FIRST AMENDMENT WATCH

NAT HENTOFF

Fictionalizing the law of libel

"FICTION IS ALL THE BETter," Cervantes once pointed out, "the more it looks like truth." And indeed, many novelists have shaped characters, to greater or lesser degree, on impressions and composites of quite real people. Proust, for instance, did not wholly invent the leading figures in *Remembrance of Things Past*. In Hemingway's *The Sun Also Rises*, Robert Cohn is partially based on the real-life Harold Loeb. And there is nary a doubt that the Citizen Kane of the screenplay by Herman Mankiewicz and Orson Welles had more than a fleeting resemblance to William Randolph Hearst. Similarly, the venerable novelist Edward Driffield in Somerset Maugham's *Cakes and Ale* is close kin to Thomas Hardy.

In most such cases, and certainly in works of fiction that have lasted, the play of the writer's imagination has transformed the actual personages and events so that the renderings are not literal. That, after all, is the very nature of fiction. Because of the surprising outcome of a recent lawsuit, however, this way of writing fiction may be in considerable peril in the United States. A California court assessed a sizable libel judgment against an author and her publisher for having defamed a psychologist in a novel. And on December 3, 1979, the United States Supreme Court refused to review the case, although three justices (Brennan, Stewart, and Marshall) went on record as favoring a hearing.

It could have been worse. Had the High Court granted a review and issued an opinion upholding damages for libel via fiction, that would be the rule of the land. Since this was no more than the denial of an appeal, however, the decision has no impact beyond California. Nonetheless, book publishers fear that courts in other jurisdictions will be influenced by the result of the case—and by the Supreme Court's failure to use the First Amendment to smite the lower court verdict. A corollary dread is that in this litigious nation, there will now be more suits charging defamation-by-fiction.

Several lawyers for large publishers have urged me not to publicize the case because "the more people who hear about it, the more libel suits there'll be. It'll be a self-fulfilling prophecy. If we cry doom, we'll get doom." Yet Townsend Hoopes, president of the Association of American Publishers, has not been able to restrain himself: "I think it's one of the most destructive and wrong-headed decisions that any court has made in the area of First Amendment rights." He's right, so why pretend it never happened?

AT ISSUE IS A NOVEL, *Touching*, by Gwen Davis Mitchell, published by Doubleday in 1971, with paperback rights licensed to New American Library in August, 1979. In the late 1960s, Mitchell, a widely published author, became interested in new frontiers of encounter-group therapy, particularly the "nude marathon"—a process by which self-actualization is presumably accelerated by interacting, naked, in a group led by a "therapist." At the time, there were a dozen or more specialists in these clothesless encounters in the region, and Mitchell attended a "nude marathon" conducted by one of them, psychologist Paul Bindrim.

Like all the other participants, Mitchell had to sign a contract with Bindrim agreeing that she would not write any articles or "in any manner disclose" what transpired at the session. Should she break the contract, she would be liable for damages. However, no citizen can contractually sign away his or her free speech rights in this kind of context. Even the California court of appeal handling this case agreed that no matter what she signed, Mitchell "was free to report what went on." She was, however, subject to penalties if her report was defamatory.

But Mitchell claimed that she simply used her impressions of the session she attended as one of many ingredients for her fictive work. For many novelists, this is standard procedure. For instance, I am currently writing a novel that involves a series of murders in New York City. The murders are entirely fictitious, but I have spent many hours with real homicide detectives and my descriptions of how and where detectives work will be based in part on what I saw. If one of those actual detectives picks up the novel and believes he has been defamed by my portrayal of an imaginary detective, now he may be encouraged to sue.

Mitchell assured her publisher at several stages that no one in *Touching* resembled any living person. Or any real corpse, for that matter. In her novel, for instance, the quasi-guru in charge of the nude marathon, Simon Herford, was a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms." The real-life Paul Bindrim is clean-shaven, nearly bald, and considerably younger than Herford. Yet Bindrim's lawyer wrote to Doubleday in 1971 demanding that all production and distribution of the book be stopped immediately because Bindrim and his profession had been defamed. He gave no specifics as to that defamation. The lawyer also wrote Gwen Davis Mitchell complaining that in her appearances on television and elsewhere, she had been stating that nude encounter workshops were harmful. This, however, was simply her opinion, and the First Amendment protects opinions. But the lawyer added that "it is unmistakable that the 'Simon Herford' mentioned in your book refers to my client."

The court acted as if Mitchell's book were not a novel at all, but a work of fact.

Doubleday again sought and received assurance from Mitchell that the book *was* fiction, and did no further investi-

NAT HENTOFF writes a monthly column on civil liberties for INQUIRY. His book The First Freedom: A Tumultuous History of Free Speech in America *will soon be published by Delacorte.*

gating. How can you investigate the "facts" in a book of fiction?

