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Daniel J. Kornstein

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Partner, Kornstein Veisz & Wexler, New York City. B.S. 1968, City of College of New York; J.D. 1973, Yale University.

This Article grew out of a talk on the same subject given by the author at The Law and Humanities Institute in New York City on April 14, 1987.

THE CASE AGAINST LILLIAN HELLMAN: A LITERARY/LEGAL DEFENSE

*DANIEL J. KORNSTEIN**

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INTRODUCTION

I met Lillian Hellman once, in November 1983, seven months before she died. For two hours on a Sunday evening, we talked in the large living room of her apartment on Manhattan's Park Avenue. The physical presence of this doyenne of American literature, whose plays I had first read in high school, was startling. She was tiny, a wisp of a woman, physically wasted from various illnesses. She could not stand, moved her arms and head only with great difficulty, and was almost blind. But her distinctive, heavily lined face, even if drawn, was unmistakable, with its prominent nose and the once-bright, now-dim eyes. Even then, in her weakened condition, she chain-smoked cigarettes, defiantly holding them with a roach clip. This was the fiery, feisty, indomitable Lillian Hellman

* Partner, Kornstein Veisz & Wexler, New York City. B.S. 1968, City College of New York; J.D. 1973, Yale University. This Article grew out of a talk on the same subject given by the author at The Law and Humanities Institute in New York City on April 14, 1987.

I had expected.[1]

Lillian Hellman was an important playwright,[2] successful screenwriter,[3] and best-selling author of memoirs.[4] A controversial figure, she gathered supporters and detractors during her lifetime, and she continues to generate controversy even after her death at age 79 in June 1984. The controversy revived recently with the publication of a bevy of new biographies.[5] "[O]ne is never done with Hellman," writes Carl Rollyson in one of these biographies.[6] "To read Hellman, even to read about her, is to start an argument," he adds.[7] She is, according to Rollyson, "an American writer about whom controversy will continue for as long as she is read."[8]

Hellman's life and work have been analyzed and criticized from many points of view.[9] Her left-wing politics, particularly her attitude toward

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1. Dashiell Hammett's biographer reacted similarly upon observing Hellman's vitality during her illness. *See* D. Johnson, Dashiell Hammett: A Life 301 (Fawcett Columbine paperback ed. 1985).

The purpose of my visit was to see if she could help actress Vanessa Redgrave, whom I represented, in a lawsuit against the Boston Symphony Orchestra. *See infra* note 250 and accompanying text. If Hellman's body was weak, her mind was still clear and sharp. She already understood the essentials of Redgrave's case, and offered unorthodox and combative suggestions. In biting and uninhibited language, Hellman compared her own plight during the McCarthy era to Redgrave's situation. She spoke bitterly of how blacklisting had hurt her and "Hammett," her long time companion, whose black and white photograph rested in a frame on a nearby table.

2. Lillian Hellman's plays include: *The Children's Hour* (1934); *Days to Come* (1936); *The Little Foxes* (1939); *Watch on the Rhine* (1941); *The Searching Wind* (1944); *Another Part of the Forest* (1946); *Montserrat* (1949) (adaptation); *The Autumn Garden* (1951); *The Lark* (1955) (adaptation); *Candide* (1957); *Toys in the Attic* (1960); *My Mother, My Father and Me* (1963) (adaptation). Hellman "was the first woman to achieve international status as a playwright, and as such became a symbolic figure to educated women all over the world." P. Johnson, Intellectuals 288 (1988).

3. Lillian Hellman's screenplays include: *North Star* (1943); *The Searching Wind* (1946); *The Chase* (1966).

4. Lillian Hellman's memoirs include: An Unfinished Woman (1969); Pentimento (1973); Scoundrel Time (1976); and Maybe (1980).

5. *See* P. Feibleman, Lilly: Reminiscences of Lillian Hellman (1988); R. Newman, Cold War Romance: Lillian Hellman and John Melby (1988); C. Rollyson, Lillian Hellman: Her Legend and Her Legacy (1988); W. Wright, Lillian Hellman: The Image, The Woman (1986). An authorized biography by William Abraham, Hellman's friend and editor, is expected soon.

6. C. Rollyson, *supra* note 5, at 14.

7. *Id.*

8. *Id.* at 13.

A series of articles in the English newspaper *The Observer*, following the London opening of the play *Lillian*, also fueled new controversy about Hellman. *See* Davie, *Lillian Hellman: Life as Fiction*, The Observer, Nov. 9, 1986, at 60 [hereinafter *Life as Fiction*] (criticizing inaccuracies in Hellman's writings); Davie, *The Life and Lies of Lillian Hellman*, The Observer, Oct. 26, 1986, at 64 [hereinafter *Life and Lies*] (further criticizing Hellman); Redgrave, *When the Little Foxes Come Out of Their Lair*, The Observer, Nov. 2, 1986, at 12 (defending Hellman as "a very special lady of absolute integrity"). Two recent books about Hellman's antagonist Mary McCarthy have added to the debate. *See* C. Gelderman, Mary McCarthy: A Life (1988); M. McCarthy, How I Grew (1986).

