel suit against the book's author. If he had, however, a crucial threshold issue—preceding questions of falsity and intent—would have been whether the memoir's portrayal of "O'Kavanaugh" amounted to a false depiction of Kavanaugh himself. In the parlance of defamation doctrine, Justice Kavanaugh would have to establish that the descriptions of O'Kavanaugh's behavior were "of and concerning" the Justice himself.³

Though Kavanaugh did not bring such a suit, the outcome of many other libel cases has hinged on whether expression that does not explicitly refer to the plaintiff can nonetheless be treated as defamatory. Much of this litigation arises from works that authors

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¹ See Matthew Haag & Rebecca R. Ruiz, *Mark Judge Says He'll Talk to the F.B.I. Here's What We Know About Him*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/mark-judge-kavanaugh-hearings.html>.

² See Dwight Garner, *What a Book Critic Finds in Mark Judge's 'Wasted' 21 Years Later; Critic's Notebook*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/books/wasted-mark-judge-memoir.html>.

³ See *infra* Part I.

and publishers describe as fiction but which plaintiffs contend contain defamatory representations of them.⁴ Another frequent source involves members of a group who claim that, because they have been collectively tarred, they have also been individually defamed.⁵ In these and other cases where plaintiffs contend that the defendant's description of repugnant conduct is tacitly *about* them, courts must first determine whether a jury could rationally find that a reasonable reader would ascribe that conduct to the plaintiff.⁶

This Article argues that the law should expressly recognize a more dominant role for courts in resolving the issue of plaintiff identity. Courts should not merely screen for minimum plausibility in plaintiffs' claims that derogatory expression falsely casts them in a harsh light even though it does not purport to describe them. Rather, courts should assertively employ First Amendment doctrine and a range of evidentiary tools to ensure that only genuinely ambiguous questions of plaintiff identity are submitted to the jury. A specific mechanism by which to effectuate this proposal would be to require by statute that allegedly defamatory statements *clearly refer* to a plaintiff as a substantive condition for liability. Such a change would reduce opportunities for dubious and practically unreviewable⁷ jury findings that a defendant has libeled the plaintiff in all but name.⁸ This approach may also promote judicial economy and relieve some of the scholarly criticism that judicial methods of ascertaining plaintiff identity have lacked clarity and coherence.

Part I of this Article describes the "of and concerning" requirement against the backdrop of the constitutional regime the Supreme Court of the United States has established for defamation. Part II explains the rationale for and operation of the proposed expansion of judicial prerogative in resolving issues of plaintiff identity. In Parts III, IV, and V, this Article examines how such questions of alleged libel can be addressed in three settings: fiction, statements about a group, and virtual worlds.

⁴ See *infra* Part III.

⁵ See *infra* Part IV.

⁶ See *infra* note 69 and accompanying text.

⁷ See *infra* notes 93–95 and accompanying text.

⁸ For the purposes of this Article, this category does not include instances where a writer of fiction employs the plaintiff's name but represents that the character is meant as a fictional variation of the plaintiff. See *infra* note 164.

I. THE “OF AND CONCERNING” REQUIREMENT IN LAW AND PRACTICE

Long before the Supreme Court brought libel law within the constitutional fold,⁹ courts recognized that successful defamation claims must show that the allegedly false statement refers to the plaintiff.¹⁰ A proper assessment of this element’s current significance, however, must take account of the limitations on libel actions now imposed by the First Amendment. Accordingly, an overview of the Court’s handiwork in this area precedes a specific focus on the “of and concerning” requirement.

A. *Libel’s Constitutional Framework*

Though often criticized for a lack of cohesion,¹¹ the Supreme Court’s treatment of defamation has followed a discernible trajectory. In *New York Times Co. v. Sullivan*, the Court elevated defamation’s rank from a class of speech essentially invisible to the First Amendment to one squarely within its purview.¹² The *Sullivan* Court declared that restrictions on libel did not enjoy “talismatic immunity” from constitutional scrutiny.¹³ From this premise, and the Court’s understanding of “the central meaning of the First Amendment,”¹⁴ flowed the rule that a public official

⁹ See *infra* notes 12–15 and accompanying text.

¹⁰ See, e.g., *Harris v. Zanone*, 28 P. 845, 846–47 (Cal. 1892); *Mix v. Woodward*, 12 Conn. 262, 286–87 (1837); *Hardy v. Williamson*, 12 S.E. 874, 876 (Ga. 1891).

¹¹ See, e.g., David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1056 (2006) (lamenting that defamation law “gives us the worst of worlds”); Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273, 276 (1990) (criticizing the “fragmented, confusing and unsatisfying array of criteria and requirements” of libel law); Joseph H. King, *Whither the “Paths of Glory”: The Scope of the New York Times Rule in Defamation Claims by Former Public Officials and Candidates*, 38 VT. L. REV. 275, 278 (2013) (“[T]he Court [should] simply cut through the complex doctrinal underbrush in the desultory inchoateness left in the wake of *New York Times* and its sequelae . . .”); Joshua B. Orenstein, Comment, *Absolute Privilege from Defamation Claims and the Devaluing of Teachers’ Professional Reputations*, 2005 WIS. L. REV. 261, 267 (2005) (describing American defamation law as “a hodgepodge of complex and contradictory standards”); Mark P. Strasser, *A Family Affair? Domestic Relations and Involuntary Public Figure Status*, 17 LEWIS & CLARK L. REV. 69, 70 (2013) (“The Court’s inability to adopt a coherent rationale combined with its unwillingness to apply the criteria that it has announced have made this area of the law chaotic.”).

¹² 376 U.S. 254, 265–66 (1964); *cf.* *Beauharnais v. Illinois*, 343 U.S. 250, 257, 266 (1952) (stating that libelous statements “are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”).

¹³ *Sullivan*, 376 U.S. at 269.

¹⁴ *Id.* at 273.

could recover damages for a defamatory falsehood only upon demonstrating “actual malice”—that is, that the defendant either had knowledge that the defamatory statement concerning the plaintiff’s official conduct was false or recklessly disregarded whether it was false.¹⁵ Underscoring the stringency of this requirement, the Court compelled officials to establish actual malice with a “convincing clarity,” which appellate courts could pronounce absent from the record.¹⁶

Sullivan launched a series of decisions that, for a time, steadily produced safeguards against libel laws whose stringency courted self-censorship not countenanced by the First Amendment.¹⁷ To bolster the actual malice standard’s difficult hurdle, the Court rejected plaintiffs’ efforts to meet the requirement through means that did not strictly conform to its definition. Neither a motive of animosity toward the plaintiff¹⁸ nor failure to undertake the level of investigation that a reasonably prudent person would conduct¹⁹ qualified. Further, the Court indulged a latitude of interpretation that allowed libel defendants to escape liability incurred by a literal or formal understanding of their words. Thus, the specific circumstances under which accusations of “treason”²⁰ and “blackmail”²¹ were made prompted the Court to treat them as rhetorical hyperbole rather than actual charges of law-breaking. And in a major expansion of the actual malice standard, the Court extended this formidable evidentiary barrier to persons deemed public figures.²²

¹⁵ *Id.* at 279–80.

¹⁶ *Id.* at 285–86.

¹⁷ *See id.* at 279 (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to . . . self-censorship.”) (internal quotation marks omitted); *see also* *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (“[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.”).

¹⁸ *Garrison v. Louisiana*, 379 U.S. 64, 72–73 (1964).

¹⁹ *St. Amant*, 390 U.S. at 731–32.

²⁰ *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 285–86 (1974).

²¹ *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 13–14 (1970).

²² *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring); *see* Harry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 275–78 (detailing alignments of separate opinions that forged this holding). During this period the Court also indicated that the “of and concerning” requirement is constitutionally mandated. *See Rosenblatt v. Baer*, 383 U.S. 75, 82–83 (1966); *Sullivan*, 376 U.S. at 288–92. *See infra* notes 36–47 and accompanying text for a discussion of this development.

A decade after *Sullivan*, however, the Court began to trim the “strategic protection” afforded to defamatory falsehoods.²³ In *Gertz v. Robert Welch, Inc.*, the Court rescinded its extension of the actual malice standard three years earlier to speech “involving matters of public or general concern.”²⁴ Instead, the Court calibrated the level of a defendant’s intent that must be proved to the status of the plaintiff. A plaintiff designated as a private figure would not be required to show actual malice in order to recover actual damages;²⁵ such individuals were allowed to demonstrate that the defendant had acted negligently in publishing the falsehood.²⁶ Only plaintiffs seeking presumed or punitive damages would have to establish that the defendant’s conduct amounted to actual malice.²⁷ The Supreme Court heavily qualified this latter protection in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* by confining the requirement to plaintiffs suing for libel involving a matter of public concern.²⁸ Nor were private figure plaintiffs the sole beneficiaries of the Court’s heightened willingness to sanction state measures for protecting reputation. Government could empower public officials and public figures suing media plaintiffs to investigate their editorial processes in search of evidence of actual malice.²⁹

Still, the Court also issued rulings with potential to thwart libel claims in several instances. For example, defendants could obtain a summary judgment when a public figure’s opposing affidavit fails to support a reasonable inference of actual malice by clear and convincing evidence.³⁰ Even defendants who survived this hurdle and proceeded to win a jury verdict could be defeated

²³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

²⁴ *See id.* at 347–48; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43–44 (1971) (Brennan, J., plurality opinion) (applying actual malice standard to all expression “involving matters of public or general concern”).

²⁵ *Gertz*, 418 U.S. at 347.

²⁶ *Id.* at 349.

²⁷ *Id.*

²⁸ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (Powell, J., plurality opinion). While unresolved over three decades later, *Dun & Bradstreet* also left open the possibility of still greater opportunities for private figures suing on speech not of public concern. Since *Gertz* was treated as a ruling governing libel involving a matter of public concern, *id.* at 756, it is debatable whether the *Gertz*’s requirement of fault applies to suits where the element of public concern is absent. *See* RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 1:19 (2d ed. 2019); Ruth Walden & Derigan Silver, *Deciphering Dun & Bradstreet: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?*, 14 *COMM. L. & POL’Y* 1, 4 (2009).

²⁹ *Herbert v. Lando*, 441 U.S. 153, 175–76 (1979).

³⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–56 (1986).

by independent appellate review of determinations of actual malice at trial.³¹ Further, though refusing to license wholesale changes to plaintiffs' quoted statements, deliberate alteration of a plaintiff's language would not constitute knowledge of falsity "unless the alteration results in a material change in the meaning conveyed by the statement."³² With similar nuance, the Court disavowed a categorical privilege for statements of opinion³³ but approvingly noted earlier rulings protecting statements that did not "contain a provably false factual connotation" or that could not "reasonably [be] interpreted as stating actual facts."³⁴ Moreover, at least in suits against media defendants for speech of public concern, private figures were held to bear the burden of demonstrating the falsity of the disputed assertion.³⁵

B. The Fundamentality of the "Of and Concerning" Requirement

In a sense, the requirement that a defamatory statement be directed at the plaintiff is inherent in the constitutional structure described above and in the very concept of libel law. After all, the Supreme Court's various rules governing status, falsity, intent, and construction all assume plaintiffs seeking relief from the harm to their reputation caused by defendants' statements about them. Indeed, the Court has seemingly conferred constitutional stature on the "of and concerning" requirement. Moreover, given the doctrine's long lineage and universal adoption, it would probably persist—though potentially in less potent form—even in the absence of constitutional prescription. The necessity of satisfying the "of and concerning" requirement, as well as the basic outline

³¹ *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984). This review has proved invaluable to defendants in a large proportion of cases. See Susanna Frederick Fischer, *Rethinking Sullivan: New Approaches in Australia, New Zealand, and England*, 34 GEO. WASH. INT'L L. REV. 101, 187 (2002) ("In trials where actual malice was at issue, the reversal rate of judgments for plaintiff was almost 70%."); Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1806 (1998) (referring to "high reversal rate of juries on the issue of actual malice").

³² *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991).

³³ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). Prior to *Milkovich*, courts had generally drawn a distinction under the First Amendment between statements of fact, which were actionable, and statements of opinion, which were not. See Ronald K. Chen, *Once More into the Breach: Fact Versus Opinion Revisited After Milkovich v. Lorain Journal Co.*, 1 SETON HALL CONST. L.J. 331, 351–65 (1991); Martin F. Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43, 47–49 (1993).

³⁴ *Milkovich*, 497 U.S. at 20 (citation omitted).

³⁵ *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986).

of this principle, appears settled. Disputes continue in the grey area where defendants' allegedly false statements do not plainly refer to the plaintiff.

While the Supreme Court has not expressly endorsed the “of and concerning” requirement, the Court’s opinions in *Sullivan* and *Rosenblatt v. Baer*³⁶ lend strong support to the requirement’s constitutional status. Having already disposed of Sullivan’s suit for failure to show actual malice, the Court noted an additional deficiency in his claim. The newspaper advertisement, over which Montgomery, Alabama, City Commissioner Sullivan sued, criticized the actions of the “police” for actions taken against civil rights demonstrators; Sullivan contended that readers would interpret the criticism and certain of its allegations as charging him with misconduct as supervisor of the police department.³⁷ In the eyes of the Court, however, the statements in question did not “make even an oblique reference to [Sullivan] as an individual.”³⁸ Therefore, the evidence in the record was “incapable of supporting the jury’s finding that the allegedly libelous statements were made ‘of and concerning’ respondent.”³⁹ The Court expressed special concern that a contrary ruling would “transmut[e] criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.”⁴⁰ Such alchemy, the Court suggested, was reminiscent of the discredited Sedition Act of 1798.⁴¹

Similar considerations informed the outcome in *Rosenblatt* two years later. There, a newspaper column raised questions about the performance of a later-disbanded commission on which the plaintiff had served.⁴² Though the plaintiff was not mentioned in the column, he argued that it would be perceived as charging him with mismanagement and speculation.⁴³ Rejecting this theory, the Court invoked *Sullivan* for the proposition that, absent a demonstrable focus on the plaintiff, “an otherwise impersonal attack on governmental operations cannot be utilized to establish

³⁶ 383 U.S. 75, 80 (1966).

³⁷ *Sullivan*, 376 U.S. at 289.

³⁸ *Id.*

³⁹ *Id.* at 288.

⁴⁰ *Id.* at 292.

⁴¹ *See id.* at 273–76.

⁴² *See Rosenblatt v. Baer*, 383 U.S. 75, 78–79 (1966).

⁴³ *Id.* at 79.

a libel of those administering the operations.”⁴⁴ It is true that *Sullivan* and *Rosenblatt* could be construed as limited to the Court’s special solicitude for the core First Amendment values implicated by criticism of government.⁴⁵ However, the two decisions have been generally viewed by both courts⁴⁶ and commentators⁴⁷ as more broadly constitutionalizing the “of and concerning” requirement.

Whether as a product of this conclusion or not, the requirement has been virtually universally recognized as an essential component of a defamation cause of action. The Restatement sets forth as the threshold element of a defamatory action “a false and defamatory statement concerning another.”⁴⁸ State supreme courts routinely affirm the principle that libel claims must be “of and concerning” the plaintiff.⁴⁹ A review of decisions on this point reveals no deviation among courts on this principle other than occasional variation in the language used.⁵⁰

⁴⁴ *Id.* at 80.

⁴⁵ See *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[T]he Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” (internal citations and internal quotation marks omitted)); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (“There is a ‘profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open.’” (quoting *Sullivan*, 376 U.S. at 270)); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ(ing) discussions of candidates” (alterations in original) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))).

⁴⁶ See, e.g., *Steam Press Holdings, Inc. v. Haw. Teamsters & Allied Workers Union*, Loc. 996, 302 F.3d 998, 1004 (9th Cir. 2002); *Emerito Estrada Rivera-Isuzu De P.R., Inc. v. Consumers Union of U.S., Inc.*, 233 F.3d 24, 26–28 (1st Cir. 2000); *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986); *QSP, Inc. v. Aetna Cas. & Sur. Co.*, 773 A.2d 906, 916 n.14 (Conn. 2001).

⁴⁷ See, e.g., SMOLLA, *supra* note 28 at § 4:40.50 (describing the requirement as “a rule of constitutional dimension”); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 428 n.351 (1989) (stating that in *Sullivan* the requirement was “elevated to the status of a constitutional requirement”); Julie J. Srochi, Note, *Must Peaches Be Preserved at All Costs: Questioning the Constitutional Validity of Georgia’s Perishable Product Disparagement Law*, 12 GA. ST. U. L. REV. 1223, 1231 n.62, 1232–33 (1996).

⁴⁸ RESTATEMENT (SECOND) OF TORTS § 558(a) (AM. LAW. INST. 1977).

⁴⁹ See, e.g., *Bierman v. Weier*, 826 N.W.2d 436, 464 (Iowa 2013); *Bouis v. Mueller*, 861 N.W.2d 620, 620–21 (Mich. 2015); *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82, 84 (2016); *Pratt v. Nelson*, 164 P.3d 366, 381–82 (Utah 2007); *Schaecher v. Bouffault*, 772 S.E.2d 589, 598 (Va. 2015).

⁵⁰ See, e.g., *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1183 (Cal. 1986) (referring to “specific reference requirement”); *QSP, Inc.*, 773 A.2d at 916 (requiring that actionable “statement identified the . . . plaintiff] to a reasonable third person”).