*BINDRIM SUED FOR LI-*bel, and the California Court of Appeal, in a decision that was in effect upheld by the state supreme court's refusal to review it, acted as if this were not a novel at all but a work of fact. Since Paul Bindrim was judged to be a public figure, he had to prove "actual malice" on the part of the author and the publisher. That is, he had to show that they knew the work was false or went ahead and published in reckless disregard of whether it was true or false.

Bindrim came to court with a transcript of one of his actual encounter sessions—similar in form to one in the novel. Contrasting the two, the court found that "some of the incidents portrayed by Mitchell are false: i.e., substantially inaccurate descriptions of what actually happened." Of course they were. She was writing *fiction.* But, the court declared, she had *knowingly* written falsely about Bindrim.

The court went on to make a whopping mistake, which should have been reason enough for a Supreme Court review. It stated that an action for defamation can be started if the work is published to "only one person other than the person defamed." That's correct, but then the court interpreted this to mean that if only one person reading the book identified Simon Herford as Paul Bindrim, that was significant proof of defamation.

As the lone dissenter, Presiding Justice Gordon Files noted with asperity that although publication to only one person may establish a claim to defamation, this "has no bearing on the principle that the allegedly libelous effect of a publication to the public *generally* is to be tested by the impression made on the average reader." (Emphasis added.)

This was a vital point. Of the thousands who read the novel, there was no proof that any—except for three people—knew who the real Paul Bindrim was, let alone identified him with the fictive Simon Herford. As Files pointed out, "only three witnesses, other than plaintiff himself, testified that they 'recognized' plaintiff as the fictitious Dr. Herford. All three of those witnesses had participated in or observed one of the plaintiff's nude marathons." These three were "insiders," not "the average reader." And even they could list no characteristics of Herford that were similar to those of the real-life Bindrim. They just testified that their "recognition" consisted of realizing that both Herford and Bindrim practiced the same kind of therapy.

What this amounts to, said the dissenting judge, is that the novelist and the publisher were being punished on the basis of Bindrim's basic contention: "Whoever attacks nude encounter therapy wounds me." They had "defamed" a profession, not a person, and that in fictive form yet.

But what was the specific defamation? Said Justice Files: "The only arguably defamatory matter I can find in the complaint is in the passages which portray the fictional therapist using coarse, vulgar and insulting language in addressing his patients." A fictional therapist can use any kind of language he wants; and if Bindrim offered evidence, as he did, that he never used such language in real life, that's all the more proof that Mitchell was not writing about him. The judge and jury thought otherwise.

As for the charge that Mitchell had defamed Bindrim's profession of nude encountering, Files emphasized that "Criticism of an institution, profession or technique is protected by the First Amendment; and such criticism may not be suppressed merely because it may reflect adversely upon someone who cherishes the institution or part of it." Furthermore, "plaintiff has no monopoly upon the encounter therapy which he calls 'nude marathon.' Witnesses testified without contradiction that other professionals use something of this kind. There does not appear to be any reason why anyone could not conduct a 'marathon' using the style if not the full substance of plaintiff's practices."

NONETHELESS, BY A 2 TO 1 majority the court of appeal found that both the author and publisher had libeled Bindrim; the publisher because it had not "investigated" further when Bindrim's lawyer sent a letter of complaint. Again, investigated what? This was not a fact book. As noted in Doubleday's unsuccessful appeal to the Supreme Court, this penalty for insufficient investigation of a work of fiction "has created an intolerable situation." One vague letter from a lawyer to a publisher claiming that a fictive character resembles his client "can have the effect of a completely unprecedented court-ordered injunction stopping the presses and preventing further dissemination of an already published fictional work pending completion of a full investigation into unsubstantiated claims of defamation."

Or, putting it another, balder way, a crank or an enemy of the author or a genuinely befuddled dream-reader may now be able to stop a book, at least for a time, without even having to go to court.

And a deterrent to ignoring such letters is the award in this case to the man who did go to court—$25,000 from Gwen Davis Mitchell and $50,000 from Doubleday. Half the latter sum was for punitive damages.

Authors and publishers may be scared into self-censorship as a result of this case.

Other possible consequences of *Mitchell and Doubleday* v. *Paul Bindrim* is a certain amount of self-censorship by both authors and publishers. In her own petition to the Supreme Court, Mitchell said: "If this decision is allowed to stand, it will chill literature and the dramatic arts. . . . Contemporary fiction might disappear, leaving us with historical novels and science fiction." That prediction may be somewhat hyperbolic, but there may well be considerable thinning of the content of "realistic" fiction.

Also, although the decision is, as of now, limited to California, publishers and authors everywhere else take a risk in having one of their books cross that state line. Or, as the Doubleday appeal to the Supreme Court put it: "This Court cannot allow one state to impose such a standard because the clear result thereof would be a requirement that all publishers be governed by California's 'lowest common denominator,' which, in turn, would have a deleterious impact on the dissemination of ideas in interstate commerce."

But, as the refusal to review has again indicated, no one can tell the High Court what it "cannot" do.