9. *See, e.g.*, J. Bryer, Conversations with Lillian Hellman (1986) (collection of inter-

Stalinism, have been scrutinized. Her literary style has been studied. Her role during the blacklisting era has been questioned. Her fidelity to facts in her memoirs has been doubted. Her personality has been faulted. Her motives in suing fellow writer Mary McCarthy for libel have been condemned.

At least one perspective on Hellman, however, remains unexplored—the perspective of the law. Surprisingly, law played a highly prominent role in Lillian Hellman's life and work. Her influence was not limited to the legal themes that appeared frequently in her work; Hellman had a genuine impact on the law.[10] In reviewing her work and life from this perspective, one is struck by the many connections between Hellman and the law. Her biographers and literary critics, by ignoring the legal vantage point, have failed to plumb the complex depths of Hellman's psyche.

Examining Lillian Hellman's life and work from a legal perspective illuminates aspects of both. Lillian Hellman's life and work demonstrate the reciprocal relationship and the points of contact between law and literature, a promising and rapidly growing field of study.[11] Hellman's

views); B. Dick, Hellman in Hollywood (1982) (description of screenwriting days); M. Estrin, Lillian Hellman: Plays, Films, Memoirs (1980) (evaluation of work); D. Falk, Lillian Hellman (1978) (biography); P. Feibleman, *supra* note 5 (personal memoir by companion of last several years); S. Hook, Out of Step 125, 220, 389, 503 (1987) (various criticisms of Hellman's politics); P. Johnson, *supra* note 2, at 288-305 ("one to whom falsehood came naturally"; nasty criticism of Hellman's whole life); R. Moody, Lillian Hellman, Playwright (1972) (discussion of plays and life); R. Newman, *supra* note 5 (discussing romantic interest during McCarthyism); C. Rollyson, *supra* note 5 (biography both critical and sympathetic); W. Wright, *supra* note 5 ("critical biography"); Davie, *Life and Lies*, *supra* note 8 (attacking "lies" in Hellman's life and works); Gellhorn, *On Apocryphism*, 23 Paris Rev. 280 (Spring 1981) (criticizing alleged falsehoods in Hellman memoirs, especially about Spanish Civil War); Glazer, *An Answer to Lillian Hellman*, Commentary, June 1976, at 36 (taking issue with Hellman's account of McCarthy era); Hook, *The Case of Lillian Hellman*, Encounter, Feb. 1977, at 82 (criticizing *Scoundrel Time* for inaccuracy); Howe, *Lillian Hellman and the McCarthy Years*, Dissent, Fall 1976, at 378 (same); Kazin, *The Legend of Lillian Hellman*, Esquire, Aug. 1977, at 28 (same); Kramer, *The Black List and the Cold War*, N.Y. Times, Oct. 3, 1976, § 2, at 1, cols. 4-6 [hereinafter *Black List*] (same); Kramer, *The Life and Death of Lillian Hellman*, The New Criterion, Oct. 1984, at 1 [hereinafter *Life and Death*] (criticism of life, politics and inaccuracies in memoirs); McCracken, *Julia & Other Fictions by Lillian Hellman*, Commentary, June 1984, at 35 (evidence of factual inaccuracies in Hellman memoirs).

10. *See infra* text accompanying notes 156-263.

11. As one federal judge recently wrote, "it is only since the publication in 1973 of James Boyd White's *The Legal Imagination*, a book that audaciously claims that the study of literature should be a part of legal education, that a distinct, self-conscious field of law and literature can be said to have emerged." R. Posner, Law and Literature: A Misunderstood Relation 12 (1988); *see also id.* at 12 n.26 (listing articles and symposia); R. Ferguson, Law and Letters in American Culture (1984) (analyzing important roles of law and literature in pre-Civil War America); B. Thomas, Cross-Examinations of Law and Literature (1987) (examining relationship between law and literature in American culture); R. Weisberg, The Failure of the Word: The Protagonist as Lawyer in Modern Fiction (1984) (discussing legal themes in modern novel); J. White, Heracles' Bow: Essays on the Rhetoric and Poetics of the Law (1985) (exploring pieces of literature for legal meaning and style); J. White, When Words Lose Their Meaning (1984) (study of selected literary texts for possible impact on law).

literary work embraces legal themes[12] and includes lawyers among its characters.[13] Her writing reveals how law is refracted in a literary medium. Sensitivity to these refracted legal themes increases our understanding and enjoyment of Hellman's work, and, reciprocally, provides insight into the law. Some of Hellman's writing itself has generated legal controversy.[14] Hellman pursued several lawsuits over the years to defend what she viewed as basic freedoms and to raise other important legal issues.[15] In Hellman's case, as much as her writings and life reveal about law, the pervasive legal themes also reveal much about her.