Additionally, consensus appears to exist on basic features of the requirement. First, of course, the plaintiff need not be expressly named to satisfy the requirement.⁵¹ This principle is foundational because if only explicit references were actionable, it would obviate the need for inquiry into whether a statement is about the plaintiff.⁵² In determining whether libel refers to the plaintiff in the absence of such references, courts look to whether the statement would be reasonably understood by readers or listeners in light of all the circumstances.⁵³ The relevant audience for this purpose is people who knew or knew of the plaintiff.⁵⁴

An often-pivotal aspect of the requirement is that the plaintiff bears a substantial burden to prove that the libelous expression was of and concerning the plaintiff.⁵⁵ Affirming this principle, the New York Court of Appeals went on to conclude in *Julian v. American Business Consultants, Inc.* that “[t]he indispensable

⁵¹ See, e.g., *Bartholomew v. YouTube, LLC*, 225 Cal. Rptr. 3d 917, 927 (Ct. App. 2017); *Wisner v. Nichols*, 143 N.W. 1020, 1025 (Iowa 1913); *Dijkstra v. Westerink*, 401 A.2d 1118, 1120 (N.J. Super. Ct. App. Div. 1979); *Three Amigos SJJ Rest., Inc.*, 28 N.Y.3d at 88 (Stein, J., dissenting); *Nelson v. Am. Hometown Publ’g, Inc.*, 333 P.3d 962, 969–70 (Okla. Civ. App. 2014); *Main v. Royall*, 348 S.W.3d 381, 395 (Tex. App. 2011).

⁵² However, there would still remain some instances where a defendant could argue that the literal use of the plaintiff’s name was not intended to refer to the “actual” defendant. See *infra* note 164.

⁵³ See, e.g., *Davis v. R.K.O. Radio Pictures, Inc.*, 191 F.2d 901, 904 (8th Cir. 1951) (“The issue was whether persons who knew or knew of the plaintiff could reasonably have understood the exhibited picture to refer to him.”); *Elias v. Rolling Stone LLC*, 192 F. Supp. 3d 383, 391 (S.D.N.Y. 2016) (“[T]he party alleging defamation must show that it is reasonable to conclude that the publication refers to him or her”), *rev’d in part*, 873 F.3d 97 (2d Cir. 2017); *Bindrim v. Mitchell*, 155 Cal. Rptr. 29, 39 (Ct. App. 1979) (“The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described.”), *overruled on other grounds by McCoy v. Hearst Corp.*, 727 P.2d 711 (Cal. 1986); *Boardman & Cartwright v. Gazette Co.*, 281 N.W. 118, 120 (Iowa 1938) (“[I]t is not necessary to constitute a libel that the article name the person libeled, but it must by inference or innuendo at least refer in an [intelligible] way to the person libeled.”); *RESTATEMENT (SECOND) OF TORTS* § 564 & cmts. a, b, d.

⁵⁴ See, e.g., *Dalbec v. Gentleman’s Companion, Inc.*, 828 F.2d 921, 925 (2d Cir. 1987); *Butowsky v. Folkenflik*, No. 4:18CV442, 2019 WL 2518833, at *38 (E.D. Tex. Apr. 17, 2019), *adopted by* No. 4:18cv442, 2019 WL 3712026 (E.D. Tex. Aug. 7, 2019); *Church of Scientology Int’l v. Time Warner, Inc.*, 806 F. Supp. 1157, 1160 (S.D.N.Y. 1992), *aff’d sub nom. Church of Scientology Int’l v. Behar*, 238 F.3d 168 (2d Cir. 2001); *Allied Mktg. Grp., Inc. v. Paramount Pictures Corp.*, 111 S.W.3d 168, 173 (Tex. App. 2003).

⁵⁵ See *Kramer v. Skyhorse Publ’g, Inc.*, 45 Misc. 3d 315, 321 (Sup. Ct. N.Y. Cnty. 2014) (“[T]he plaintiff has a heavy burden, even at the pleading stage, of establishing that the statement was actually about him.”).

proof is lacking.”⁵⁶ Other courts have likewise underscored this evidentiary hurdle in the course of deciding that the plaintiff failed to show the necessary identification.⁵⁷ In other instances, the weight of this burden has been demonstrated by the court’s skepticism rather than a formal pronouncement. Two frequently cited cases, *Clare v. Farrell*⁵⁸ and *Davis v. R.K.O. Radio Pictures*,⁵⁹ illustrate this phenomenon.

In *Clare*, the defendant had published a novel whose title character bore the name of the plaintiff and engaged in a number of “sordid experiences.”⁶⁰ Like the plaintiff, the novel’s protagonist was a writer, and his physical appearance as described in the book purportedly matched that of the plaintiff.⁶¹ Notwithstanding this confluence of similarities, however, the district court granted summary judgment to the author and the publisher.⁶² Under the evidence required to show that the novel amounted to a portrayal of the plaintiff, “no jury could find otherwise.”⁶³

In *Davis*, the medium was film, but the plaintiff’s logic and its rejection by the court were the same.⁶⁴ There, one of the movie’s principal characters shared the name of the plaintiff and pursued what might be viewed as a darker version of the plaintiff’s life.⁶⁵ The Eighth Circuit Court of Appeals, emphasizing that the perception of a work describing the plaintiff must be “reasonable,” refused to upset the jury’s verdict for the studio.⁶⁶ It is true that defendants in the two cases benefited from representing their work as fiction. Still, the label of fiction does not always create immunity for the creator,⁶⁷ and a less imposing standard of proof might have enabled at least one of these plaintiffs to recover.

⁵⁶ 2 N.Y.2d 1, 18 (1956).

⁵⁷ See *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006); *Fornhill v. Ruddy*, 891 F. Supp. 1062, 1069–70 (D. Md. 1995); *Cox Tex. Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 433 (Tex. App. 2007); *Camer v. Seattle Post-Intelligencer*, 723 P.2d 1195, 1200 (Wash. Ct. App. 1986).

⁵⁸ 70 F. Supp. 276 (D. Minn. 1947).

⁵⁹ 191 F.2d 901 (8th Cir. 1951).

⁶⁰ *Clare*, 70 F. Supp. at 277.

⁶¹ See *id.* at 276–77.

⁶² *Id.* at 281.

⁶³ *Id.* at 278.

⁶⁴ *Davis*, 191 F.2d at 902.

⁶⁵ See *id.*

⁶⁶ *Id.* at 904–05.

⁶⁷ See *infra* Part III, discussing the problem of libel through fiction.

Though the burden of showing that a defamatory statement is “of and concerning” the plaintiff is “not a light one,”⁶⁸ the enterprise is aided by the range of evidence that a plaintiff may introduce. In particular, the plaintiff is not confined to the communication at issue in seeking to prove that it is about the plaintiff. Rather, the plaintiff may present extrinsic facts showing that a reasonable reader or auditor would understand the expression in context as referring to the plaintiff.⁶⁹ The admissibility of such evidence, however, is subject to a significant constraint: the outside facts adduced must have been known to those who read or heard the communication.⁷⁰ The Restatement provides: “Not only must the plaintiff prove the publication of the defamatory matter, but . . . he must satisfy the court that it was *understandable* as intended to refer to himself, and must convince the jury that it was so understood.”⁷¹ And indeed, courts have often stated that where an expression is reasonably understood to refer to the plaintiff, absence of intent does not relieve the defendant of liability.⁷²

At the same time, however, courts, when rejecting claims for lack of reference to the plaintiff, have often highlighted evidence that the defendant did not mean to describe the plaintiff.⁷³ Moreover, First Amendment doctrine raises doubt as to whether a regime of strict liability on this point would pass constitutional muster. Perhaps for that reason, courts often note a defendant’s negligence in failing to realize that its defamatory depiction could

⁶⁸ *Handelman v. Hustler Magazine, Inc.*, 469 F. Supp. 1048, 1050 (S.D.N.Y. 1978).

⁶⁹ *See, e.g.*, *Dorn v. Astra USA*, 975 F. Supp. 388, 396 (D. Mass. 1997); *Gales v. CBS Broad., Inc.*, No. Civ.A.5:03-CV-35(BR), 2004 WL 1961680, at *9 (S.D. Miss. July 9, 2004); *Bierman v. Weier*, 826 N.W.2d 436, 464–65 (Iowa 2013); *New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co.*, 480 N.E.2d 1005, 1011 (Mass. 1985); *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 738 (Va. 1985).

⁷⁰ *See, e.g.*, *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 189 (3d Cir. 1998); *Chicherchia v. Cleary*, 207 A.D.2d 855, 856 (2d Dep’t 1994); *Berry v. Safer*, 293 F. Supp. 2d 694, 701 (S.D. Miss. 2003).

⁷¹ RESTATEMENT (SECOND) OF TORTS § 613 cmt. d (emphasis added).

⁷² *See, e.g.*, *Weinstein v. Bullick*, 827 F. Supp. 1193, 1201 (E.D. Pa. 1993); *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410–11 (E.D. Pa. 1983); *New England Tractor-Trailer Training of Conn., Inc.*, 480 N.E.2d at 1009–10; *Cheatum v. Wehle*, 5 N.Y.2d 585, 594 (1959); *Marr v. Putnam*, 246 P.2d 509, 521 (Or. 1952).

⁷³ *See, e.g.*, *Clare v. Farrell*, 70 F. Supp. 276, 278 (D. Minn. 1947); *Ellis v. Safety Ins. Co.*, 672 N.E.2d 979, 984 (Mass. App. Ct. 1996); *Landau v. Columbia Broad. Sys., Inc.*, 205 Misc. 357, 361–62 (Sup. Ct. N.Y. Cnty. 1954); *Vice v. Kasprzak*, 318 S.W.3d 1, 13 (Tex. App. 2009).

be reasonably understood as referring to the plaintiff.⁷⁴ At a minimum, it is difficult to reconcile strict liability with the demanding evidentiary requirements of actual malice where that standard applies.⁷⁵

II. MAKING PLAINTIFF IDENTIFICATION—MAINLY—A MATTER FOR JUDGES

For reasons discussed below, courts should be afforded more authority to determine whether plaintiffs have presented sufficient evidence that a defamatory statement is about them to proceed to trial. This shift in allocation of responsibilities could be accomplished in a number of ways. A straightforward means, though perhaps unrealistically novel, would be to remove the question from juries altogether and assign it to courts—at least under state law.⁷⁶ A less dramatic change, though still substantial, would be to ratchet up the standard for establishing this element of a defamation claim to “clear and convincing evidence.” With that obstacle confronting plaintiffs, courts would more frequently dismiss on the pleadings or at summary judgment claims presenting this issue.⁷⁷ Or in a similar vein, but perhaps more palatable—as suggested earlier—the most effective means of greater judicial screening of dubious claims of identity may be simply to require that defamatory statements *clearly* refer to a plaintiff.

Admittedly, these proposals are probably unattainable without statutory enactment. Even under existing law, however, courts have more latitude than is often recognized or exercised to reject claims involving plaintiff identity before they reach the jury. In particular, a more robust examination of evidence presented at summary judgment could spare the costs of a trial and possible

⁷⁴ See, e.g., *Stanton v. Metro Corp.*, 438 F.3d 119, 128 (1st Cir. 2006); *Godbout v. Cousens*, 485 N.E.2d 940, 946 (Mass. 1985); *Downey v. Chutehall Constr. Co.*, 19 N.E.3d 470, 476 (Mass. App. Ct. 2014); *Nelson v. Am. Hometown Publ'g, Inc.*, 333 P.3d 962, 970 (Okla. Civ. App. 2014).

⁷⁵ See *supra* notes 14–22 and accompanying text.

⁷⁶ See *McDonald v. City of Chicago*, 561 U.S. 742, 867–68 (2010) (Stevens, J., dissenting).

⁷⁷ This impact could be limited by courts' reluctance to grant summary judgment where credibility is at issue. However, the value of witness testimony in this context is generally insubstantial. See *infra* notes 81–82 and accompanying text.

reversal on appeal arising from inadequate claims.⁷⁸ While a complaint advances a one-sided perspective, summary judgment gives the court the opportunity to consider the evidence and the arguments of both sides. In this setting, it is especially important that parties can introduce at this stage any evidence that would be admissible at trial.⁷⁹ Thus, for example, parties can offer affidavits supporting or contradicting the plaintiff's assertion that the defamatory material referred to the plaintiff.⁸⁰

It is true that dismissal of a case on this ground at summary judgment precludes jurors' evaluation of witnesses, but in general this assessment seems to add little benefit anyway—especially if the plaintiff's intent is not part of the equation.⁸¹ Even with respect to reasonable perception of the defendant's expression, the utility of witnesses is doubtful. As a practical matter, it seems doubtful in most cases that a sufficient sampling of witnesses can be gathered to gauge the perspective of the average reader. Assuming, though, that a satisfactory threshold can sometimes be met, their probative value is questionable. Jurors would presumably watch dueling processions of witnesses cherry-picked by each side to support its contention that the communication at issue was or was not about the plaintiff.⁸² Survey evidence of the writing's audience, collected by a special master and submitted to the court, would bypass these tendentious witnesses. Of course, cases can arise in which live testimony will possibly shed light on whether the defendant's statement refers to the plaintiff. However, courts should forego summary judgment on this issue only where this is manifestly the case.

More vigorous judicial evaluation of plaintiff identity does not drastically invade jury prerogative in another sense as well. The Supreme Court has displayed a willingness to rule on what constitutes reasonable perception where constitutional

⁷⁸ *But see* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 522 (2007) (arguing that summary judgment, on balance, increases costs, inefficiency, and unfairness of the civil justice system).

⁷⁹ *See, e.g.*, FED. R. CIV. P. 56(c)(4); FLA. R. CIV. P. 1.510(e); OHIO R. CIV. P. 56(E); TEX. R. CIV. P. 166a(f).

⁸⁰ In the setting of administrative law, the Supreme Court has recognized that submission of documents rather than a live hearing may often suffice as a basis for taking away a person's property interest. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332–35, 344–46 (1976).

⁸¹ *See infra* notes 229–242 and accompanying text.

⁸² For a skeptical view of the value of deciding credibility by presenting live witness testimony to juries, *see* Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 837–51 (2011).

guarantees are at stake. A notable example can be found in Establishment Clause jurisprudence. There, the Court has sometimes weighed whether a government practice or gesture can be reasonably viewed as endorsing or supporting religion.⁸³ In these instances, the Court has not been deterred by consciousness that its constitutional ruling is rooted in its evaluation of the facts.⁸⁴ Similarly, the Court has exercised independent judgment in determining what constitutes a citizen's reasonable, subjective expectation of privacy under the Fourth Amendment in various scenarios.⁸⁵ Granted these analogies are imperfect in that they do not purport to gauge the actual views of specific audiences. Nevertheless, it is already implicit in present doctrine—which permits courts to determine what an audience *cannot* reasonably conclude—that courts have the capacity to judge the reactions of auditors and readers.

While the approach proposed here would presumably subject fewer defendants to trial on the issue of plaintiff identity, it would not invariably operate as a one-way ratchet. On the contrary, there could also be suits in which a libel suit raising multiple issues—for example, public figure status—could be pruned of tenuous defendant assertions about identity before the case reached the jury. Unless the “of and concerning” issue is inextricably intertwined with other questions, jurors would benefit from the ability to focus on essential questions before them. Achieving this result does not call for major institutional change. Courts need only seriously scrutinize the evidence presented and settle a resolvable issue rather than abdicate this determination to the jury.

Still, it must be acknowledged that the principal impetus for the proposal is adequate protection of free speech. The elaborate body of First Amendment doctrine governing libel represents the Court's effort to balance the right of free expression with the state's interest in protecting individual reputation from false

⁸³ See *McCreary Cty. v. ACLU*, 545 U.S. 844, 866, 869 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 616, 620 (1989), *abrogated in part by* *Town of Greece v. Galloway*, 572 U.S. 565, 578–81 (2014).

⁸⁴ See *Cty. of Allegheny*, 492 U.S. at 620; *Lynch v. Donnelly*, 465 U.S. 668, 693–94 (1984) (O'Connor, J., concurring)

⁸⁵ *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

charges.⁸⁶ The result is a distinctive hybrid of tort law and speech regulation. Though the state's power to award damages "reflects no more than our basic concept of the essential dignity and worth of every human being,"⁸⁷ that interest does not apply to instances in which the defendant has not accused the plaintiff of anything.

With respect to ascertaining plaintiff identity, two dangers stand out from inferring too readily that speech not purporting to be about the plaintiff actually refers to that person. First, especially in the realm of fiction, a speaker may be deterred by the specter of unwittingly portraying repugnant conduct by someone whose description matches the plaintiff. As the court observed in *Clare v. Farrell*, "It would have been a practical impossibility for the defendant in the exercise of reasonable care to have discovered the existence of the plaintiff."⁸⁸ Though *Clare* was decided before the advent of the internet, its essential rationale stands: writers and other speakers should not be held responsible for exhausting every possibility that their words could apply to an unknown person.⁸⁹

In addition, given the complexity of defamation doctrine, even to many trained in law, the "of and concerning" requirement may be especially susceptible to misapplication by juries. With elements of libel actions like negligence and actual malice, jurors render an assessment of the defendant's state of mind when committing the defamatory falsehood. Determining levels of intent is by no means a simple task, but it falls squarely within the traditional province of juries.⁹⁰ Likewise, if it is established that the defendant's statement does refer to the plaintiff, as is self-evident in most cases, juries are competent to evaluate the statement's truth or falsity. Where the putative reference is not clear, though, determining its presence partakes more of textual interpretation that courts are accustomed to making and less

⁸⁶ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22–23 (1990); *Phila. Newspapers v. Hepps*, 475 U.S. 767, 773 (1986); *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

⁸⁷ *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

⁸⁸ 70 F. Supp. 276, 279 (D. Minn. 1947).