THE COURT'S DAMAGING silence in this case, and its continued encouragement of libel suits in other contexts ("Libel Law: New Thorns in the Thicket," Sept. 10, 1979) ought to create more adherents for the Black-Douglas view that there should be no libel law at all, certainly not when

public issues are concerned. As with obscenity, these attempts to find a coherent constitutional line between protected and unprotected speech inexorably lead to absurdity. As in the notion that a writer of *fiction* can be punished for "actual malice" because she created untrue "facts."

In 1974 (*Cantrell* v. *Forest City Publishing Co.*), Mr. Justice Douglas said: "The press will be 'free' in the First Amendment sense when the judge-made qualifications of that freedom are withdrawn and the substance of the First Amendment restored to what I believe was the purpose of its enactment."

And the principal framer of that amendment, James Madison, also had an aversion to "judge-made" qualifications concerning liberty of the press:

"That this liberty is often carried to excess; that it has sometimes degenerated into licentiousness, is seen and lamented, *but the remedy has not yet been discovered.* Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America."

Nor have they been to this day.

Back before Madison, the British theorists of a free press, John Trenchard and Thomas Gordon (who wrote under the name of Cato and greatly influenced libertarian colonists) said of libel itself:

"As long as there are such Things as Printing and Writing, there will be Libels: It is an Evil arising out of a much greater Good. And as to those who are locking up the Press, because it produces Monsters, they ought to consider that so do the Sun and the Nile; and that is something for the World to bear some particular Inconveniences arising from the general Blessings, than to be wholly deprived of Fire and Water."

In the aftermath of the fictionalizing of libel—with no succor from the Supreme Court—it is worth considering which is the more evil Monster: Gwen Davis Mitchell's novel, *Touching,* or the judge-made qualification in this case that more clearly and more extensively than ever before makes works of the imagination subject to shriveling sanctions by the state.

Whatever risks we might run by the abolition of the law of libel are worth the increasingly high costs of exercising free speech under the lengthening shadow of the law of libel.

POLITICS

DOUG BANDOW

Dole waits but the lightning fizzles

NOT SINCE ALFRED M. Landon lost to Franklin Delano Roosevelt in 1936 has a Kansan been a major party's presidential candidate. But forty-four years later, Senator Robert Dole, the Republican vice-presidential nominee in 1976 and Kansas' leading politician, is attempting to turn a career of Republican partisanship and zealous support for farmers, ethnics, and the military into a winning Republican majority.

However, after nearly a year of campaigning, all Dole is harvesting are a decline in his rating and a withering organization. John Connally may be the corporation candidate and George Bush the resumé candidate, but Dole, who admitted in an unguarded moment last year that he was "just out here waiting for lightning to strike," is the drought candidate.

Not that Dole's ambition and career have often failed to grow. Twice wounded and decorated in World War II, he was elected to the Kansas House of Representatives in 1951 when he was twenty-eight. After serving one term as a state legislator, Dole was four times elected as Russell County attorney before successfully running for Congress from Kansas' First District.

In 1968, Dole managed to parlay his undistinguished eight-year House career into a U.S. Senate seat. He emerged from the typical obscurity of most midwestern Republicans through his vigorous—and unexpected—support of Nixon administration programs such as the ABM system and SST funding, as well as the Supreme Court nominations of Clement Haynsworth and Harrold Carswell, issues on which few Senate Republicans were not prepared to abandon the President. This led Nixon to choose Dole to be Republican National Committee (RNC) chairman in 1971. In his two years in that post Dole served his President and party well, developing a dogmatic partisanship and faithfully deflecting all criticism of Nixon and Watergate.

But he left the RNC chairmanship in 1973 with his political career in jeopardy, and it looked for a while as if he might lose his Senate seat to Democratic Representative Bill Roy. Kansans who thought they'd elected a Kansas spokesman found instead a Republican party hack and an acid-tongued defender of a disgraced President. Dole's efforts to joke off his "Nixon connection" failed; only after going on the offensive, attacking the Democrats for smearing him on Watergate and Roy—an obstetrician—for performing abortions, did Dole eke out an underwhelming 51 percent victory in his 1974 reelection bid.

Dole's career miraculously moved from near collapse to national visibility in two years. As the 1976 presidential election approached, Dole quickly endorsed and campaigned for his former House colleague President Gerald Ford.

Dole first envisioned himself as a possible Reagan running mate, a moderate-conservative Ford supporter on a "West-Midwest" ticket. But after Reagan's preconvention selection of Richard Schweicker as his vice-presidential nominee, Dole looked toward Ford, lobbying southern Republican state chairmen and soliciting Reagan's backing through Reagan aide Lyn Nofziger.

Playing the hatchet man in 1976, Dole hurt his own party more than he did the Democrats.

When Dole was ultimately chosen as Ford's running mate his major assets were his acceptability to the Reagan forces, his strength in farm and rural areas, and his acid wit, which had already proven so effective against his Democratic opponents. Assigned the brunt of campaign duty in September and October, as part of Ford's White

DOUG BANDOW, a Los Angeles attorney, has written for the Los Angeles Times *and the* Boston Globe.