I. HELLMAN'S LITERARY WORK

One school of literary thought, which includes Gustave Flaubert and Marcel Proust, believes the written text is everything and the writer's personality nothing in the search for meaning of an author's work.[16] According to that school, only the author's work counts, not the author. The artist must make posterity believe that he or she never existed. The non-writing part of an author's life, wrote Proust in *Against Sainte-Beuve*, "is the product of a quite superficial self, not of the innermost self which one can only recover by putting aside the world and the self that frequents the world."[17] In one's writing, Proust continued, "it is the secretion of one's innermost life, written in solitude and for oneself alone, that one gives to the public."[18]

Proust's comments have particular cogency for Hellman's plays. The plays, unlike the memoirs, were written early in Hellman's career. They are, by definition of the genre, more imaginative, less defensive, and more spontaneous than the self-conscious memoirs.[19] Of the two main genres of Hellman's writings, therefore, her plays provide a better index to her attitudes toward law and lawyers. Three of Hellman's plays—*The Children's Hour*, *Days to Come* and *Watch on the Rhine*—contain conspicuous and important legal themes or characters.

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12. *See infra* notes 16-64 and accompanying text.

13. *See infra* notes 48-63 and accompanying text.

14. Her first play, memoirs, and last will and testament all figured in lawsuits. *See infra* notes 172-223, 236-49 and accompanying text.

15. *See infra* notes 172-223, 249 and accompanying text.

16. *See, e.g.*, T.S. Eliot, *Tradition and the Individual Talent*, in The Selected Prose of T.S. Eliot 37-44 (F. Kermode ed. 1975); T.S. Eliot, *The Use of Poetry and the Use of Criticism*, *id.* at 79-96; W. Wimsatt & M. Beardsley, *The Intentional Fallacy*, in W. Wimsatt, The Verbal Icon 3-18 (1967). *But see* E. Hirsch, Validity in Interpretation 1-23 (1967) (unable to attach any determinate meaning to text).

17. Naipaul, *On Being a Writer*, N.Y. Rev. Books, Apr. 23, 1987, at 7 (quoting Proust).

18. *Id.* In a similar vein, W. Somerset Maugham wrote in one of his most famous books, "A man's work reveals him. . . . [I]n his book or his picture the real man delivers himself defenceless [sic]. . . . To the acute observer no one can produce the most casual work without disclosing the innermost secrets of his soul." W. Maugham, The Moon and Six-pence 130-31 (Bantam ed. 1919).

19. *See infra* notes 111-37 and accompanying text.

A. *The Plays*

1. *The Children's Hour*

The Children's Hour, Hellman's first play, is a drama about a libel lawsuit. The play turns on false accusations of lesbianism made against two teachers by one of their young students. Believing the lies, the student's grandmother circulates the accusations and has the two women fired and the school closed. The two teachers sue the grandmother for libel, but lose the case because a witness, whose misleading comment led to the student's charges and who could clear the teachers, refuses to testify. Although lesbianism—still a sensitive subject, but more so in 1934 when the play was written—is an element in the play, its real theme is the destructiveness of slander—the devastation caused by a lie.[20]

Approaching *The Children's Hour* as a play about libel supplies symmetry to Hellman's life insofar as it calls to mind her famous libel suit against Mary McCarthy near the end of her life.[21] Hellman understood the dramatic potential of legal cases. Indeed, the courtroom process has had a perennial hold on lovers of drama.[22] Apparently, Hellman got the idea for her first play from a real case. In 1933, Dashiell Hammett brought to Hellman's attention a collection of noteworthy British court cases called *Bad Companions* by William Roughead.[23] One chapter, *Closed Doors, or the Great Drumsheugh Case*, concerned two headmistresses of a girls' school in Scotland accused by a student of having a lesbian relationship. After the scandal led to the school's closing, one of the headmistresses sued for libel. This true story about a libel suit inspired *The Children's Hour*. It was neither the first nor the last time an actual court case inspired an imaginative writer.[24]

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20. *See* C. Rollyson, *supra* note 5, at 70; W. Wright, *supra* note 5, at 109; Gilroy, *The Bigger the Lie, reprinted in* J. Bryer, *supra* note 9, at 25.

21. For a discussion of the Hellman-McCarthy libel case, see *infra* notes 172-214 and accompanying text. Indeed, we wonder at the words Hellman's characters speak when the victim announces her intent to sue for libel. "That will be very unwise," says the potential defendant. Six Plays by Lillian Hellman 50 (Vintage ed. 1979) [hereinafter Six Plays]. "Very unwise—for you," replies the victim. *Id.* Did Hellman recall those lines when deciding to sue McCarthy? Thus libel plays a prominent role in Hellman's first play and at the end of her life.