⁸⁹ See *Landau v. Columbia Broad. Sys.*, 205 Misc. 357, 360–61 (Sup. Ct. N.Y. Cnty. 1954) ("To make such accidental or coincidental use of a name a libel would impose a prohibitive burden upon authors . . .") (rejecting claim arising from fictional television crime program).

⁹⁰ See, e.g., 40A AM. JUR. 2D *Homicide* § 450 (2019) ("The question of intent with which a homicidal act was committed is ordinarily deemed to be a question for the determination of the jury.").

deciding concrete facts. Thus, this exercise appears to resemble judicial functions like statutory construction and fixing the meaning of a contract term⁹¹ more than reaching a verdict on whether a defendant ran a red light or accepted a bribe.⁹²

Further, excessive reluctance to dismiss a libel claim before trial when the heavy burden of showing a statement's reference to the plaintiff cannot be met creates a problem of reviewability. Deferring the question of plaintiff identity to the jury may enable it to mistakenly find that speech refers to the plaintiff without realistic opportunity to correct the error. Except where the jury has reached an emphatically irrational conclusion, courts are reluctant in motions for judgment notwithstanding the verdict or on appeal to upset what is designated a factual conclusion.⁹³ Moreover, this problem is compounded by the secrecy of jury deliberations and the nature of general verdicts. Except in the unusual case of special interrogatories,⁹⁴ a jury verdict does not reflect the particular determinations made in reaching the

⁹¹ See *L.P.P.R., Inc. v. Keller Crescent Corp.*, 532 F. App'x 268, 273–75 (3d Cir. 2013) (“[T]here is no role for the jury to play in contract interpretation when there is no ambiguity.”); *Parsons v. Bristol Dev. Co.*, 402 P.2d 839, 842–43 (Cal. 1965) (“[U]nless the interpretation turns upon the credibility of extrinsic evidence,” interpretation of a contract is purely a “judicial function”).

⁹² Much of this same reasoning could be brought to bear on the question of whether a libel defendant's statement was an actual fact rather than merely the defendant's view. See *supra* notes 33–34 and accompanying text. Indeed, the two issues may be seen as overlapping where parties dispute whether defendants' expression actually portrayed plaintiffs or only fanciful versions of them. This similarity in considerations may help to explain why courts so often rule at summary judgment or on appeal that the defendant did not assert a provably false fact. See, e.g., *Nat'l Ass'n of Gov't Emps./Int'l Bhd. of Police Officers v. BUCI Television, Inc.*, 118 F. Supp. 2d 126, 130 (D. Mass. 2000); *Romero v. Thomson Newspapers (Wis.), Inc.*, 648 So. 2d 866, 870 (La. 1995); *Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158, 1163, 1165 (Mass. 1993). Nevertheless, as a relative matter, it is safer to entrust juries with deciding whether a communication can be reasonably understood as hurling factual charges at the plaintiff than with whether they were aimed at the plaintiff in the first place. For the reasons discussed above, courts are better equipped to assess questions of plaintiff identity. On the other hand, once it is settled that a statement refers to the defendant, jurors can draw on their own experiences and perceptions to decide whether it should be read as containing a provably false assertion.

⁹³ *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1546 (Fed. Cir. 1983); 4 N.Y. JUR. 2D *Appellate Review* § 529 (2019).

⁹⁴ See *Foster v. Moore-McCormack Lines, Inc.*, 131 F.2d 907, 908 (2d Cir. 1942) (noting that Federal Rules of Civil Procedure Rule 49 authorizing special interrogatories is “seldom used”).

decision.⁹⁵ Thus, unsupported logic employed to infer that a defamatory falsehood was of and concerning the plaintiff may be cloaked by a verdict reflecting multiple bases for liability.

Even in cases where jury competence on this issue is high, probing judicial scrutiny of plaintiff identity can serve the goal of judicial economy. Libel suits sharply increased several decades ago and have not significantly decreased in volume.⁹⁶ Measures that streamline these suits supply welcome relief to this burden on the courts. Where disputed speech cannot plausibly be viewed as referring to the plaintiff, the time and costs of trial should be avoided. Again, it bears emphasizing that more robust enforcement of the “of and concerning” requirement would not generally stifle libel claims—the great majority of which hinge on other issues.⁹⁷

And of course, even where this issue does arise, heightened scrutiny does not inevitably spell defeat for plaintiffs. Two leading cases illustrate that, even in the realm of fiction, plaintiffs can make a powerful prima facie case that a work can reasonably be viewed as portraying them.⁹⁸ In *Geisler v. Petrocelli*, the Second Circuit Court of Appeals refused to dismiss Geisler’s suit over Petrocelli’s “potboiler . . . concerning the odyssey of a female transsexual athlete through the . . . corrupting world of the women’s professional tennis circuit.”⁹⁹ The main character, who participated in a tennis fraud and engaged in graphically described “untoward” sex, had Geisler’s exact name and allegedly bore Geisler’s physical appearance.¹⁰⁰ Nor could the resemblance—more substantial than that in *Clare v. Farrell*¹⁰¹—convincingly be chalked up to coincidence; Geisler and Petrocelli had become acquainted while working at the same small publishing firm for six months.¹⁰²

⁹⁵ See *Nollenberger v. United Air Lines, Inc.*, 216 F. Supp. 734, 738 (S.D. Cal. 1963) (“[Federal Rules of Civil Procedure Rule 49] is designed to take some of the mystery out of general verdicts where, in case after case, neither counsel for either side nor the Court have been able to reconcile the verdict with the evidence.”).

⁹⁶ See Pamela C. Laucella & Barbara Osborne, *Libel and College Coaches*, 12 J. LEGAL ASPECTS SPORT 183, 188 (2002).

⁹⁷ See Daniel Smirlock, Note, “Clear and Convincing” Libel: Fiction and the Law of Defamation, 92 YALE L.J. 520, 529 (1983).

⁹⁸ See *infra* Part III for a discussion of the possibility of libel through fiction.

⁹⁹ 616 F.2d 636, 638 (2d Cir. 1980).

¹⁰⁰ *Id.*

¹⁰¹ See *supra* notes 60–63 and accompanying text.

¹⁰² *Geisler*, 616 F.2d at 638.

In *Fetler v. Houghton Mifflin Co.*, the Second Circuit allowed a suit to proceed over a novel written by the plaintiff's brother.¹⁰³ Unlike in *Geisler*, the defendant did not appropriate the plaintiff's name for the chief character. The story's alleged resemblance to the plaintiff's life, however—aside from the character's opprobrious conduct—was striking if not comprehensive. Like the plaintiff, the main character was the eldest child and twenty-three years old in 1938, was Latvian, and looked after the family.¹⁰⁴ The composition of the family, whose travels the novel depicts, matched the Fetlers down to the number of children—thirteen—as well as the precise distribution of its girls and boys.¹⁰⁵ Like the Fetlers, too, the fictional family bought a home in Stockholm.¹⁰⁶ In both families, the father was a Russian Protestant minister who brought the family around Europe in an old bus to perform concerts as a band and choir.¹⁰⁷ While such details did not prove that the book libeled the plaintiff, it is hard to fault the court for permitting a jury to weigh that question.¹⁰⁸

These exceptional instances, however, do not remove the need to dismiss unconvincing assertions of plaintiff identity to protect core First Amendment values. That need is especially pronounced with respect to media coverage of current events. A central purpose of the First Amendment was to preserve free public discussion of matters of public concern.¹⁰⁹ In one of the principal arenas of “of and concerning” issues, the general bar to suits based on libel of large groups,¹¹⁰ courts have recognized the rule's advancement of this aim.¹¹¹ Some have particularly emphasized

¹⁰³ 364 F.2d 650, 650 (2d Cir. 1966).

¹⁰⁴ *Id.* at 651.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ This discussion of *Geisler* and *Fetler* assumes, as current law permits, that fiction can be a vehicle for defamation. *See infra* notes 169–171 and accompanying text for an argument to the contrary.

¹⁰⁹ *See Meyer v. Grant*, 486 U.S. 414, 421–22 (1988); *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966); *Wood v. Georgia*, 370 U.S. 375, 391–92 (1962); *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).

¹¹⁰ *See infra* Part IV.

¹¹¹ *See, e.g., Mich. United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 900 (W.D. Mich. 1980) (stating that suits by members of large groups could “seriously interfere with public discussion of issues, or groups, which are in the public eye” and “result in the public receiving less information about topics of general concern”), *aff'd*, 665 F.2d 110 (6th Cir. 1981); *Art of Living Found. v. Does*, No. 10–CV–05022–LHK, 2011 WL 2441898, at *6 (N.D. Ca. June 15, 2011) (“The rationale for [the group libel] rule is to protect freedom of public discussion”); *Three Amigos SJL Rest., Inc. v.*

the vital role of journalists in promoting this discussion.¹¹² Suits based on group libel of political organizations, where interests at the heart of the First Amendment are at stake, should trigger special vigilance. Charges against such organizations have sometimes provoked suits by a prominent member.¹¹³ At the same time, courts should also take care that general references to actors in matters of public concern outside the political sphere—from whatever source—are not subject to overly facile translations into individual charges.¹¹⁴

Courts have displayed varying sensitivity to their duty to screen suits against news providers for inadequate evidence of plaintiff identity. In *Smith v. Huntington Publishing Co.*, the court recognized that a coincidence of names and similarity of circumstances did not automatically qualify a libel claim for trial.¹¹⁵ Agreeing to substitute fictitious names, the defendant's

CBS News Inc., 132 A.D.3d 82, 93 n.2 (1st Dep't 2015) (“[The group libel rule is designed] to ‘encourage frank discussions of matters of public concern under the First Amendment guarantees.’” (quoting *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 229 (2d Dep't 1981))), *aff'd*, 28 N.Y.S.3d 82 (2016).

¹¹² See, e.g., *PetRays Veterinary Radiology Consultants v. DVM Insight, Inc.*, No. D062821, 2013 WL 6628083, at *11 (Dec. 16, 2013); *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 853 (8th Cir. 1979) (rejecting libel claim by member of group in light of the “importance of journalistic freedom in investigating and reporting on matters of public interest” under the First Amendment); *Barger v. Playboy Enters., Inc.*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983) (stating that the group libel rule “safeguards freedom of speech by effecting a sound compromise between . . . the societal interest in free press discussions of matters of general concern, and . . . the individual interest in reputation.” (citation and internal quotation marks omitted)), *aff'd*, 732 F.2d 163 (9th Cir. 1984).

¹¹³ See, e.g., *Palin v. N.Y. Times Co.*, 933 F.3d 160, 164 (2d Cir. 2019) (suit by former vice presidential candidate arising from editorial criticizing her political action committee); *Schonek v. WJAC, Inc.*, 258 A.2d 504, 506–07 (Pa. 1969) (suit by a leader of group financing committee charged with “pilfering” and “doctoring” campaign document).

¹¹⁴ See, e.g., *Golden North Airways, Inc. v. Tanana Publ'g Co.*, 218 F.2d 612, 615–16, 622 (9th Cir. 1954) (dismissing complaint by air carrier based on newspaper editorial critical of all non-scheduled air carriers); *Nat'l Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 380–81 (S.D.N.Y. 1980) (granting summary judgment to defendants nutritionist and physician to remarks in newspaper and magazine asserting that some in industry were “quacks” or practiced “quackery”); *Julian v. Am. Bus. Consultants, Inc.*, 2 N.Y.2d 1, 11–12 (1956) (dismissing complaint by plaintiff over a book's report that he attended two meetings by Communist front organizations seven years apart where the book used caustic language to describe broadly those who were exploited by such organizations); *Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.*, 702 N.E.2d 149, 152–54 (Ohio Ct. App. 1997) (dismissing claims based on alleged defamatory statements about a software company, made in newspaper and on television, brought by operator of company).

¹¹⁵ 410 F. Supp. 1270, 1273–74 (S.D. Ohio 1975).

newspaper obtained the consent of a woman and her son to report on their experiences arising from the son's drug addiction and mental problems.¹¹⁶ After the plaintiffs informed the newspaper that the names chosen and problems faced matched their own, the newspaper reiterated in headline form the original story's highlighted statement that the names were fictitious.¹¹⁷ Finding these measures ensured that "no reasonable person could have reasonably believed that the article pointed to the plaintiff," the court granted summary judgment for the defendant.¹¹⁸

More problematic in its approach was the decision in *Hudson v. Guy Gannett Broadcasting Co.*¹¹⁹ Overturning the lower court, the Supreme Judicial Court of Maine denied summary judgment to the defendant over its broadcast of a report that a mill had terminated twelve employees—none of whom were named—for involvement with illegal drugs.¹²⁰ Although the plaintiff was one of the twelve fired employees, he was actually dismissed for alleged alcohol abuse rather than drug-related involvement like the other eleven.¹²¹ A coworker averred that his learning the day after the report aired that Hudson had been among those terminated caused the coworker to believe that Hudson had been dismissed over illegal drugs.¹²² This affidavit—coupled with Hudson's allegation that others in the community had gained this same impression—was found sufficient to allow the suit to go forward.¹²³ Though the existence of such a perception may have been plausible, the threshold permitted to establish it is troubling. A single affidavit supported by a plaintiff's self-serving declaration obviously does not satisfy the heavy burden¹²⁴ for meeting the "of and concerning" requirement where the plaintiff has not been named. Such logic opens the door to authorization of trials based on skimpy and biased evidence that third parties have connected the dots between an unspecific news report and the plaintiff.¹²⁵

¹¹⁶ *Id.* at 1272.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1274.

¹¹⁹ 521 A.2d 714 (Me. 1987).

¹²⁰ *Id.* at 714.

¹²¹ *Id.* at 715.

¹²² *Id.*

¹²³ *Id.* at 716–17, 718.

¹²⁴ See *supra* notes 55–57 and accompanying text.

¹²⁵ By contrast, the denial of summary judgment to the defendant in *Nelson v. Am. Hometown Publ'g, Inc.*, 333 P.3d 962, 966 (Okla. Civ. App. 2014), rested on a direct link to the plaintiff that yielded demonstrable harm. A list of sex offenders published by the defendant newspaper had incorrectly placed the plaintiffs' address

Television news is especially susceptible to unforeseen claims that it has defamed the plaintiff, because the accompaniment of words by images can create unforeseen alleged associations. In particular, plaintiffs may perceive a broadcast as tying them to a broadcast's report of offensive or shameful behavior. In *Sims v. Kiro, Inc.*, the court recognized the danger of permitting a claim to proceed on the basis of too speculative a link.¹²⁶ A television newscast disparaging bicentennial merchandise on sale at the Seattle Center had included closeup shots of merchandise on display in the plaintiff's store.¹²⁷ These shots did not picture either the plaintiff or his shop.¹²⁸ Affirming summary judgment dismissal below, the court observed that under these circumstances "the scales must be tilted in favor of the need of free speech."¹²⁹ Though the plaintiff belonged to the group of sellers being depicted, he could not persuasively claim that the broadcast's description had singled him out.¹³⁰

Conversely, the rejection of the defendant's summary judgment motion in *Clark v. American Broadcasting Companies, Inc.* illustrates the dangers to broadcasters if they fail to painstakingly consider all potential implications of each image presented.¹³¹ In *Clark*, the program focused on the effect of street prostitution on a middle-class neighborhood, and several women were shown as they walked down the street.¹³² As the plaintiff appeared, the narrator stated that "for black women whose homes were [in the neighborhood], the cruising white customers were an especially humiliating experience."¹³³ Shortly afterward, a black female resident of the neighborhood stated on camera: "Almost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute."¹³⁴ Reversing the district court, the Sixth Circuit held that it was for a jury to decide whether the plaintiff's appearance cast her as a

next to one of the offenders. *Id.* at 965. According to the allegations, this error led to the plaintiffs' harassment and intimidation and to gunshots being fired near their home. *Id.* at 965-66.

¹²⁶ 580 P.2d 642, 645 (Wash. Ct. App. 1978).

¹²⁷ *Id.* at 644.

¹²⁸ *Id.*

¹²⁹ *Id.* at 646.

¹³⁰ *Id.*

¹³¹ 684 F.2d 1208, 1214 (6th Cir. 1982), *disapproved on other grounds*, *Bichler v. Union Bank & Tr. Co. of Grand Rapids*, 745 F.2d 1006, 1012 (6th Cir. 1984).

¹³² *Id.* at 1210-11.

¹³³ *Id.* at 1211.