22. An adversary trial is "a ready-made dramatic technique . . . . [F]ew social practices are so readily transferable to a literary setting as the trial or so well suited to the literary depiction of conflict." R. Posner, *supra* note 11, at 78.

23. *See* C. Rollyson, *supra* note 5, at 60; W. Wright, *supra* note 5, at 86, 89, 91-92, 102. Wright notes that "Hellman would begin her career as a public figure with the accusation that she had presented fact as fiction, and she would exit from it with the opposite accusation—that she presented fiction as fact." *Id.* at 102.

24. *See, e.g.*, R. Posner, *supra* note 11, at 80 n.18; *see also* M. Levin, Compulsion (1956) (fictionalized account of Loeb-Leopold murder case); J. McGinniss, *Blind Faith* (1989) (non-fiction account of Rob Marshall murder case); J. McGinniss, *Fatal Vision* (1983) (non-fiction account of Jeffrey MacDonald murder case); L. Uris, QB VII (1970) (fictionalized account of author's libel trial); Collins, *Steinberg and Myerson Trials: 2 Cases Provoke Many Books*, N.Y. Times, Jan. 2, 1989 at 1, col. 1 (discussing two recent cases and books they have spawned).

The Children's Hour introduces legal themes in its first line of dialogue. The play opens with a student practicing Portia's "quality of mercy" speech from *The Merchant of Venice*. This opening has great significance for several reasons. Portia is one of Shakespeare's leading legal characters.[25] In the role of judge in Shylock's strange lawsuit against Antonio for a pound of flesh, Portia personifies a certain concept of law. She understands that law, to be sensible, requires judicial discretion. The rigor of the law, Portia thinks, must be softened with equity and mercy and tempered by individual circumstances. In her "quality of mercy" speech, Portia verbalizes an equitable concept of law that should inform all legal proceedings.[26] By having the student practice Portia's speech, Hellman introduces this theme into *The Children's Hour*. As the teacher tells the practicing student, "You are pleading for the life of a man."[27]

Mercy, however, is a quality not shown by many of the characters in *The Children's Hour*. They are quick to believe the worst about the innocent victims.[28] In believing false rumors about others, Hellman's characters provide another link with Portia and *The Merchant of Venice*. Shakespeare's play teaches that things are not always as they appear.[29] Portia appears to be a male judge, but is only wearing a disguise. She appears to believe in mercy, but ultimately is cruel to Shylock. Similarly, in *The Children's Hour*, things are not always as they appear. A pupil eavesdrops on part of a conversation that gives the impression of a lesbian relationship, when in fact none exists.[30]

Hellman also drew on the law in *The Children's Hour* in her portrayal of what amounts to a classic cross-examination. Although not a lawyer, Dr. Joe Cardin effectively cross-examines the student who started the malicious rumor. He probes until Mary Tilford says, "I looked through the keyhole and they [the teachers] were kissing . . . ."[31] But when Mary learns there is no keyhole on the door in question, she breaks down: "Everybody is yelling at me. I don't know what I'm saying with everybody mixing me all up. I did see it! I did see it!"[32] A few moments later, however, Mary changes her story, now declaring, "It was Rosalie who saw them. I just said it was me so I wouldn't have to tattle on

25. *See* R. Posner, *supra* note 11, at 91-99.

26. *See id.* at 96; Kornstein, *The Strange Case of Shylock v. Antonio*, N.Y.L.J., Jan. 2, 1987, at 2, col. 3.

27. Six Plays, *supra* note 21, at 7.

28. "I *know* that it is true," says one character. *Id.* at 51. "I didn't mean you any harm. I still don't," says the person speaking the lies. *Id.* Even the boyfriend of one of the maligned teachers doubts her. *See id.* at 67.

29. *See* H. Goddard, The Meaning of Shakespeare 81-116 (1951).

30. Hellman takes the point about misleading appearances one step further by having one of the teachers later confess that she had secretly lusted after the other teacher, demonstrating that what appeared to be innocence may have masked something else. *See* Six Plays, *supra* note 21, at 71.

31. Six Plays, *supra* note 21, at 54.

32. *Id.* at 55.

Rosalie."[33]

After pointing out the holes in Mary's story, Joe takes a page from the *Apocrypha* and, like Daniel in "The Story of Susanna,"[34] cross-examines Rosalie, the other student, who fails to corroborate Mary's version. When questioned, Rosalie tearfully exclaims: "I never saw any such thing. Mary always makes things up about me and everybody else."[35] Only when Rosalie succumbs to a form of blackmail does she lie and recant. This passage paints a chilling portrait of perjury being suborned.

Despite Joe's telling cross-examination, the teachers lose their libel suit because a key witness, who professes to be their friend, leaves the jurisdiction and refuses to testify. This teaches a legal lesson—the importance of preserving important testimony by way of deposition before trial. It also teaches that the failure to act is itself evil. Mere protestations of friendship are not enough. Testimony in court—positive action—is required, because passivity in the face of evil is equally evil.

The play also speaks about tolerance and intolerance. The victims suffer because of intolerant attitudes toward certain private sexual behavior between consenting adults. Hellman insisted the play was not about lesbianism but about slander.[36] The specific subject matter of the libel, however, forces us to examine the Constitution's as well as our own attitudes toward homosexuality, toward all forms of private sexual conduct, and, more generally, toward privacy and tolerance of individual differences in society. Tolerance of different sexual needs breeds tolerance of different political creeds, an issue at the heart of the individual's relationship to society.[37] Had the teachers been accused of being communists, rather than lesbians, the play would foreshadow events in Hellman's own life, particularly her own contact with McCarthyism.

Hellman's parting comment on lawyers in *The Children's Hour* is anything but happy. After events have run their course and the teachers' innocence is revealed too late, one of the teachers voices her disenchantment with things she had previously idealized. "And every word will

33. *Id.*

34. In "The Story of Susanna," a young Daniel shows the innocence of a wrongly accused woman by cross-examining each of the two witnesses against her separately and out of each other's presence. The glaring inconsistencies in the versions of the two accusers belie their accusations and prove their own wrongdoing. *See The Story of Susanna*, in The Apocrypha 349-53 (Modern Library ed. 1959).

35. Six Plays, *supra* note 21, at 56.

36. *See* C. Rollyson, *supra* note 5, at 70; W. Wright, *supra* note 5, at 109; Gilroy, *supra* note 20, at 25.

37. Evidence of this, if any were needed, would surely include the continuing constitutional debate over privacy in the sexual realm, including the questions still raised by Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down state law prohibiting sale of contraceptives to married couples), the uncertain status of Roe v. Wade, 410 U.S. 113 (1973) (upholding constitutional right to abortion), and the power of the state to punish private sexual conduct in Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding state law criminalizing homosexual sodomy as applied to adult defendant's conduct in his own home with consenting adult partner).

have a new meaning" she says, "Woman, child, love, lawyer—no words that we can use in safety any more."[38] Hellman echoes the familiar complaint about the failure of the law and lawyers to fulfill their promise of making justice triumph over injustice.[39]

2. *Days to Come*

Hellman continued her treatment of legal themes in her next play, *Days to Come*. Written in 1936, it depicts the individuals involved in a labor strike in the midwest. At the suggestion of his lawyer, who is also his best friend, the well-meaning owner of the business hires unscrupulous strikebreakers who stir up violence and tragedy. The strikebreakers later try to frame one of the union organizers for a murder committed by one of their own.

The play's plot closely parallels the Haywood case, one of the most famous labor cases tried by Clarence Darrow.[40] In 1899, Idaho governor Frank Steunenberg called in United States Army troops to end a labor strike by defeating the Western Federation of Miners. In 1905, Steunenberg was killed by a bomb in front of his home. The authorities suspected that the union had taken revenge. The union asked Darrow to defend its leaders who were accused of the murder.

The 1907 murder trials in Idaho became a widely publicized courtroom battle between capital and labor.[41] During the trials, Darrow expounded political and social arguments in favor of the labor movement. In one of the trials, Darrow told the jury that the defendant was part of the worker's struggle in a "world-wide contest . . . between the rich and the poor."[42] In the trial of "Big Bill" Haywood, secretary-treasurer of the miners' union, Darrow explained in his summation how important the case was "to a great movement which represents the hopes and the wishes and the aspirations of all men who labor to sustain their daily life."[43] The jury acquitted Haywood, and the case became a well-known episode of American labor history.[44]

Whether Hellman made a conscious connection between Darrow's trial and *Days to Come* is uncertain. The parallels are certainly there, and her social, economic and political views suggest she was familiar

38. Six Plays, *supra* note 21, at 66.

39. *See, e.g.*, J. Auerbach, Unequal Justice 12 (1976) (criticizing bar for distributing justice "according to race, ethnicity, and wealth, rather than need"); D. Kairys, The Politics of Law 6 (1982) (essays presenting "a progressive, critical analysis of the operation and social role of the law in contemporary American society").

40. *See* C. Darrow, The Story of My Life 127 (1932); C. Darrow, Attorney for the Damned 410-88 (A. Weinberg ed. 1957); I. Stone, Clarence Darrow for the Defense 214-83 (1941).

41. *See* sources cited *supra* note 40.

42. C. Darrow, Attorney for the Damned, *supra* note 40, at 440-41.

43. *Id.* at 443-44.