¹³⁴ *Id.*

neighborhood resident or as a prostitute.¹³⁵ The ruling is understandable in light of the consequences the plaintiff said she suffered¹³⁶ and the larger backdrop of racism¹³⁷ from which this episode arose. However, the district court's ruling was at least defensible because the plaintiff appeared after the story's focus had shifted from the presence of street prostitutes to their effects; the court had grounds for finding that her appearance could only be reasonably understood as one of the black middle-class women who had been approached by white customers.¹³⁸ Regardless, courts should be cautious about extrapolating a holding like this beyond its distinctive circumstances. Otherwise, producers of television and other visual media may unduly rein in coverage lest a jury ultimately find that a combination of words and image produced an unintended calumny.¹³⁹

This is not to suggest, of course, that solicitude for press freedom should prompt courts to force plaintiffs to dispel all doubt as to whether the speech at issue can be reasonably viewed as referring to the plaintiff. Where plaintiffs have met the heavy, but

¹³⁵ *Id.* at 1214.

¹³⁶ *Id.* at 1211. Plaintiff testified that, among other things, members of her church had shunned her and two potential employers declined to hire her out of fear that her presence would damage their businesses. *Id.*

¹³⁷ See Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 545–48 (1996) (discussing racial implications of *Clark*).

¹³⁸ See *Clark*, 684 F.2d at 1223 (Brown, J., dissenting).

¹³⁹ Of course, media not presenting moving images can also encounter their own version of this problem. The issue of permissible inferences from the juxtaposition of word and picture in newspaper journalism is as old as *Peck v. Tribune Co.*, 214 U.S. 185 (1909), and as contemporary as *Cheney v. Daily News L.P.*, 654 F. App'x 578 (3d Cir. 2016). In *Peck*, the Court overturned a directed verdict against a woman who sued over the appearance of her photograph in a newspaper advertisement. 214 U.S. at 188–90. The advertisement consisted of an endorsement by a “Mrs. A. Schuman” of the salutary effects of malt whiskey. *Id.* Justice Holmes’s opinion stated that “[o]f course” the insertion of Peck’s picture in place of Mrs. Schuman’s conveyed that Peck had offered the testimonial. *Id.* In *Cheney*, a newspaper published on its website an article about a sex scandal at the Philadelphia Fire Department. 654 F. App'x at 580. Next to the article appeared a photograph of the plaintiff captioned “Philadelphia firefighter Francis Cheney holds a flag at a 9/11 ceremony in 2006.” *Id.* The Third Circuit ruled that a reader might reasonably conclude from the photograph’s presence beside the article that Cheney was one of the firefighters implicated in the scandal. *Id.* at 581; see also *Prince v. Out Publ'g Inc.*, No. B140475, 2002 WL 7999, at *5 (Cal. Ct. App. Jan. 3, 2002) (dismissing a claim based on photographs of plaintiff in an article about partying, allegedly featuring unsafe sex and illegal drug use, on the grounds that while plaintiff’s likeness in photographs was “of and concerning” him in truthfully indicating his presence at a party and his sexual orientation, it was not “of and concerning” him with respect to article’s references to unsafe sex and drug use).

not insuperable, burden of showing that such an interpretation is plausible, they should be permitted to pursue an otherwise actionable claim. For example, close similarity between the name and nature of a plaintiff's business and those of the company reported on can sometimes furnish a basis for sending a case to trial. On a segment on "scams" purportedly run by some sweepstakes companies, a television news magazine conceived of a presumably fictional company called "Sweepstakes Clearing House."¹⁴⁰ In fact, however, the plaintiff for years had been conducting a concededly legitimate sweepstakes contest called "Sweepstakes Clearinghouse" strongly resembling the "con" version depicted in the story.¹⁴¹ The court concluded that viewers could reasonably perceive the segment as reporting that Sweepstakes Clearinghouse had engaged in a sweepstakes scam.¹⁴²

Similarly, a newspaper in *New England Tractor-Trailer Training of Connecticut, Inc. v. Globe Newspaper Co.* published a series of articles sharply critical of the "New England Tractor-Trailer School."¹⁴³ Though the newspaper argued that its charges had been directed at New England Tractor-Trailer School-Massachusetts, plaintiff New England Tractor-Trailer School-Connecticut contended that readers would understand the charges to apply to its own operation.¹⁴⁴ The court authorized a trial to determine whether such an understanding was reasonable.¹⁴⁵

¹⁴⁰ *Allied Mktg. Grp., Inc. v. Paramount Pictures Corp.*, 111 S.W.3d 168, 171–72 (Tex. App. 2003).

¹⁴¹ *Id.*

¹⁴² *Id.* at 176.

¹⁴³ *New England Tractor-Trailer Training of Conn. v. Globe Newspaper Co.*, 480 N.E.2d 1005, 1006 (Mass. 1985). Among the accusations leveled against the school were that the school's trucks were "decrepit, sometimes unsafe; [the school's president] made a number of demonstrably false statements . . . about the school; and that the school's contracts with its students violate[d] the laws of at least two states." *Id.* at 1006–07 (second alteration in original) (internal quotation marks omitted).

¹⁴⁴ *Id.* at 1007.

¹⁴⁵ *Id.* at 1011. If the jury were to reach this conclusion, it would then decide whether the newspaper had been negligent in failing to recognize that the articles would be viewed in this light. *Id.* at 1012. The case is distinguishable from *Nelle v. WHO Television, LLC*, 342 F. Supp. 3d 879 (S.D. Iowa 2018). There, the court granted summary judgment for the defendant where the Nebraska plaintiff roofing company had sued over alleged defamation concerning an Iowa company that had a partly overlapping name but which the disputed broadcast had portrayed as operating entirely within an Iowa city. *Id.* at 901.

Similar logic can be applied to suits by corporation presidents where the defendant's own statements have highlighted the president's dominant role. In *Winn v. United Press International*, the United Press International ("UPI") published an article alleging fraudulent and other improper activity by a corporation that produced beauty pageants.¹⁴⁶ The UPI rebutted the corporation's president's claim that the article defamed her by noting that the accusatory statements did not mention her by name and related only to the alleged practices of her corporation.¹⁴⁷ Such a narrow reading, countered the court, was acontextual and ignored three explicit references to the plaintiff in other parts of the article. In two parts, the plaintiff was reported as "denying all charges."¹⁴⁸ Moreover, the article described the plaintiff as the pageant's "director" and "executive director" while not mentioning any other employee of the corporation.¹⁴⁹ Taken as a whole, then, the article could be reasonably interpreted to refer to her.¹⁵⁰

Similarly, in *Hoffman v. Roberto*, the former president of a trucking company that had entered into bankruptcy proceedings brought suit over a telex sent by the union's leadership summarizing the bankruptcy court's reasons for appointing a trustee for the company.¹⁵¹ The telex charged the company, though not Hoffman himself, with what could be considered improprieties.¹⁵² Denying summary judgment for the defendants, the court determined that the telex's audience—union locals familiar with the company—might attribute responsibility for the alleged actions to the plaintiff.¹⁵³

In cases like these, the real possibility of reader or viewer identification is almost intuitively apparent; in other instances, however, suits over coverage of business activities have gone to trial on more attenuated connections to plaintiffs. In *Eyal v. Helen*

¹⁴⁶ 938 F. Supp. 39, 42 (D.D.C. 1996).

¹⁴⁷ *Id.* at 43.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 44.

¹⁵⁰ *Id.* The court went on to grant summary judgment for the defendants on the ground that the UPI had not committed negligence in reporting these charges. *Id.* at 45–46.

¹⁵¹ 85 B.R. 406, 408 (W.D. Mich. 1987).

¹⁵² *Id.* at 409. The court found that three of the statements cited by the plaintiff were susceptible to a defamatory interpretation. *Id.* at 411.

¹⁵³ *Id.* at 411–12. In addition, the court permitted the plaintiff to invoke group libel theory because the company's management—viewed as collectively accused of misconduct—was relatively small. *Id.* at 412.

Broadcasting Corp., the defendant radio station reported: “The owner of a Brookline [d]elicatessen and seven other people are arrested in connection with an international cocaine ring.”¹⁵⁴ Though the report did not mention the plaintiff by name, he contended as owner of Haim’s Deli that many listeners would infer that he was operating the business as a front for cocaine dealers.¹⁵⁵ Applying what it deemed the “objective standard” of *New England Tractor-Trailer*, the court held that Eyal’s allegations potentially showed that the station should have realized that listeners would piece together its report with those from other sources to infer that the report referred to Eyal.¹⁵⁶ The court did emphasize the modesty of the plaintiff’s burden at this early stage of the suit. Both the complaint’s allegations and reasonable inferences from it in Eyal’s favor were presumed true, and his complaint would be sufficient “unless it appears beyond doubt that [Eyal] can prove no set of facts in support of his claim which would entitle him to relief.”¹⁵⁷ Though a correct articulation of law at the time, these propositions as applied here stand in some tension to libel plaintiffs’ supposedly weighty burden to demonstrate that falsehoods are “of and concerning” them. This approach invites plaintiffs to craft tendentious and expansive allegations to stave off dismissal. That the defendant has another opportunity to prevail at summary judgment does not entirely remove the incentive caused by permissive theories of plaintiff identity. The ability of plaintiffs simply to prolong the suit provides leverage to

¹⁵⁴ 583 N.E. 2d 228, 229 (Mass. 1991) (alteration in original).

¹⁵⁵ *Id.* at 230–31.

¹⁵⁶ *See id.* at 231.

¹⁵⁷ *Id.* at 230 (citations omitted). The logic of ascribing alleged company misconduct to its president can be adapted to areas where a course of treatment has been prominently identified with its chief proponent. In *Theodosakis v. Clegg*, the defendants issued a high-profile report containing allegedly false statements criticizing a popular recommendation for treating arthritis with certain over-the-counter nutritional supplements. No. CV-14-02445-TUC-JAS (BPV), 2017 WL 1294529, at *1 (D. Ariz. Jan. 30, 2017). The recommendation had been included in a number-one best-selling book by the plaintiff as part of a nine-step treatment program. *Id.* The plaintiff argued that the report was “of and concerning” him because his “name was virtually synonymous with” the supplements in question. *Id.* at *12. Surviving a motion to dismiss, the complaint was ruled sufficiently pled to support a theory that the plaintiff was so closely linked in the public mind with the use of these supplements that the allegedly false statements impeached his personal reputation. *Id.* at *13. Permitting the plaintiff to proceed at this stage does not seem troubling in light of the level of evidence he would presumably need to marshal to prevail at summary judgment.

extract a favorable settlement. That leverage increases as the prospect of decision by a jury—perhaps influenced by hindsight and sympathy for the plaintiff's distress—looms larger.

Moreover, the standard applied by the *Eyal* court—sustaining a complaint unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”¹⁵⁸—recited a Supreme Court passage the Court itself later disavowed. In *Bell Atlantic Corp. v. Twombly*, the Court rejected this approach because it would permit “a wholly conclusory statement of claim . . . whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.”¹⁵⁹ Accordingly, the Court emphasized that courts “are not bound to accept as true a legal conclusion couched as a factual allegation.”¹⁶⁰ Instead, the Court would assess a complaint by its “plausibility.”¹⁶¹ Under this more stringent criterion, the Court would require plaintiffs to plead sufficient facts “to raise a reasonable expectation that discovery will reveal evidence of” the alleged misconduct at issue.¹⁶² Elaborating on this standard two years later, the Court underscored the increased scrutiny applied to complaints. Determining their sufficiency was to be a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹⁶³ Thus, claims that a plaintiff unmentioned by the defendant is the target of libel should not be upheld on the mere possibility that evidence may later be amassed in support of the putative link. Rather, courts should searchingly apply their “experience and common sense” to a complaint’s assertions to realistically decide whether the claim is truly “plausible.”

III. LIBEL THROUGH FICTION

Alleged defamation through works of fiction has proved a fertile and vexing source of suits against authors and other creators. The very notion that a work purporting to be nonfactual can defame an individual raises questions of meaning with which courts and commentators have long grappled. The issue typically arises in the form of a plaintiff’s contention that the defendant’s

¹⁵⁸ *Eyal*, 583 N.E. 2d at 429 (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

¹⁵⁹ 550 U.S. 544, 561 (2007) (alteration in original).

¹⁶⁰ *Id.* at 555 (internal citation omitted).

¹⁶¹ *Id.* at 564.

¹⁶² *Id.* at 556.

¹⁶³ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

work contains a thinly disguised, but libelously false, portrayal of the plaintiff. In other instances, the defendant has given a repellent character a name that happens to coincide with that of the plaintiff.¹⁶⁴ Both circumstances present the danger that jurors will be swayed more by sympathy for a distraught plaintiff than by the demanding criteria of the “of and concerning” requirement. Failure by courts to guard against invalid conflation of fact and fiction risks stifling creative expression protected and encouraged by the First Amendment.

A. *Inherent Challenges and Varied Solutions*

Though case law on defamatory fiction lacks cohesion,¹⁶⁵ the Restatement captures the basic prevailing philosophy:

A libel may be published of an actual person by a story or essay, novel, play or moving picture that is intended to deal only with fictitious characters if the characters or plot bear such a resemblance to actual persons or events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person.¹⁶⁶

This concept is hardly self-executing, and numerous commentators have advanced specific tests to refine the inquiry.¹⁶⁷

¹⁶⁴ Still other works consciously depict a particular individual but avowedly take imaginative liberties with the person’s life. Film “biopics” are well-known examples of this genre. See, e.g., RAGING BULL (Chartoff-Winkler Productions 1980) (relating life of boxer Jake LaMotta); THE SOCIAL NETWORK (Columbia Pictures 2010) (portraying founding of Facebook by Mark Zuckerberg). Rarely litigated, such works are outside the scope of this analysis. This discussion also excludes instances in which the disputed work places the plaintiff in an unmistakably fantastical or satirical setting. See, e.g., *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982) (“The test is not whether the story is or is not characterized as ‘fiction’ . . . but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated.”). In *Pring*, the court found that the plaintiff’s identity could be discerned in the defendant’s story, but overturned the jury’s award of damages because the story could not be reasonably understood to describe actual conduct by the plaintiff. See *id.* at 443 (“The charged portions of the story described something physically impossible in an impossible setting . . . [I]t is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else.”). Though the suit floundered on the lack of factual content rather than of plaintiff identity, it still illustrates the potential inclination of jurors to find for a sympathetic plaintiff who has apparently suffered emotionally but has not established the legal requisites for libel.

¹⁶⁵ See Matthew Savare, Comment, *Falsity, Fault, and Fiction: A New Standard for Defamation in Fiction*, 12 UCLA ENT. L. REV. 129, 155, 155 nn. 219–20 (2004).

¹⁶⁶ RESTATEMENT (SECOND) OF TORTS § 564 cmt. d.

¹⁶⁷ See, e.g., Martin Garbus & Richard Kurnit, *Libel Claims Based on Fiction Should Be Lightly Dismissed*, 51 BROOK. L. REV. 401, 403 (1985) (recommending as

This diversity in approaches reflects in part the problem that the idea of defamation by fiction on its face seems contradictory. Whatever larger “truths” about life literature may offer, they are contained in a vehicle that is the product of the defendant’s imagination. Since libel claims allege that the defendant has misrepresented the plaintiff’s reality, the charge is arguably misdirected at a work that does not proclaim itself as presenting reality at all. As one judge commented, “Every fiction writer knows his creation is in some sense ‘false.’ . . . Therefore, where fiction is the medium . . . it is meaningless to charge that the author ‘knew’ his work was false.”¹⁶⁸ Similarly, the charge that a fictional character both represents and darkly deviates from the plaintiff can have a self-defeating quality, for the plaintiff is simultaneously arguing that the character is and is not that person.¹⁶⁹ Moreover, to infer from the plaintiff’s shared characteristics with a fictional figure that the latter portrays the former is to ignore that artists routinely draw from and transform actual persons in the creation of their work.¹⁷⁰ Given such

part of proposed three-pronged inquiry that a “court determine . . . whether the plaintiff has established an identity with the fictional character *and* whether a reasonable reader would attribute the defamatory aspects of that character to the plaintiff”); Paul A. LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOK. L. REV. 281, 304–319 (1985) (setting forth factors to be considered in determining whether a defendant should be liable for harm caused by the publication of fiction); Mark Arnot, Note, *When Is Fiction Just Fiction? Applying Heightened Threshold Tests to Defamation in Fiction*, 76 FORDHAM L. REV. 1853, 1900 (2007) (“[A] work of fiction must ‘not only be reasonably read’ as stating actual facts about the plaintiff, but must ‘also affirmatively suggest that the author intends or endorses’ the literal reading.” (quoting *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993) (citing *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990))); Smirlock, *supra* note 97, at 521 (proposing as criteria “unmistakability” of a statement’s reference to the plaintiff, “individuality” of the reference, and inspiration of “conviction” in the reader that work describes the plaintiff).

¹⁶⁸ *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 461 (Cal. 1979) (Bird, C.J., concurring).

¹⁶⁹ See William E. Carlson, Comment, *Defamation by Fiction*, 42 MD. L. REV. 387, 410–11 (1983) (“A person who denies having any of his counterpart’s ‘unsavory characteristics’ unwittingly may negate a perception that the writing describes him. . . . A reader cannot mechanically disregard all defamatory characteristics and identify the character based solely on the remaining nondefamatory characteristics.” (citation omitted)).

¹⁷⁰ See Isidore Silver, *Libel, the “Higher Truths” of Art, and the First Amendment*, 126 U. PA. L. REV. 1065, 1078 (1978) (“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.”).

considerations, it is not surprising that some observers have called for extending blanket immunity from libel suits to authors and publishers of fiction.¹⁷¹

Nevertheless, courts and most commentators have rejected categorical protection for fiction. Instead, they have embraced the position that “[r]eputations may not be traduced with impunity . . . under the literary forms of a work of fiction.”¹⁷² The language of “forms” appears to reflect an underlying concern that automatic immunity for works that purport to be fictional would supply creators means and incentive to cloak what amounts to factual accusations in the garb of fiction.¹⁷³ Thus, while a work’s designation as fiction can inform a reasonable understanding of whether it contains a defamatory falsehood, it is this understanding rather than the formal label assigned that resolves the issue.

Little judicial consensus exists, however, on means of yielding such an understanding. Rather, the kinds and degrees of similarities between plaintiffs and their fictional counterparts required to make a work actionable tend to be—perhaps inevitably—a highly particularized determination. The much-discussed case of *Aguilar v. Universal City Studios, Inc.*, illustrates the individualized and subjective nature of this judgment.¹⁷⁴ There, the plaintiff alleged that she had been libeled by the portrayal of a character of “loose morals” in the film *Zoot*

¹⁷¹ See, e.g., Heidi Stam, Comment, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U. L. REV. 571, 571 (1980); see also Robert D. Richards, *When “Ripped from the Headlines” Means “See You in Court”: Libel by Fiction and the Tort-Law Twist on a Controversial Defamation Concept*, 13 TEX. REV. ENT. & SPORTS L. 117, 137 (2012) (proposing application of innocent-construction rule to libel-by-fiction cases so as to bar such suits “except in the most egregious instances”).

¹⁷² *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 65 (1920); see also, e.g., *Smith v. Stewart*, 660 S.E.2d 822, 830 (Ga. Ct. App. 2008) (“Simply because a book is labeled ‘fiction’ does not mean that it may not be defamatory.”); *Bryson v. News Am. Publ’ns*, 672 N.E.2d 1207, 1221 (Ill. 1996) (“[W]e must reject the defendants’ claim that the story cannot reasonably be interpreted as stating actual facts simply because it is labeled fiction.” (emphasis omitted)); *Allied Mktg. Grp. v. Paramount Pictures Corp.*, 111 S.W.3d 168, 173 n.3 (Tx. App. 2003); Donald Meltzer, Note, *Toward a New Standard of Liability for Defamation in Fiction*, 58 N.Y.U. L. REV. 1115, 1138 (1983) (“Certain works labeled ‘fiction’ may mirror reality so closely that a reasonable person might consider such a work or a statement therein to be a ‘statement of fact.’”).

¹⁷³ See SMOLLA, *supra* note 28, § 4:48 (“Some device is required to allow defamed plaintiffs recompense when a work of fiction is nothing but a shield for an intentional attack on reputation.”).

¹⁷⁴ See 219 Cal. Rptr. 891, 893–94 (Ct. App. 1985).

Suit.¹⁷⁵ The movie's story was based on the sensational Sleepy Lagoon murder case and the riots that followed.¹⁷⁶ According to the complaint, the disreputable character was identified with the plaintiff because both had the first name "Bertha," the plaintiff had been involved in the riots, and others believed that the film's "Bertha" was the plaintiff.¹⁷⁷ Affirming a grant of summary judgment for the defendants, the court found this evidence "insufficient to raise a triable issue" as to whether the character represented the plaintiff.¹⁷⁸ The court ruled that the identity of names could not suffice to establish that the film's fictional Bertha was "of and concerning" the plaintiff.¹⁷⁹ Nor did enough other similarities exist to support a reasonable belief that the movie depicted the plaintiff. For example, the character was much older than the plaintiff at the time of the Sleepy Lagoon incident, did not physically resemble the plaintiff, and played a role in the incident highly dissimilar to the plaintiff's role.¹⁸⁰ That a single witness claimed to believe that "Bertha" was the plaintiff based on coincidence of first names was far too meager to compensate for these deficiencies.¹⁸¹

The reasoning and outcome of *Aguilar* appear unexceptionable. Yet, the indeterminacy of standards in this area would have enabled another court with different sensibilities to reach a different conclusion and allow the suit to proceed. It would then not be difficult to imagine a jury, moved by the plaintiff's account of trauma, finding that the two Berthas were one and the same.

The potential for such a scenario can be seen in *Bryson v. News America Publications*.¹⁸² In *Bryson*, the plaintiff sued over a magazine short story that appeared as part of a series called "New Voices in Fiction."¹⁸³ At one point the story's narrator described a classmate with the plaintiff's last name as a "slut."¹⁸⁴ Both the trial and appellate courts dismissed the plaintiff's claim.¹⁸⁵

¹⁷⁵ *Id.* at 891.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 892.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 893–94.

¹⁸¹ *See id.* at 894–95.

¹⁸² 672 N.E.2d 1207, 1218–19 (Ill. 1996).

¹⁸³ *Id.* at 1213.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1212.

Reversing, the Illinois Supreme Court emphasized that the story took place in southern Illinois, home to both the plaintiff and author, that the plaintiff alleged that the character shared about two-dozen physical features and experiences with the plaintiff, and, especially, that the character bore the uncommon name Bryson.¹⁸⁶ Given these similarities, the court allowed the plaintiff a chance to prove that the character bore “such a close resemblance to the plaintiff that reasonable persons would understand that the character was actually intended to portray the plaintiff.”¹⁸⁷

Decisions like *Bryson* must give pause to authors who draw elements of their characters—even inadvertently—from actual individuals. The sheer unpredictability of courts’ disposition of libel claims over such works is illustrated by the Illinois Supreme Court’s reversal of two prior rulings against the plaintiff’s claim.¹⁸⁸ Moreover, the court effectively found that the plaintiff had cleared two substantial hurdles, which in combination should have demanded a powerful showing by the plaintiff. First is the heavy burden placed on all plaintiffs who contend that fictional characters amount to portrayals of themselves.¹⁸⁹ Additionally, a claim drawn from a reference allegedly to the plaintiff as a “slut” must overcome authority that epithets and pejorative terms in and of themselves do not ordinarily constitute actionable factual accusations.¹⁹⁰ In *Bryson*, the story’s narrator states in the offending passage: “Who knows what guys like that made Bryson do. . . . I remembered what a slut she was and forgot about the sorriness I’d been holding onto for her.”¹⁹¹ While the court reasoned that the first of these sentences placed a specific gloss on

¹⁸⁶ See *id.* at 1219.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1225.

¹⁸⁹ See *Springer v. Viking Press*, 90 A.D.2d 315, 320 (1st Dep’t 1982), *aff’d*, 60 N.Y.2d 916 (1983); *Carter-Clark v. Random House, Inc.*, 196 Misc. 2d 1011, 1013 (Sup. Ct. N.Y. Cnty. 2003), *aff’d*, 17 A.D.3d 241 (1st Dep’t 2005); R. Bruce Rich & Livia D. Brilliant, *Defamation-in-Fiction: The Limited Viability of Alternative Causes of Action*, 52 BROOK. L. REV. 1, 10–11 (1986); Bettina M. Chin, Note, *Regulating Your Second Life: Defamation in Virtual Worlds*, 72 BROOK. L. REV. 1303, 1336 (2007) (describing requirement as “quite strict”).

¹⁹⁰ See *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 285–86 (1974) (finding “scab” to be “merely rhetorical hyperbole”); *Greenbelt Coop. Publ’g Ass’n, Inc. v. Bresler*, 398 U.S. 6, 13–14 (1970) (noting that “blackmail” “was no more than rhetorical hyperbole”).

¹⁹¹ *Bryson*, 672 N.E.2d at 1213.

the second,¹⁹² speculation that does not imply the speaker's personal knowledge of a defamatory fact is ordinarily protected.¹⁹³ Nevertheless, the court approved a claim based on "an opinion uttered by a fictional character about another fictional character" in a brief episode of a story portraying adolescent life.¹⁹⁴ The range of possible libel actions based on this attenuated chain of logic would appear limitless.¹⁹⁵

Such an approach also threatens to inhibit the creation of "faction" in which actual figures appear in an invented narrative.¹⁹⁶ A staple of books,¹⁹⁷ film,¹⁹⁸ and television,¹⁹⁹ such works could be made vulnerable to suits by living individuals portrayed in them under *Bryson's* mode of analysis. Obviously, a producer of fiction can argue that the portrayal of a person's behavior can only be understood as an imagined course of conduct in the setting of a fictional work. Indeed, Isidore Silver has deemed it "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."²⁰⁰ In *Bryson*, however, the court disparaged the notion that a "fictional label" could be relied upon to deflect readers' inclination to equate a fictional character with the plaintiff.²⁰¹

¹⁹² See *id.* at 1217.

¹⁹³ See *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 250 (1st Cir. 2000); *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997); *Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995).

¹⁹⁴ *Bryson*, 672 N.E.2d at 1228 (McMorrow, J., dissenting) (internal citation and quotation marks omitted).

¹⁹⁵ See ROBIN HEMLEY, *TURNING LIFE INTO FICTION* 173 (2006); Savare, *supra* note 165, at 143 n.125 ("The holding in *Bryson* puts at risk almost any writer of fiction who has had a real experience in this world. It expands the possible universe of plaintiffs to those who have merely crossed paths with a writer." (quoting Sandra Baron in telephone interview)); Wes Smith, *Libel in Fiction? Trial Will Tell Story*, CHI. TRIB. (Nov. 17, 1996), <https://www.chicagotribune.com/news/ct-xpm-1996-11-17-9611170256-story.html>.

¹⁹⁶ See *Faction*, n.2, OXFORD ENG. DICTIONARY (3d ed. 2014). See generally Silver, *supra* note 170, at 1067.

¹⁹⁷ See, e.g., TRUMAN CAPOTE, *IN COLD BLOOD: A TRUE ACCOUNT OF A MULTIPLE MURDER AND ITS CONSEQUENCES* (Vintage Int'l ed. 2012); NORMAN MAILER, *THE EXECUTIONER'S SONG* (First Grand Cent. Pub. Trade ed. 2012); TOM WOLFE, *THE ELECTRIC KOOL-AID ACID TEST* (1968).

¹⁹⁸ See, e.g., *ALL THE PRESIDENT'S MEN* (Warner Bros. 1976); *CHARLIE WILSON'S WAR* (Universal Pictures 2007).

¹⁹⁹ See, e.g., *Narcos* (Netflix, Aug. 28, 2015–Sept. 1, 2017); *When We Rise* (ABC television broadcast, Feb. 27, 2017–Mar. 3, 2017).

²⁰⁰ See Silver, *supra* note 170, at 1086.

²⁰¹ See *Bryson v. News Am. Publ'ns, Inc.*, 672 N.E.2d 1207, 1219 (Ill. 1996).

Again, the court reached this conclusion where a private individual complained of a passing remark by a fictional narrator about a fictional character in an imagined story. Presumably the “fictional label” would carry even less weight where the plaintiff recognizably appears in the work at issue. Under *Bryson*’s lax standard, such an individual might readily survive the defendant’s motion to dismiss. That the defendant would then still have the opportunity to persuade the jury not to equate the plaintiff and the plaintiff’s fictional namesake does not obviate the need for a higher bar at an earlier stage. In addition to concerns already expressed²⁰²—including costs²⁰³—about leaving issues of plaintiff identification to juries, those concerns increase in this forum. The job of distinguishing libelous charge from imaginative liberty under the First Amendment may prove especially challenging to jurors.

In this respect, the experience of juries’ application of the actual malice standard may be instructive. One study found that about two-thirds of trial verdicts against media defendants were reversed where the appellate court ruled specifically on the issue of actual malice.²⁰⁴ In light of such data, and of a well-known report on a jury’s struggle to apply the standard in a high-profile case,²⁰⁵ one scholar concluded that “juries are confused by the complexities of *Sullivan*’s categorical, constitutional rules.”²⁰⁶ If so, juries may find application of the “of and concerning” requirement to fiction even more baffling than the concept of actual malice. With actual malice, jurors are asked to gauge the level of intent with which a plaintiff uttered a defamatory falsehood. However difficult that inquiry, it is conceptually more focused than determining whether the version of the plaintiff who appears in a work of fiction is “really” that individual. The latter calls for sophistication in assessing a range of evidence bearing on the place of the plaintiff in the disputed work and in the world. Moreover, just as bias is thought to account in part for libel

²⁰² See *supra* notes 90–95 and accompanying text.

²⁰³ Susan Gilles has pointed out that a large portion of a defendant’s costs in a libel suit have already been incurred before the summary judgment stage. See Gilles, *supra* note 31, at 1780–81.

²⁰⁴ *Id.* at 1778.

²⁰⁵ See Stephen Brill, *Inside the Jury Room at the Washington Post Libel Trial*, AM. LAW., Nov. 1982, at 1, 94, cited in Susanna Frederick Fischer, *Rethinking Sullivan: New Approaches in Australia, New Zealand, and England*, 34 GEO. WASH. INT’L L. REV. 101, 187 (2002).

²⁰⁶ Fischer, *supra* note 31, at 187.

verdicts against media defendants in cases that hinge on actual malice,²⁰⁷ some jurors may be influenced by emotion rather than by analytical abstractions in drawing conclusions about faction. The shame or anger displayed by the plaintiff may hold more sway than nuances of literary theory or a fine calculation of the overlap between the plaintiff's actual and fictional lives.²⁰⁸

In a sense, then, faction represents in heightened form the uncertainty over legal treatment of fiction generally that can exert a chilling effect on authors and publishers. Confronted with indeterminate standards and unpredictable juries, they “simply cannot tell which aspects of a portrayal will be considered significant in comparing plaintiffs and characters.”²⁰⁹ This specter may intimidate them into rendering characters in less vivid hues or forego certain works altogether. Nor can this impact be measured; the amount of work diluted or halted for fear of a libel action by its nature tends to be untraceable. Even authors and other creators who justifiably expect to be vindicated cannot forecast the costs they will incur to defeat a suit. With judges reluctant to intrude on the jury's role and jurors susceptible to misapplication of First Amendment doctrine, libel defendants may have to absorb the large expenses generated on the long road from initial complaint to successful appeal.

B. *Chronic Inconsistencies*

It would be unrealistic to demand precise uniformity of treatment and result for a problem as variegated and multijurisdictional as libel through fiction. Nevertheless, divergences among courts have produced an unpredictability that

²⁰⁷ See Gilles, *supra* note 31, at 1794–95; Tigran W. Eldred, Note, *Amplifying Bose Corp. v. Consumers Union: The Proper Scope of De Novo Appellate Review in Public Person Defamation Cases*, 57 *FORDHAM L. REV.* 579, 588–89 (1989). At this time, it is speculative but plausible to think that various public accusations of “fake news” may come to contribute to jurors' attitudes in such cases. See e.g., Jeremy W. Peters, *Wielding Claims of 'Fake News,' Conservatives Take Aim at Mainstream Media*, N.Y. TIMES (Dec. 26, 2016), <https://www.nytimes.com/2016/12/25/us/politics/fake-news-claims-conservatives-mainstream-media.html>; John Hayward, *Sean Hannity: People Don't Need 'Fake News' Corporate Media Anymore; Landscape Shifting to Breitbart, Drudge, Talk Radio*, BREITBART (Nov. 28, 2016), <https://www.breitbart.com/radio/2016/11/28/sean-hannity-people-dont-need-fake-news-shifting-breitbart-drudge-talk-radio/>.

²⁰⁸ Another kind of potential bias is the temptation for jurors to align their votes with their publicly espoused values. See Silver, *supra* note 170, at 1082–83. (“[J]uries may well find liability for works they publicly abhor but secretly enjoy.”).

²⁰⁹ Smirlock, *supra* note 97, at 531.

is disturbing even under a far more indulgent expectation. Creators of fictional characters and those who disseminate their works cannot reliably anticipate whether a self-proclaimed real-life counterpart will haul them into court or how much weight that court will assign to First Amendment values. As one commentator pointedly observed, defendants “cannot tell whether a fictional description’s ‘ugliness’ serves to preclude identification or whether it constitutes false and libelous matter. They will be unsure whether even their best efforts will shield them from libel, or whether a mere disclaimer will suffice.”²¹⁰ And if judges—presumably familiar with legal authority and precedent—adopt such diverse approaches, then the caprices of individual juries must be all the more treacherous.²¹¹

As the reference to disclaimers above suggests, courts differ widely even on the fundamental question of how much a work’s representation as fiction should shape their analysis. As noted earlier, the court in *Bryson* was almost disdainful of the idea that a work’s designation as fiction should influence its determination even in view of the plaintiff’s tangential connection to a short story’s character.²¹² Nor was the Illinois court isolated in this attitude. In *Muzikowski v. Paramount Pictures Corp.*, the Seventh Circuit Court of Appeals expressly looked to *Bryson* for guidance in finding that a story’s assertion that it does not mean to describe any real person “does not mean that it may not be defamatory *per se*.”²¹³ The film that provoked Robert Muzikowski’s suit had stated in its credits, “While this motion picture is in part inspired by actual events, persons and organizations, this is a fictitious story and no actual persons, events or organizations have been portrayed.”²¹⁴ While Muzikowski had become well-known for coaching Little League Baseball teams in struggling areas of Chicago, the film included no character named “Robert” or “Muzikowski” or any references to Little League Baseball.²¹⁵ Moreover, the character whose criminal behavior formed the basis of the suit differed from Muzikowski in significant ways. For

²¹⁰ *Id.*

²¹¹ See Savare, *supra* note 165, at 156.