44. Clarence Darrow's role in these 1907 trials is an oft-told tale. *See* sources cited *supra* note 40.

with famous labor struggles.[45] Nevertheless, even if there is no direct connection to Darrow's case, *Days to Come* drew on a fund of common lore. The legal struggle between capital and labor was part of the American experience, especially during the Depression.[46] The use of court injunctions and strikebreakers to stop strikes, and the violence that often ensued, were public knowledge.[47] Hellman drew upon these legal struggles in setting up the action in her second play.

A major character in *Days to Come* is an attorney, whom Hellman develops as the opposite of Clarence Darrow. Hellman's Henry Ellicott is the attorney not for the strikers, but for the factory owner. Ellicott, allied with capital and commercial interests, opposes the strikers. He is wealthy and lends large sums to his client. He is responsible for bringing in the violent strikebreakers, knowing they would cause trouble. Ellicott refers to the local judge as a pal who will not get in the way. Hellman's portrayal of Ellicott coincides with a persistent stereotype of lawyers as the handmaidens of the rich and powerful.

But Hellman goes further and exposes deep defects in Ellicott's ethics and personality. He sleeps with the wife of his best friend and client. When the client says to him, "You are my lawyer. You must protect me—," Ellicott responds with a possibly mercenary smile, "Certainly. Increased protection, increased fees."[48] The client-friend later sees through the attorney's mask of propriety and says: "I know all about Henry, the rich and worldly Henry, and all the very legal manipulating he does with his money and with his life."[49]

In the final, revealing scene, the client confronts his attorney: "[Y]ou've never had anything but toleration for me—and I've never had

45. Her sympathy with the intellectual left leaves no room for doubt here. *See* C. Rollyson, *supra* note 5, at 2; W. Wright, *supra* note 5, at 13.

46. After decades of highly publicized court rulings curbing the ability of labor unions to organize and to use economic pressure against employers, Congress in 1932 passed the Norris-LaGuardia Act, ch. 90, § 1, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-110, 113-115 (1982)), which restricted the power of federal courts to issue labor injunctions. Then, in 1935, Congress passed the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1982)), which gave affirmative protection to the right to organize and bargain collectively. According to James MacGregor Burns, the Depression saw a "virtual uprising of workers for union membership." J. Burns, Roosevelt: The Lion and the Fox 216 (1956). He continued that "[w]ith growing unionism came a rash of strikes . . . . More workers struck in the summer of 1933 than in the whole period of 1930 and 1931. And the strike wave surged upward during 1934 and 1935." *Id.*

47. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 478 (1921) (holding employer entitled to injunction against union for restraint of trade despite section 20 of the Clayton Act); Vegelahn v. Guntner, 167 Mass. 92, 99-100, 44 N.E. 1077, 1078 (1896) (injunction preventing defendant from patrolling in front of plaintiff's premises in a conspiracy to impede plaintiff's ability to hire workers). *See generally* F. Frankfurter & N. Greene, The Labor Injunction (1930) (discussing use of labor injunctions); C. Summers & H. Wellington, Cases and Materials on Labor Law 12-16, 163-68, 187 (1968) (reviewing history of labor injunctions).

48. Six Plays, *supra* note 21, at 87.

49. *Id.* at 144.

anything but contempt for you."[50] We wonder at how far that comment goes. Is it limited to the characters' feelings in *Days to Come*? Or does it reflect something broader? Is Hellman saying to all lawyers: "I've never had anything but contempt for you"?[51] We glimpse an answer in another Hellman play.

3. *Watch on the Rhine*

In *Watch on the Rhine*, Hellman's 1941 play about fighting fascism, she demonstrates her strong preference for action over words, the latter personified by verbose and indecisive lawyers. The lawyer character in *Watch on the Rhine* is different from Henry Ellicott. David Farrelly has inherited a place in his famous father's prominent law firm. Living with his widowed mother in a large house, Farrelly is a cynic, drifting without much purpose, when we first meet him.

Then Farrelly's sister and her anti-fascist refugee husband come from Europe to live with them. Farrelly's brother-in-law is an active anti-Nazi with a price on his head offered by the German government. He has entered the United States illegally. The play reaches a dramatic climax when a dilettante house guest threatens to reveal the brother-in-law's whereabouts to the Nazi German embassy, and the refugee kills the potential informer. Faced with the choice of telling the authorities about the murder or allowing his brother-in-law to escape, Farrelly decides to assist him.

Farrelly progresses from a superficial, weak and wordy character to one of real strength, able to take action for something he believes in. Hellman depicts Farrelly's growth by comparing the futility of words to the power of action, finding action far more noble and effective.