²¹² See *supra* note 201 and accompanying text.

²¹³ 322 F.3d 918, 925 (7th Cir. 2003) (citing *Bryson v. News Am. Publ’ns, Inc.*, 672 N.E.2d 1207, 1219 (Ill. 1996)).

²¹⁴ *Id.* at 922.

²¹⁵ See *id.* at 921–22. Muzikowski’s alleged fictional counterpart, however, did coach an inner-city baseball league. See *id.* at 926.

example, the character copes with a gambling addiction²¹⁶ and “never breaks his drinking habit.”²¹⁷ Neither the disclaimer nor these differences sufficed to halt the suit. Overturning the district court’s order to dismiss, the Seventh Circuit gave the plaintiff the opportunity to show that no innocent construction of the character’s portrayal was reasonably possible.²¹⁸

At the same time, other courts appear to treat a work’s designation as fiction as creating an overwhelming presumption that it does not portray the plaintiff. In *Middlebrooks v. Curtis Publishing Co.*, the plaintiff could point to considerable overlap between his circumstances and those of a short story’s character as well as to numerous witnesses who testified that they believed the character represented the plaintiff.²¹⁹ The court nevertheless dismissed the suit, emphasizing that the story “was an obvious work of fiction. It was listed in the fiction section of the [magazine’s] index, was labeled fiction, and was illustrated by cartoons.”²²⁰ In a similar vein, the court in *Smith v. Huntington Publishing Co.* acknowledged that a news story focusing on a troubled individual assigned a fictitious name also described in notable ways the plaintiff who happened to have the same name.²²¹ Despite the similarity of struggles and identity of names, however, the court granted summary judgment for the defendant.²²² To the court, any reasonable belief that the article reported on the plaintiff was dispelled by the “clear statement by the author in boldface print that the names were fictitious.”²²³

In *Aguilar* as well, the court’s grant of summary judgment for the defendant highlighted at the outset of its analysis: “*Mere Identity or Similarity of Names Is Insufficient to Prove a Work of*

²¹⁶ *Id.* at 926.

²¹⁷ *Id.* at 922.

²¹⁸ *Id.* at 927. The presence of disclaimers in *Greene v. Paramount Pictures Corp.*, 138 F. Supp. 3d 226 (E.D.N.Y. 2015), similarly failed to halt a claim. The closing credits of the film *The Wolf of Wall Street* announced that some of its characters were composites of actual individuals depicted in the memoir on which the movie was based and that “any similarity . . . to the actual character or history of any person . . . is entirely for dramatic purposes and not intended to reflect on an actual character, history, product or entity.” *Id.* at 230. Nevertheless, the plaintiff was allowed to proceed with his contention that one of the film’s characters falsely portrayed him as “as a criminal, drug user, degenerate, depraved, and/or devoid of any morality or ethics.” *Id.* at 230–31.

²¹⁹ 413 F.2d 141, 142 (4th Cir. 1969).

²²⁰ *Id.* at 143.

²²¹ 410 F. Supp. 1270, 1272–73 (S.D. Ohio 1975).

²²² *Id.* at 1274.

²²³ *Id.*

*Fiction Is Of and Concerning a Real Person.*²²⁴ This principle also defeated the claim in *Landau v. Columbia Broadcasting Systems, Inc.*, where the door panel of a gambler's office, briefly shown in a television crime drama, bore the same name as the plaintiff's business.²²⁵ For the court, the nature of the program was decisive: "The script from which the performance was dramatized was wholly fictional. The plot, settings, characters and dialogue were entirely the product of imagination."²²⁶ Even a series of advertisements by a company mocking a fictional corporation that used terminology associated with a rival was protected by their fictional nature.²²⁷ As the court summarized, "[T]he only reasonable inference to be drawn from these advertisements is that Sid's Waste Water Treatment Emporium is a purely fictional enterprise."²²⁸

Another area of uncertainty for creators whose characters resemble actual individuals is the role a court will assign to their presumed intent. Notwithstanding the oft-quoted doctrine that it "is not so much who was aimed at as who was hit,"²²⁹ courts are often influenced by their perception of whether an author meant to present a thinly veiled portrait of the plaintiff. In *Fetler*,²³⁰ for example, the plaintiff's suit was bolstered by his asseveration that the novel's author—"his brother told him that the book, which he was then writing, 'was about our father, the family concerts and me.'" ²³¹ Conversely, the court in *Aguilar*²³² found significant to its grant of summary judgment for the defendant "the uncontradicted testimony of the author . . . [that] he had never heard of Ms.

²²⁴ *Aguilar v. Universal City Studios, Inc.*, 219 Cal. Rptr. 891, 892 (Ct. App. 1985) (capitalization and italics in original); see also *supra* notes 174–181 and accompanying text.

²²⁵ 205 Misc. 357, 359 (Sup. Ct. N.Y. Cnty. 1954).

²²⁶ *Id.* at 360.

²²⁷ See *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 413–14 (E.D. Pa. 1983).

²²⁸ *Id.* at 414–15.

²²⁹ *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 64 (1920). As the court elaborated, a publisher "is chargeable with the publication of the libelous matter if it was spoken 'of and concerning' [the plaintiff], even though it was unaware of his existence, or that it was written 'of and concerning' any existing person." *Id.* at 63.

²³⁰ *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650 (2d Cir. 1966). See *supra* notes 103–108 and accompanying text for a discussion of this case.

²³¹ *Fetler*, 364 F.2d at 651.

²³² *Aguilar v. Universal City Studios, Inc.*, 219 Cal. Rptr. 891 (Ct. App. 1985). See *supra* notes 174–181 and accompanying text for a discussion of this case.

Aguilar” before his work was written.²³³ Similarly, in *Clare*,²³⁴ the court repeatedly emphasized the defendant’s intent to write a fictional story,²³⁵ finally ruling against the plaintiff on the ground that the defendant “did not intend to write the book of plaintiff or intend to appropriate plaintiff’s name to the story.”²³⁶ In *Landau*, too, the court’s dismissal of the plaintiff’s suit assigned importance to the absence of any “attempt by the defendants . . . to create any other impression” than for the play at issue to recount “an imaginary event involving fictional characters.”²³⁷

Yet other courts have declared the defendant’s intent simply irrelevant to its analysis. In *Allied Marketing Group, Inc. v. Paramount Pictures Corp.*, the court’s acknowledgement that the defendant “intended to use a fictional company name” that turned out to coincide with the plaintiff’s did not invalidate the plaintiff’s claim.²³⁸ Rather, because the viewer’s reasonable understanding controlled, “it is not necessary for the plaintiff to prove that the defendant intended to refer to the plaintiff.”²³⁹ Sustaining a verdict against the defendant in *Davis v. R.K.O. Radio Pictures, Inc.*,²⁴⁰ the court there likewise stated: “If the communication is reasonably understood by the person to whom it is made as intended to refer to the plaintiff, it is immaterial that the defamer did not intend to refer to him.”²⁴¹ Other courts have recited this principle even as they have ultimately ruled against the plaintiff. In *Smith v. Huntington Publishing Co.*, for example, the court granted summary judgment to the defendant after noting that “[t]he test is [not] the intent of the author The test is whether a reasonable person could reasonably believe that the article referred to the plaintiff.”²⁴²

²³³ *Aguilar*, 219 Cal. Rptr. at 894–95.

²³⁴ *Clare v. Farrell*, 70 F. Supp. 276 (D. Minn. 1947). See *supra* notes 58–63 and accompanying text for a discussion of this case.

²³⁵ See *Clare*, 70 F. Supp. at 277–79.

²³⁶ *Id.* at 278.

²³⁷ *Landau v. Columbia Broad. Sys., Inc.*, 205 Misc. 357, 360, 362 (Sup. Ct. N.Y. Cnty. 1954); cf. *Tamkin v. CBS Broad., Inc.*, 122 Cal. Rptr. 3d 264, 266–68 (Ct. App. 2011) (dismissing under California statute a libel suit by real estate agents whose names were used as placeholders in the preliminary script of a television episode where the defendants did not intend for the script to be disseminated on the Internet).

²³⁸ 111 S.W.3d 168, 171 (Tex. App. 2003). See *supra* notes 140–142 and accompanying text for a discussion of this case.

²³⁹ *Allied Mktg. Grp., Inc.*, 111 S.W.3d at 173.

²⁴⁰ 191 F.2d 901, 905 (8th Cir. 1951). See *supra* notes 64–66 and accompanying text for a discussion of this case.

²⁴¹ *Davis*, 191 F.2d at 904 (internal citation and quotation marks omitted).

²⁴² 410 F. Supp. 1270, 1273 (S.D. Ohio 1975).

Implicit in these and other suits based on fiction is the unpredictability of what a court or jury will consider the “sweet spot” between a character’s resembling a plaintiff so closely as to meet the “of and concerning” requirement and departing so harshly as to support the charge of libel. As suggested earlier,²⁴³ the problem here is less inconsistency than the intrinsic impossibility of constructing a reliable guide to the degree of resemblance that will trigger actionability. A notable example is the role that physical similarities or dissimilarities will play in a court’s calculus. In *Tamkin v. CBS Broadcasting, Inc.*, for example, the court in dismissing the suit noted that “there is nothing about the physical description of the fictional Scott Tamkin, such as a special birthmark or a specific fashion accessory or hairstyle” that would support a reasonable inference that he represented the actual Scott Tamkin.²⁴⁴ In *Bindrim v. Mitchell*, by contrast, the court brushed aside the lengths to which a novel’s author went to distinguish her main character’s appearance from that of the plaintiff who inspired the work.²⁴⁵

IV. THE PROBLEM OF GROUP DEFAMATION

Another frequent source of claims that plaintiffs have suffered de facto defamation by inference is group defamation doctrine. In suits based on fiction, the question is whether a purportedly imagined character effectively—but falsely—portrays the plaintiff. Where issues of group defamation arise, by contrast, no one doubts that the defendant has described real people. Rather, the plaintiff must demonstrate that an allegedly defamatory statement about an aggregate body of persons refers specifically to the plaintiff.²⁴⁶ The Restatement articulates a widely followed standard for determining when a plaintiff may prevail on such a claim.

One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if,

²⁴³ See *supra* notes 166–167 and accompanying text.

²⁴⁴ 122 Cal. Rptr. 3d 264, 274 (Ct. App. 2011).

²⁴⁵ 155 Cal. Rptr. 29, 37 (Ct. App. 1979).

²⁴⁶ See *Bezons v. Nelson*, 155 N.W.2d 241, 243 (Mich. Ct. App. 1967) (“[I]f defamatory words are used broadly in respect to a class or group, there is no cause of action unless the words can be made to apply to a single member of that group or to every member of the group.” (citations omitted)).

- (a) the group or class is so small that the matter can reasonably be understood to refer to the member,
or
(b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.²⁴⁷

A group of more than twenty-five members is presumptively too large to support a libel claim by one of its individual members.²⁴⁸ Though this rule of thumb is defensible,²⁴⁹ it still leaves ample scope for divergent judicial interpretation and jury bias below the twenty-five-member threshold. As with fiction, then, group libel suits should contain heightened safeguards against the abuse of claims based on defamation by inference.

A. *Principles, Rationales, and Standards*

Notwithstanding variations in analysis, courts generally agree on a handful of principles governing group defamation claims. In evaluating a small group defamation claim, a court takes into account the group's size, the portion of the group that has been defamed, and "the prominence of the group and its individual members" within the area where the defamatory charge is disseminated.²⁵⁰ Thus, where a statement defames an entire small group, individual members of the group can readily show that the statement referred to them.²⁵¹ On the other hand, a member of a defamed organization has the burden of showing that "that person is distinguished from other members of the group."²⁵²

²⁴⁷ RESTATEMENT (SECOND) OF TORTS § 564A.

²⁴⁸ See *Peterson v. Sanghi*, No. 8-18-cv-020000-JLS-ADS, 2019 WL 1715487, at *6 (C.D. Cal. Feb. 14, 2019); *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1185 (Cal. 1986); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 750 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 564A cmt. b.

²⁴⁹ See Nat Stern, *The Certainty Principle as Justification for the Group Defamation Rule*, 40 ARIZ. ST. L.J. 951, 969 (2008).

²⁵⁰ *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 239 (2d Dep't 1981).

²⁵¹ See *id.* at 231.

²⁵² *Three Amigos SJJ Rest., Inc. v. CBS News, Inc.*, 132 A.D.3d 82, 88 (1st Dep't 2015); see also *Yow v. Nat'l Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1188 (E.D. Cal. 2008) ("[I]f the group is small and its members easily ascertainable, [the] plaintiff may succeed, on an individual action based on the defamatory matter being directed at the group." (second and third alterations in original) (quoting *Blatty*, 728 P.2d at 1885)).

Similar to the notion of “prominence,” courts consider group libel claims from the perspective of the average informed²⁵³ and reasonable²⁵⁴ reader.

Undergirding the group defamation rule is the idea that libelous statements about large groups offers too attenuated a link with any single member to support a claim of individual harm. In the words of one court, “[T]he larger the collectivity named in the libel, the less likely it is that a reader would understand it to refer to a particular individual.”²⁵⁵ Even where such sweeping generalizations are taken at face value, audiences are unlikely to find them credible.²⁵⁶ Moreover, the availability of suits by individual members could trigger multiple, potentially prohibitive, claims.²⁵⁷ This prospect has especially troubling potential to dampen free public discussion.²⁵⁸ Conversely, the ability to bring

²⁵³ See *Excellus Health Plan, Inc. v. Tran*, 287 F. Supp. 2d 167, 174 (W.D.N.Y. 2003) (upholding suit where underlying facts connecting medical practice group to defamed individual physicians were “known to those who read or heard the publication”); *Gonzalez v. Sessom*, 137 P.3d 1245, 1248 (Okla. Civ. App. 2006) (noting article’s reference to plaintiff to be “measured by its natural and probable effect upon the mind of the average lay reader” (internal citation and quotation marks omitted)); *Marr v. Putnam*, 246 P.2d 509, 521 (Or. 1952) (permitting claim because “persons with a knowledge of the circumstances” could have understood article as referring to plaintiffs); *Harvest House Publishers v. Local Church*, 190 S.W.3d 204, 214 (Tex. App. 2006) (repeatedly describing relevant perspective as that of the “reasonable reader”).

²⁵⁴ See *AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1005 (4th Cir. 1990) (interpreting publication “in the sense in which hearers or readers of common and reasonable understanding would ascribe to [it]” (alteration in original) (internal citation and internal quotation marks omitted)); *Harvest House Publishers*, 190 S.W.3d at 214 (conducting objective inquiry of what “the hypothetical reasonable reader” would believe).

²⁵⁵ *Brady*, 84 A.D.2d at 228; see also *Jankovic v. Int’l Crisis Grp.*, 494 F.3d 1080, 1089–90 (D.C. Cir. 2007).

²⁵⁶ See *Barger v. Playboy Enters., Inc.*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983) (Courts are inclined to “presume that no reasonable reader would take the statements [about a large class of people] as literally applying to each individual member.”), *aff’d*, 732 F.2d 163 (9th Cir. 1984); see also RICHARD A. EPSTEIN, *TORTS* § 18.6, at 489 (1999) “[M]ost people have already formed their baseline opinions about large groups of individuals and are, therefore, unlikely to be swayed by general denunciations that run counter to their own opinions.”).

²⁵⁷ See *Mich. United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 900 (W.D. Mich. 1980) (expressing concern that permitting claims by members of large group “could invite any number of vexatious lawsuits”), *aff’d*, 665 F.2d 110 (6th Cir. 1981); Ellyn Tracy Marcus, Comment, *Group Defamation and Individual Actions: A New Look at an Old Rule*, 71 CAL. L. REV. 1532, 1555 (1983) (“[A] multiplicity of actions could expose defendants to liability severely out of proportion to the harm the speakers have actually inflicted.”).

²⁵⁸ See *Art of Living Found. v. Does*, No. 10–CV–05022–LHK., 2011 WL 2441898, at *6 (N.D. Cal. June 15, 2011) (“The rationale for [the group libel] rule is to protect freedom of public discussion . . .”); *Brady*, 84 A.D.2d at 229 (stating the group

suit when a statement tars a small group embodies the judgment that readers or auditors will probably connect the collective libel to each member.²⁵⁹

The presumptive immunity of statements about groups of more than twenty-five members represents the principal effort to bring some predictability to an inherently inexact analysis. The operation of this principle was famously illustrated by the influential ruling in *Neiman-Marcus v. Lait*.²⁶⁰ There, a book had asserted that most of the salesmen at Neiman-Marcus's Dallas store were "fairies" and that some of the salesgirls were "call girls."²⁶¹ The court allowed a suit by fifteen of the store's twenty-five salesmen,²⁶² but dismissed an action by 30 of 382 saleswomen on the "widely accepted" ground that "[w]here the group or class libelled is large, none can sue even though the language used is inclusive."²⁶³ Though the twenty-five member limit for actionability does not constitute a hard ceiling,²⁶⁴ it appears to offer more space for uninhibited speech than application of multiple factors to particular cases.

Nevertheless, a number of courts have rejected "slavish reliance upon the general rule which relies upon numbers alone"²⁶⁵ and adopted a multi-factor approach. The most prominent multifactor method examines "the intensity of the suspicion cast

defamation rule is "designed to encourage frank discussions of matters of public concern under the First Amendment guarantees").

²⁵⁹ See Note, *Developments in the Law Defamation*, 69 HARV. L. REV. 875, 894 (1956) ("Where the group is small there is a great likelihood that others will understand that the defendant intended to attribute certain qualities, beliefs, or acts to each member."); EPSTEIN, *supra* note 256, § 18.6, at 490 (pointing to the "rough empirical judgment . . . that the more focused the attack, the greater the potential reputational harm").

²⁶⁰ 13 F.R.D. 311 (S.D.N.Y. 1952).

²⁶¹ *Id.* at 313.

²⁶² *Id.* at 316–17. The court took for granted that an accusation of homosexuality was libelous *per se*. This premise has since been questioned in light of advancing social and cultural norms. See generally Holly Miller, *Homosexuality as Defamation: A Proposal for the Use of the "Right-Thinking Minds" Approach in the Development of Modern Jurisprudence*, 18 COMM. L. & POL'Y 349 (2013); Anthony Michael Kreis, *Lawrence Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation*, 122 YALE L.J. ONLINE 125 (2012).

²⁶³ *Neiman-Marcus*, 13 F.R.D. at 315 (citations omitted); see also *id.* at 316 (stating that no reasonable person would "conclude from the publication a reference to any individual saleswoman." (citations omitted)).

²⁶⁴ See RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (stating that "[i]t is not possible to set definite limits as to the size of the group or class" above which a libelous generalization cannot be considered of and concerning an individual member).

²⁶⁵ *McCullough v. Cities Serv. Co.*, 676 P.2d 833, 836 (Okla. 1984).

upon the plaintiff²⁶⁶ by the defendant's collective libel.²⁶⁷ The Oklahoma Supreme Court adopted this test in a case ignited by an article appearing to charge "[University of] Oklahoma players" with taking amphetamines.²⁶⁸ In upholding a directed verdict for the plaintiff, who was not one of the team's stars,²⁶⁹ the court refused to find decisive that the team comprised sixty to seventy players. Rather, under circumstances like these, "even a general derogatory reference to a group does affect the reputation of every member" and liability can attach where the suspicion placed on the plaintiff is sufficiently intense.²⁷⁰ In a case widely followed in New York, a court there based its adoption of the "intensity of suspicion test" on the premise that "[a]n absolute limit on size" was "unduly restrictive" and "arbitrary."²⁷¹ While acknowledging that size was relevant, the court set forth a number of other factors to be considered when determining whether defamation of a group brought a member into disrepute.²⁷² Applying this analysis, the court authorized a suit by twenty-seven of a city police department's fifty-three officers over a suggestion that they had been accessories to misconduct by eighteen indicted fellow officers.²⁷³

While the Restatement's position retains considerable ambiguity when applied to groups with twenty-five members or fewer, the "intensity of suspicion" test raises far more uncertainty. Though the test has found favor with some commentators,²⁷⁴ its

²⁶⁶ *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42, 52 (Okla. 1962) (internal quotation marks omitted) (quoting Note, *Liability for Defamation of a Group*, 34 Colum. L. Rev. 1322, 1325 (1934)).

²⁶⁷ Commentators have also proposed standards that weigh specific factors. See, e.g., Jeffrey S. Bromme, Note, *Group Defamation: Five Guiding Factors*, 64 TEX. L. REV. 591, 608 (1985); Marcus, *supra* note 257, at 1552.

²⁶⁸ *Fawcett Publ'ns, Inc.*, 377 P.2d at 47.

²⁶⁹ He was a fallback on the alternate squad who had played in nine of the team's eleven games. *Id.* at 47, 52.

²⁷⁰ *Id.* at 52 (internal quotation marks omitted) (quoting Note, *supra* note 266, at 1324–25).

²⁷¹ *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 234–37 (2d Dep't 1981). See *infra* notes 324–327 and accompanying text for a discussion of this case.

²⁷² *Brady*, 84 A.D.2d at 236–37 (citing Note, *supra* note 266, at 1326).

²⁷³ *Id.* at 236–37, 240–41.

²⁷⁴ See, e.g., LAURENCE H. ELDREDGE, *THE LAW OF DEFAMATION* § 10, at 57–58 (1978) (describing *Fawcett* as a potential "landmark in the American law"); Bromme, *supra* note 267, at 597; David A. Elder, "Hostile Environment" Charges and the ABA/AALS Accreditation/Membership Imbroglia, *Post-Modernism's "No Country for Old Men": Why Defamed Law Professors Should "Not Go Gentle Into that Good Night,"* 6 RUTGERS J.L. & PUB. POL'Y 434, 495–96, 504–05 (2009); Mason C. Lewis, *The*

free-floating, ad hoc approach leaves a broad spectrum of expression potentially exposed to liability. The case in which the test originated illustrates its lack of guidance. The court intuited that the plaintiff, though a part-time player, would “not be overlooked by those who were familiar with the team.”²⁷⁵ It is far from evident how later courts—and later speakers—could draw on this pivotal observation to determine the permissible boundaries of comments about large groups. Moreover, a New York court noted that the balancing factors it enumerated were “not meant to be exclusive.”²⁷⁶ Thus, not only do speakers under this approach lack the assurance that comments about groups of over twenty-five members carry a strong presumption of immunity, they also cannot anticipate what factors will ultimately be deemed relevant. The standard’s vagueness inhibits speech in another way as well. Because of its extreme malleability, a court is less positioned to pronounce a given statement protected as a matter of law. Accordingly, a defendant is more likely to be subjected to the vagaries of jury predilections with which this Article is concerned.

B. *Difficulties of Application*

A brief survey of cases involving group defamation claims suggests their potential to inhibit even good-faith generalizations about a collection of individuals. Admittedly, courts on the whole have not lightly permitted group libel claims to proceed. Still, disparate treatment of similar claims, authorization of dubious suits, and the murky line between insufficient and permissible claims point to the value of erecting a higher threshold for such actions.

In addressing group defamation claims, courts have generally required more than the literal or theoretical possibility that a defendant’s collective characterization specifically targeted the plaintiff. In *Riverhouse Publishing Co. v. Porter*, the defendant had published a column describing the problem of “phony award schemes.”²⁷⁷ Though the column contained a phrase included in the title of the plaintiff’s biographical encyclopedia, the court held that the column could not be construed as referring to the plaintiff

Individual Member’s Right to Recover for a Defamation Leveled at the Group, 17 U. MIAMI L. REV. 519, 536 (1963).

²⁷⁵ *Fawcett Publ’ns, Inc.*, 377 P.2d at 52.

²⁷⁶ *Brady*, 84 A.D.2d at 236.

²⁷⁷ 287 F. Supp. 1, 3 (D.R.I. 1968).

or any other individual publisher.²⁷⁸ The complaint, asserted the court, “cannot make the plaintiff’s identity certain which is otherwise uncertain.”²⁷⁹

Applying this type of reasoning, a court found that a circular raising doubts about the reliability of a certain kind of insurance company could not reasonably be understood as directed at a company of that nature: “If the circular carries any libelous imputation, it is defamatory of a class and not of plaintiff as a member of that class.”²⁸⁰ Similarly, the court in *Board of Forensic Document Examiners, Inc. v. American Bar Association* dismissed a suit by seven document forensic examiners over the defendant’s assertion that examiners who had not met certain standards had not received appropriate training.²⁸¹ For the court, the statement’s application to many others besides the plaintiffs²⁸² removed it from the reach of small group libel doctrine.²⁸³

In other instances, the very generality of defendants’ statements has immunized them from suit. *Granger v. Time, Inc.* involved an article asserting that in one city “[a]rson has become common as people who are unable to sell their devalued buildings burn them for the insurance.”²⁸⁴ Given the large number of relevant fires, 481, and owners, 204, the court ruled that the statement could not be reasonably construed as specifically charging the two plaintiff owners with arson.²⁸⁵ Likewise, a book’s broad critical statements about managers of collateralized debt obligations were held insufficient to support an action by a manager on whom a chapter of the book had focused.²⁸⁶ Nor did a news report’s statement that an establishment was “run by the

²⁷⁸ *Id.* at 4–5.

²⁷⁹ *Id.* at 5.

²⁸⁰ *Hosp. Care Corp. v. Commercial Cas. Ins. Co.*, 9 S.E.2d 796, 800 (S.C. 1940).

²⁸¹ 287 F. Supp. 3d 726, 734 (N.D. Ill. 2018).

²⁸² In addition, five other individuals had also been certified under the plaintiff board’s putatively inadequate standards. *See id.*

²⁸³ *See id.*

²⁸⁴ *Granger v. Time, Inc.*, 578 P.2d 535, 537 (Mont. 1977).

²⁸⁵ *See id.* at 539–40.

²⁸⁶ *See Chau v. Lewis*, 935 F. Supp. 2d 644, 665 (S.D.N.Y. 2013), *aff’d*, 771 F.3d 118, 121 (2d Cir. 2014). *See also Sims v. Kiro, Inc.*, 580 P.2d 642, 647 (Wash. Ct. App. 1978), discussed at *supra* notes 126–130 and accompanying text, which offers a comparable rejection of a claim by a member of the class whom the defendant had disparaged.

mafia” furnish grounds for suit where no individuals were named and the plaintiffs included two entities that provided service to the establishment and three of their employees.²⁸⁷

Indeed, even where plaintiffs constitute a small group of identifiable individuals, courts have often dismissed the suit for failure to demonstrate that the audience would have drawn that connection from the communication in question. For example, in *Lazore v. NYP Holdings, Inc.*, a newspaper editorial critical of a Mohawk tribe’s attempt to build a casino asserted that the tribe “amounts to a criminal enterprise.”²⁸⁸ The three chiefs of the Mohawk Tribal Council, the tribe’s ruling body, persuaded the trial court that their coordination of the casino project and the editorial’s supporting examples of illegal behavior by “the tribe,” “tribal members,” or “Mohawks” pointed to the chiefs individually as the operators of this “criminal enterprise.”²⁸⁹ Reversing, the appellate court concluded that “the offending statements were directed against a governing body and how it governed[;] . . . there were no statements that the Tribal Council members were individually corrupt or individually promoting a criminal enterprise.”²⁹⁰

In a recent case, a manufacturer of helicopter helmets had warned of the inadequacies and dangers of helmets produced by certain unidentified companies.²⁹¹ Two rival companies contended that the nation’s small number of helicopter helmet manufacturers meant that the warning would inevitably be understood as referring to one of them.²⁹² Noting that none of the warnings mentioned the plaintiffs, however, the court found this link implausible and dismissed the complaint.²⁹³ Employing similar logic, a court rejected a claim by law enforcement officials who had been involved in the arrest of a major drug trafficker.²⁹⁴ The article in question had repeated the trafficker’s claim that the arresting officers had stolen millions of dollars from his

²⁸⁷ See *Three Amigos SJJ Rest., Inc. v. CBS News, Inc.*, 28 N.Y.3d 82, 87 (2016).

²⁸⁸ 61 A.D.3d 440, 440 (1st Dep’t 2009) (quoting *Lazore v. NYP Holdings, Inc.*, No. 08/102674, 2008 WL 6691430 at *1 (Sup. Ct. N.Y. Cnty. Oct. 15, 2008)).

²⁸⁹ *Lazore*, 2008 WL 6691430, at *5–6 (internal quotation marks omitted).

²⁹⁰ *Lazore*, 61 A.D.3d at 440 (citations omitted).

²⁹¹ *Helicopter Helmet, LLC v. Gentex Corp.*, No. 1:17-CV-00497, 2018 WL 2023489, at *2–3 (D. Del. May 1, 2018).

²⁹² See *id.* at *4.

²⁹³ *Id.*

²⁹⁴ *Haefner v. N.Y. Media, LLC*, 82 A.D.3d 481, 482 (1st Dep’t 2011).

residence.²⁹⁵ The bare reference to an “NYPD/DEA strike force,” however, could not sustain a group libel claim in the absence of more specific descriptions of individual agents.²⁹⁶

Nor can it fairly be said that judicial authorization of group libel claims necessarily reflects insensitivity to First Amendment values. In some instances, the number of members in the defamed class is so small as to render a reference to the plaintiff altogether plausible. In one such case, the defendant homeowner’s assertion that he had “2 crooks” as builders justified a suit by the second builder.²⁹⁷ In another, individual members of a four-attorney law firm that was accused of charging shockingly high fees were allowed to bring suit.²⁹⁸ Where the defamed group comprises a few more members, the defendant’s unqualified charge of group misconduct may sometimes realistically support claims by individual members.²⁹⁹ Claims of this number may also proceed where plaintiffs can credibly plead that their acquaintances would recognize the defendant’s allegedly false statement as referring to them.³⁰⁰

Nevertheless, judicial recognition of some group libel claims raises questions about the adequacy of current eligibility for such suits. In one case, the defendant had written that some academics and parents’ groups “accuse[d] D.A.R.E. supporters of . . . slashing scientists’ tires, making threatening phone calls in the middle of the night, harassing critics’ children and even of jamming the

²⁹⁵ *Haefner v. N.Y. Media, L.L.C.*, No. 150189/08, 2009 WL 634654, at *1 (Sup. Ct. N.Y. Cnty. Oct. 22, 2009), *aff’d*, 82 A.D.3d 481 (1st Dep’t 2011).

²⁹⁶ *Haefner*, 82 A.D.3d at 481–82. Also illustrative of widespread judicial skepticism of group libel claims is *Brummett v. Taylor*, 569 F.3d 890, 891 (8th Cir. 2009), in which the group was large but identification of plaintiffs specific. *Id.* At a press conference, the president of a company distributed a complaint that the company had filed against its union and 130 named members. *Id.* In a libel suit by the workers, the court determined that the president’s allegedly defamatory statements about them at the press conference had not been shown to be understood by their audience as specifically referring to individual plaintiffs. *Id.* at 893.

²⁹⁷ *Levine v. Steve Scharn Custom Homes, Inc.*, 448 S.W.3d 637, 651–52 (Tex. App. 2014) (upholding jury verdict for plaintiff).

²⁹⁸ *See Boyce & Isley, PLLC v. Cooper*, 568 S.E.2d 893, 900 (N.C. Ct. App. 2002) (“By claiming that ‘Dan Boyce’s law firm’ had committed unethical business practices, defendants maligned each attorney in the firm . . .”).

²⁹⁹ *Green v. Cosby*, 138 F. Supp. 3d 114, 137 (D. Mass. 2015) (permitting suit by three women who brought sexual assault claims against defendant in the two weeks preceding defendant’s statement that the new claims over that period, which numbered eleven, were entirely unfounded).

³⁰⁰ *See, e.g., Vasquez v. Whole Foods Mkt., Inc.*, 302 F. Supp. 3d 36, 66–67 (D.D.C. 2018) (involving defendant’s accusation that 9 store managers among 457 were dismissed for a specific form of misconduct).

television transmission of a news report to hush criticism.”³⁰¹ Elsewhere the article identified the plaintiff as D.A.R.E.’s leader. The court found that he met the “of and concerning” requirement through a two-phased line of reasoning. First, the statements linking “D.A.R.E. supporters” to these and other unlawful actions “imply that such actions were undertaken at the behest, or certainly with the approval, of the organization itself.”³⁰² Second, readers would “believe that actions taken on behalf of D.A.R.E., including unlawful behavior, were probably directed, encouraged, or approved by” the plaintiff.³⁰³ This bootstrapping logic’s potential for chilling criticism suggests the need for a higher evidentiary barrier for such claims.

Similarly, another court determined that a charge of ethically questionable behavior against a public figure’s political action committee could plausibly be viewed as implicating the figure herself.³⁰⁴ Though a somewhat more plausible conclusion, the ruling also throws into question whether a more substantial showing should be required to equate followers and their leaders. Otherwise, a speech-inhibiting version of respondeat superior might creep into group libel doctrine.

In other settings, too, multiple links in the chain connecting plaintiffs to charges against their groups contain the potential for excessive availability of claims. In an older case³⁰⁵ still cited as authority,³⁰⁶ the Alabama Supreme Court ruled that the following statement constituted libel: “The shooting occurred on Avenue E, between Eleventh and Twelfth streets, in a house which bears a bad reputation with the police.”³⁰⁷ Though the newspaper’s account did not specify an address, identify any individuals, or describe any reason for the “bad reputation,” the court concluded that the article leveled an actionable charge of misconduct against the plaintiff homeowner.³⁰⁸ Under the court’s reasoning, “No one could doubt that the neighbors and friends of plaintiff . . . would

³⁰¹ D.A.R.E. Am. v. Rolling Stone Magazine, 101 F. Supp. 2d 1270, 1275 (C.D. Cal. 2000).

³⁰² *Id.* at 1290.

³⁰³ *Id.*

³⁰⁴ See *Palin v. N.Y. Times Co.*, 933 F.3d 160, 172 (2d Cir. 2019).

³⁰⁵ *Fitzpatrick v. Age-Herald Publ’g Co.*, 63 So. 980 (Ala. 1913).

³⁰⁶ *E.g.*, *Nelson v. Am. Hometown Publ’g, Inc.*, 333 P.3d 962, 971 (Okla. Civ. App. 2014).

³⁰⁷ *Fitzpatrick*, 63 So. at 980.

³⁰⁸ See *id.* at 981–82.

conclude that the libel was directed to the plaintiff.”³⁰⁹ The potential breadth of liability under this theory, allowing suits based on indefinite metonymy, threatens to curb robust reporting.