The most celebrated example in drama of a tension between thought and action is Shakespeare's Hamlet. Indeed, these traits have led some observers to see in Hamlet certain lawyer-like characteristics. Hamlet's hesitancy and indecision in seeking revenge for his father's murder are similar to equivocal legalizing, his postponements resemble legalistic delays.[52]

As Professor Richard Weisberg writes in his provocative book, *The Failure of the Word*, "Hamlet's procedures are those of a lawyer, not an aristocrat or hero. Everything must be proven to him, even the self-evident . . . [E]ndless cross-examination and prolix argumentation become his mode."[53]

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50. *Id.* at 145.

51. She may have felt that way after an encounter in 1942 with prominent civil liberties lawyer, Morris Ernst, who apparently led a double life as an informant for J. Edgar Hoover and Franklin Roosevelt on persons with leftist leanings. *See* C. Rollyson, *supra* note 5, at 188-89.

52. *See, e.g.*, R. Weisberg, *supra* note 11, at 9; Kornstein, *Hamlet and the Law*, N.Y.L.J., Mar. 10, 1987, at 2, col. 3.

53. R. Weisberg, *supra* note 11, at 8.

The key to Hamlet's "legalistic proclivity," as Weisberg calls it, is his verbosity. Hamlet, like many lawyers, talks too much. An inactive, wordy character, he prefers the safety of words to the risks of action. Speech, for Hamlet, replaces action. He uses words to hide from, and sometimes to recast reality. His futile wordiness prevents him from doing anything to right the wrong he so keenly feels. Rather than act, Hamlet talks.[54]

In *Watch on the Rhine*, David Farrelly breaks free of the Hamlet syndrome. At the start of the play, Farrelly, like Hamlet, is unwilling to act to confront evil. He later sheds his Hamlet-like traits and progresses to the point where words and passivity are no longer enough. He stops talking and acts.

In a broader sense, Hellman's portrayal of lawyer Farrelly may help explain fundamental aspects of modern culture. Lawyer-like protagonists in nineteenth and twentieth century literature, like Farrelly in *Watch on the Rhine*, frequently combine the two fundamental cultural themes of *ressentiment*, a sense of perpetual rancor and legalism.[55] This is the central theme of Weisberg's *Failure of the Word*,[56] although he does not mention Hellman. Weisberg draws upon the works of Dostoyevsky, Flaubert, Camus and Melville.[57] In these examples of lawyer-like protagonists, Weisberg finds the "legalistic ressentiment" an integral part of modern fiction.[58] Hellman's *Watch on the Rhine* fits this mold.

For most of the play, Farrelly exhibits legalistic *ressentiment*, displaying disguised rage against imagined insults. Like other ressentient individuals, Farrelly has a lingering sense of injury without having firm values. He perceives a discrepancy between what he considers his own worth and the position accorded him by others, particularly his belittling mother. He displays the legalism that makes him "prefer the safety of wordiness to the risks of spontaneous human interaction."[59]

Juxtaposed against these negative traits are the attractive qualities of Farrelly's anti-Nazi brother-in-law. While less articulate than Farrelly, the brother-in-law is well adjusted and fulfilled. He displays a keen intelligence and combines action with reason. Unlike his verbose legal counterpart, the brother-in-law responds quickly and effectively, albeit nonverbally, to evil through his leadership of the resistance. He spontaneously partakes of all the fullness of reality.[60]

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54. *See id.* at 4, 8-9; *see also* Kornstein, *supra* note 52, at 2, col. 3 (discussing Hamlet's verbosity). *But see* R. Posner, *supra* note 11, at 64-65 (discussing other theories for Hamlet's inaction).

55. *See* R. Weisberg, *supra* note 11, at xiii.

56. *See id.*

57. *See id.* at 43-176.

58. *See id.* at xiii.

59. *See id.* at xi. *But cf.* R. Posner, *supra* note 11, at 54-70 (discussing theories for Hamlet's inaction).

60. For comparisons between verbal and active characters, see R. Weisberg, *supra* note 11, at xii, 4, 6-7, 13, 34, 39.

Tension between these two sets of character traits generates much of the dramatic energy in *Watch on the Rhine*. According to Weisberg, the bitter and resentful verbosity, the sheer wordiness, of fictional lawyers has led to the failure of modern Western culture.[61] This cultural failure results, in Weisberg's view, from the inadequacy of speech as a substitute for legitimate action.[62] We have been plagued by the "futile wordiness of legalistic protagonists."[63] Hence the genesis of Weisberg's title, *The Failure of the Word*, and his subtitle, *The Protagonist as Lawyer in Modern Fiction*.

Farrelly's metamorphosis in *Watch on the Rhine* makes us guardedly optimistic by showing that *ressentiment* can be altered and that negative forces can yield eventually to more positive ethics. In *Watch on the Rhine*, Hellman, reflecting our culture's self-image, couples law and language to fight evil.