Even in the notorious case of *Elias v. Rolling Stone LLC*, where the falsehood was egregious and the plaintiffs had real cause to be upset by the publication, validation of the suit under the small group defamation doctrine raises unsettling questions.³¹⁰ In *Elias*, Rolling Stone magazine published an article accusing seven unnamed members of a university fraternity of having participated in a gang rape while two other members observed.³¹¹ When the story was discovered to have been fabricated, Rolling Stone issued a retraction and an apology.³¹² In the libel action that followed, the Second Circuit Court of Appeals ruled that each of the fraternity’s fifty-three members at the time of the alleged incident was entitled to bring suit.³¹³ This decision could not be deemed unsupportable on its face. The court’s conclusions that “a reader could plausibly conclude that many or all fraternity members participated in alleged gang rape as an institution ritual and all members knowingly turned a blind eye to the brutal crimes” were based on several passages in the article.³¹⁴ Moreover, the court emphasized the low threshold to be met for the complaint to survive the defendants’ motion to dismiss.³¹⁵

Nevertheless, the court’s reasoning contains the seeds of a small group defamation rationale whose reach seems in tension with the general bar against group libel actions. The court opened the door to liability by Rolling Stone to each of the fraternity’s fifty-three members on the premise that the article ascribed to them all at least “guilty knowledge” of the alleged gang rape.³¹⁶ That interpretation, in turn, rested largely on the article quoting some of the nine members present at the reported rape as having said, “ ‘Don’t you want to be a brother,’ and ‘We all had to do it, so

³⁰⁹ *Id.* at 982.

³¹⁰ 872 F.3d 97 (2d Cir. 2017).

³¹¹ *Id.* at 100–01.

³¹² *Id.* at 101.

³¹³ *Id.* at 108.

³¹⁴ *Id.* at 109.

³¹⁵ *See id.* at 105 (“Plaintiffs need only plead sufficient facts to make it plausible—not probable or even reasonably likely—that a reader familiar with each Plaintiff would identify him as the subject of the statements at issue.” (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))); *id.* at 106 (“[The allegedly defamatory] statements are to be read in the light most favorable to Plaintiffs . . .”).

³¹⁶ *Id.* at 109–10 (quoting *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 227 (2d Dep’t 1981)).

you do, too' ”—which the court took as indicating that the rape was an “initiation ritual.”³¹⁷ In other words, these comments were deemed to signal to the reader the article’s representation that every member of the fraternity had committed or knew of acts of rape.³¹⁸ It is doubtful that a reasonable reader would extrapolate from these isolated utterances the author’s own accusations against fifty-three individuals. If current doctrine does stretch that far, then it is time to revisit the showing required of plaintiffs who claim harm under such an attenuated theory.

Under current doctrine, even decisions dismissing suits based on group libel theory can sometimes highlight the unpredictability of courts’ approaches. The treatment of claims arising from allegedly defamatory statements about law enforcement agencies furnishes one such example. In *Bujol v. Ward*, the defendant distributed materials asserting that the Street Crimes Unit of Jefferson Parish “has a long history of treating innocent, law-abiding African-American citizens with hostility, excessive force and no respect. The African-American male is a target of abuse of this special unit.”³¹⁹ The article went on to give accounts of two allegedly representative examples of this rampant abuse.³²⁰ In an action by twenty-three members of the forty-six member unit, the court concluded that “there [wa]s no showing that any one individual in the class . . . [could] satisfy the burden of showing that the words referred particularly to them individually.”³²¹

In *Diaz v. NBC Universal, Inc.*, a legend at the end of a film based on a gangster’s criminal career stated that a “collaboration” between a police officer “led to the convictions of three quarters of New York City’s Drug Enforcement Agency.”³²² In a suit on behalf of agents who served during the period covered by the film—variously numbered at 400 and 233 individuals—the court held that the legend’s reference “only to three-quarters of the group” rendered the claim “incapable of supporting a jury’s finding that the allegedly libelous statements refer to them as individuals.”³²³

³¹⁷ *Id.* at 109.

³¹⁸ *See id.* at 114 (Lohier, J., concurring in part and dissenting in part).

³¹⁹ 778 So. 2d 1175, 1178 (La. Ct. App. 2001).

³²⁰ *See id.* at 1178–79.

³²¹ *Id.* at 1180.

³²² 337 F. App’x 94, 95 (2d Cir. 2009).

³²³ *Id.* at 96.

Though both of these results are defensible—even welcome—they stand in notable contrast to the oft-cited case of *Brady v. Ottaway Newspapers, Inc.*³²⁴ Seven years after eighteen officers of a city police department were indicted on charges of misconduct, a newspaper opined:

We said at the time, and we still believe, that the entire department was under a cloud. It is inconceivable to us that so much misconduct could have taken place without the guilty knowledge of the unindicted members of the department. If so, they all were accessories after the fact, if not before and during.³²⁵

Twenty-seven of the presumed fifty-three members of the police force who had not been indicted, charged that the editor's statement was libelous.³²⁶ The court determined that the group was sufficiently defined, the statement sufficiently specific, and group members sufficiently identifiable that the statement could be understood as charging each unindicted member with criminal behavior.³²⁷ In contrast to *Bujol* and *Diaz*, however, the editor expressed his belief—not knowledge—that unindicted officers must have known about their colleagues' misdeeds, and that, if his inference was correct, these officers were accessories. Again, the outcome in *Brady* cannot be condemned as wholly without justification. A would-be critic of law enforcement, however, might understandably exercise caution born of inability to forecast the analysis a court would apply to a future libel suit.

V. THE NEXT FRONTIER: DEFAMATION OF AVATARS IN VIRTUAL WORLDS

One reason for restricting plaintiffs' ability to bring suits based on implied defamation is the possibility of unforeseen consequences from an unduly expansive conception of libelous statements "of and concerning" the plaintiff. One area in which a heightened standard of proof would especially safeguard against runaway litigation is claims based on alleged defamation of an electronic version of the plaintiff. Failure to impose strict limits on ascertainability in this realm could open the floodgates to

³²⁴ 84 A.D.2d 226, 240–41 (2d Dep't 1981). The court's application of the "intensity of suspicion" test is discussed at *supra* notes 271–273 and accompanying text.

³²⁵ *Brady*, A.D.2d at 227.

³²⁶ *Id.* at 228.

³²⁷ *See id.* at 234–40.

lawsuits rooted in virtual “avatars”³²⁸ and technological matrices yet undevised. Only where the line connecting a factual charge against an electronically created persona with the creation’s real-world counterpart is clear, direct, and compelling should courts seriously entertain claims under this theory.

Virtual worlds are designed to enable users to experience online existence as a three-dimensional reality.³²⁹ There, a user creates a three-dimensional virtual avatar whose appearance and personality can be chosen and changed at the user’s discretion.³³⁰ In a pioneering article on First Amendment implications of virtual worlds, Jack Balkin expressed concern that then-current doctrine did not adequately protect the speech rights of owners and users.³³¹ His initial aim was to establish that virtual worlds were entitled to recognition as a form of expression³³²—a status apparently cemented by the Supreme Court’s later recognition of video games as warranting First Amendment protection.³³³ He then urged ample freedom from government interference with these worlds to the extent they afford opportunities for designers and users to explore their imaginations and ventilate their ideas.³³⁴ At the same time, Balkin acknowledged that some real-world effects produced by virtual activities—especially those involving commodification of virtual goods and currencies—justify a degree

³²⁸ See *Avatar*, OXFORD DICTIONARY OF SOCIAL MEDIA (1st ed. 2016) (stating as one definition “a figure controlled by the user in a 3-D graphical environment such as a virtual world”); Ralitza Petit, *Avatar-Space: The Ego Inc.*, 44 PERSPECTA 92, 94 (2011) (“One of the pioneering virtual words, *Habitat* . . . specifically introduced the term *avatar* as the human body’s virtual counterpart in a graphically presented social online community.” (emphasis in original)).

³²⁹ For a helpful description of Second Life, a leading virtual world, see Matt Weinberger, *This Company Was 13 Years Early to Virtual Reality – and It’s Getting Ready To Try Again*, BUS. INSIDER (Mar. 29, 2015, 7:34 AM), <https://www.businessinsider.com/second-life-is-still-around-and-getting-ready-to-conquer-virtual-reality-2015-3>. See also Chin, *supra* note 189, at 1309–15.

³³⁰ See Pierre Berthon, et al., *Advocating Avatars: The Salesperson in Second Life*, 30 J. PERS. SELLING & SALES MGMT. 195, 198 (2010); Chin, *supra* note 189, at 1310–11; Chris Houliez & Edward Gamble, *Dwelling in Second Life? A Phenomenological Evaluation of Online Virtual Worlds*, 17 VIRTUAL REALITY 263, 264 (2013).

³³¹ Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y. L. SCH. L. REV. 63, 63 (2004).

³³² *Id.* at 63, 68–71.

³³³ *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 790 (2011). Balkin had noted that lower courts already recognized “first person shooter games” as falling under First Amendment protection. Balkin, *supra* note 331, at 69.

³³⁴ See Balkin, *supra* note 331, at 70–72.

of government regulation.³³⁵ Under this rationale, he would allow for remedies caused by “communications torts” such as copyright and trademark violations.³³⁶ Balkin also included defamation in this category, but merely noted that libel law “in theory” can apply to defamation of avatars.³³⁷

A few years later, Bettina Chin developed this latter suggestion at length and with a more definite view toward vigorously extending libel law to this sphere.³³⁸ She described ways in which defamation of a virtual persona can damage the reputation and potentially the financial standing of both the persona and her real-world counterpart.³³⁹ In contrast to Balkin, who generally advocated a high degree of internal regulation for virtual communities,³⁴⁰ Chin deemed contractual remedies particularly inadequate to address defamation of these communities’ residents.³⁴¹ In short, “[I]f the law has specific rules that apply to real-world instances of defamation, it should similarly apply such rules to virtual spaces to protect the users.”³⁴² Under Chin’s approach, a plaintiff could recover for defamation of her avatar by showing that other residents of the virtual community viewed the plaintiff and her avatar as inextricably intertwined—so as to make defamation of the avatar tantamount to defamation of herself—and that the plaintiff suffered a real-world pecuniary harm.³⁴³

While perhaps reasonable in the abstract, such an approach could seriously inhibit the free play of expression for which virtual worlds exist if plaintiffs were not held to a stringent standard of proof. As with suits based on fiction or group libel, claims of libel of avatars require the audience to actively deduce that the alleged

³³⁵ *See id.* at 72, 78–80.

³³⁶ *Id.* at 73.

³³⁷ *Id.* at 74.

³³⁸ *See generally* Chin, *supra* note 189.

³³⁹ *See id.* at 1305–07.

³⁴⁰ *See* Balkin, *supra* note 331, at 76 (“Courts and legislatures should give virtual communities wide latitude to design their own rules and social norms to deal with misbehavior and leave plenty of room for the creativity of the people who design games as well as the people who play them.”).

³⁴¹ *See* Chin, *supra* note 189, at 1316, 1327–28.

³⁴² *Id.* at 1328. For the argument that the vast reach and impact of the Internet calls for expanding the concept of the relevant community under libel law, see Amy Kristin Sanders & Natalie Christine Olsen, *Re-Defining Defamation: Psychological Sense of Community in the Age of the Internet*, 17 COMM. L. & POL’Y 355 (2012). *See generally* DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET* (2007).

³⁴³ *See* Chin, *supra* note 189, at 1331–33.

defamation actually referred to the plaintiff. Even Chin acknowledged that the centrality of role-playing in virtual worlds creates a presumption that “defamation” of a virtual plaintiff does not convey an actual fact about an individual.³⁴⁴ This presumption, however, should be quite daunting to account for virtual worlds’ fundamental premise of nonreality. Further, the attenuation of the link between statements about avatars and concrete harm to actual persons is compounded by the protean nature of virtual residents.³⁴⁵ Liability for statements about an invented character whose appearance and behaviors could change at any time should require extraordinary justification.

Failure to impose this weighty a level of demonstration could unleash a torrent of suits over statements maligning avatars. It is possible that even under a less demanding approach most claims would ultimately fall short of proving that aspersions cast on avatars amount to defamation of plaintiffs. A more permissive standard, however, would still enable a larger number of awards to plaintiffs than a stringent barrier. This prospect would generally invite more claims and allow them to survive deeper into the litigation process. Prolonged litigation can exact substantial costs even when it does not result in a verdict for the plaintiff. Moreover, concerns about jurors’ capacity to assess claims of plaintiff identity are amplified in this context. On top of absorbing the nuances of law’s “of and concerning” requirement, many—probably most—jurors would need instruction on the assumptions, dynamics, and sensibilities of interactions in virtual worlds. Thus, a heightened burden of proof would contain the number of such claims, their costly advancement through progressive phases of litigation, and the potential for misguided jury awards.

Moreover, the complexity of gauging the outer-world impact of besmirching evanescent avatars carries an additional implication. One can decry unfair statements about virtual residents without leaping to the conclusion that such statements should be subjected to the full-blown machinery of existing defamation doctrine. Any facile assumption that this relatively new and still-evolving technology fits neatly into old paradigms risks unduly penalizing speech whose ramifications are far from

³⁴⁴ See *id.* at 1345.

³⁴⁵ See *supra* note 330 and accompanying text; see also Chin, *supra* note 189, at 1332 (“Identities [of avatars] are arguably fluid and fragile . . .”).

fully understood. Traditional libel law, even if adjusted to impose a higher burden of showing plaintiff identity, may be too blunt an instrument to properly weigh the competing interests at stake. About a century ago, a news service asked the Supreme Court to bar a competitor from copying the former's news accounts and selling them under the latter's banner.³⁴⁶ Deeming the plaintiff service's interest in its reports as "quasi property"³⁴⁷ and the defendant's use of the service as "unfair competition,"³⁴⁸ the Court approved injunctive relief.³⁴⁹ In dissent, however, Justice Brandeis objected to the Court's wholesale transplantation of common law concepts to this novel circumstance. Though acknowledging the "obvious injustice" of the defendant's conduct, Justice Brandeis argued that the legislature was far better equipped to conduct the factual investigations needed for devising an appropriate rule and to erect the machinery for enforcing it.³⁵⁰ With alleged libel of virtual residents, too, judicial modesty would seem to be in order. In this area, raising the bar to prove plaintiff identity may be only the first step in a broader resolution that protects reputation without stifling a promising technology or free expression.

Finally, resistance to defamation claims involving avatars has an equitable dimension. The very purpose of virtual worlds is to allow users to construct beings who are more than mere extensions of themselves. Users can assume as residents of these worlds' personal histories, ethnic identities, professions, and behaviors quite different from their own, and to impart to their creations a fluidity of self not available to actual humans. They can thus give free rein to their creative impulses without fear of being held legally accountable for the conduct of their avatars. Having distanced themselves from their avatars, users should generally be forbidden to claim derivative harm from attacks on their counterparts' reputation. Selectively conflating a user and avatar to pursue libel claims, while insisting on separation for other purposes, is to have it both ways and so erode the robust expression for which virtual communities are designed.

³⁴⁶ *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 232 (1918).

³⁴⁷ *Id.* at 236.

³⁴⁸ *Id.* at 240.

³⁴⁹ *See id.* at 245–46.

³⁵⁰ *Id.* at 264–67 (Brandeis, J., dissenting).

CONCLUSION

In the decades since the Supreme Court brought defamation within the ambit of First Amendment protection, it has devised an array of safeguards to preserve ample breathing space for speech while respecting the state's interest in protecting reputation. These constraints on states' ability to ban libel, however, represent constitutional minima; states are not obligated to press penalties for defamatory expression to their constitutional limit. One means by which states can enhance free speech without undermining their core reputational goals is to increase the burden on plaintiffs to demonstrate that alleged defamation actually refers to them. In the great majority of libel suits, this change would not raise the practical barrier for plaintiffs. It is only in those instances where the expression at issue is not self-evidently "of and concerning" the plaintiff that an action would founder because of this requirement. And it is in such cases that judicial sophistication about defamation doctrine and sensitivity to infringement on speech will be most valuable.

Thus, the specific goal of this Article is to afford more discretion to courts to screen from trials charges of libel that cannot establish its definite reference to the plaintiff. A heightened test is justified in part by the threshold nature of plaintiff identity; failure to show that the disputed statement is about the plaintiff renders all other elements of the claim irrelevant. In addition, the determination of whether speech that does not mention plaintiffs should be treated as directed at them is distinctly vulnerable to misapplication by juries. The specter of such trials and attendant costs, even where a verdict for the plaintiff is overturned on appeal, casts an immeasurable pall on speech. The damage to First Amendment values is especially acute where this effect dampens creative expression and reporting on matters of public concern.

While adoption of the proposal here would not entirely dispel the uncertainty created by the current regime, it would remove much of the inhibition caused by fear that words that do not expressly target individuals will give rise to actionable defamatory inferences by these unnamed plaintiffs. The potential for such deterrence is especially notable in the realms of fiction and characterizations of groups. As the prospect of libel charges born of virtual worlds illustrates, however, advancing technology creates additional possibilities for individuals to claim that speech,

not ostensibly about them, readily translates into speech that is. An imposing burden on libel plaintiffs to prove the cogency of this link will help shield against future threats to robust expression.