In *Watch on the Rhine*, Hellman also explores the legal theme inherent in freedom of expression. The play underscores with vivid dialogue the way totalitarianism kills the human spirit, atrophies freedom of thought and belief, and destroys the most basic civil liberties. Insofar as freedom of expression is part of our cherished legal system, *Watch on the Rhine* eloquently defends that freedom. Hellman returns to this theme in later works and activities.[64]

Lillian Hellman displayed her preoccupation with law in her plays. She used legal settings and confrontations to add dramatic effect, to highlight her perception of lawyers and the legal system, and to express her attitudes about issues of justice. As a barometer of Hellman's views of lawyers and the law, the plays reveal more than Hellman's memoirs, which are important to law and literature for other reasons.

B. *The Memoirs*

1. The Controversy

Hellman's best-selling memoirs, written toward the end of her life, are no less provocative than her plays. What they have mainly provoked, however, is persistent and angry criticism of her alleged inaccuracies or embellishments in *An Unfinished Woman*, *Pentimento* and *Scoundrel Time*. Critics have accused Hellman of fabricating people, incidents, and her own role in events, including the famous Julia episode.[65] "Hellman's

61. *See id.* at xiii.
62. *See id.*
63. *Id.*
64. *See infra* notes 167-71 and accompanying text.
65. *See* W. Wright, *supra* note 5, at 381, 390, 396, 398, 428, 430; Davie, *Life and Lies*, *supra* note 8, at 64; Davie, *Life as Fiction*, *supra* note 8, at 60; Gellhorn, *supra* note 9, at 280, 289, 291; Glazer, *supra* note 9, at 38-39; Hook, *supra* note 9, at 82, 85; Howe, *supra* note 9, at 378; Kazin, *supra* note 9, at 28;McCracken, *supra* note 9, at 38, 41. In 1983, a person whom some believe was the real "Julia" wrote her memoirs and caused an anti-Hellman stir. *See* M. Gardiner, Code Name Mary (1983); *see also* C. Rollyson, *supra* note 5, at 514-16 (discussing reaction to publication of Gardiner's autobiography); W.

autobiographical works," wrote one recent critic, "are full of lies."[66] As if to highlight this theme, Carl Rollyson takes for the epigraph to his recent biography the following line from Hellman's play, *The Little Foxes*: "God helps those who invent what they need."[67]

Although Rollyson devotes a significant part of his "critical biography" to repeating allegations about Hellman's lying, he makes a few suggestive remarks that should send the Hellman debate off in a new and more promising direction. "[M]uch of the argument with [Hellman's] chronology and her plot is beside the point,"[68] writes Rollyson. "She would use dates, seasons, and times of the year to give verisimilitude to the narrative and not to document where she was and when."[69] Notes Rollyson, "That Hellman hopelessly mixed up dates does not make her a liar."[70]

Rollyson raises, in passing, some important questions about literature. He asks "whether Hellman crossed the line between fiction and fact in believing in her characters."[71] He refers to "moments in the creative process when the writer almost believes that his or her characters actually exist."[72] In a sentence pregnant with suggestion, Rollyson writes, "the fictionalizing that assuredly took place seems less important than the artistic and biographical truth that for Lillian Hellman, Julia was real."[73]

"There is a sense," Rollyson writes in a desultory tone of partial exoneration, "in which all writers are liars and thieves."[74] Artists, he points out, often yield to the temptation to embroider and even steal material.[75]

These provocative statements by Rollyson, occasional and uncharacteristic though they may be, open the door, however slightly, to a recasting of the issues at stake in the Hellman controversy. From this new perspective, the factual accuracy or inaccuracy of Hellman's memoirs—which has been the focus up to now—hardly ends the matter. On the contrary, factual accuracy may be the wrong or at least not the only standard by which to measure the "truth" of literary memoirs.

Wright, *supra* note 5, at 403-11 (same). On the other hand, the charges go both ways. Wright's recent biography is said to have been "riddled with inaccuracy [and] larded with untruth." P. Feibleman, *supra* note 5, at 346.

66. Davie, *Life and Lies*, *supra* note 8, at 1, col. 1.

67. C. Rollyson, *supra* note 5, at vii.

68. *Id.* at 525.

69. *Id.*

70. *Id.* at 526.

71. *Id.*

72. *Id.*

73. *Id.* at 528.

74. *Id.* at 471.

75. *See id.* Flaubert put it this way: "I would like to write everything I see, not just as it is, but transfigured. An exact account of the most magnificent real fact would be impossible for me. I would still need to *embroider* it." Quoted in J. Vargas Llosa, Perpetual Orgy 126 (1986).

2. The Role of Truth in Law

Criticism of Hellman's attitude toward truth in her memoirs evokes an ongoing debate about the role of truth in another field—the law.[76] That legal debate may provide insight into the definition of truth, how truth competes with other values, and why truth in literary memoirs, like truth in law, may itself be a term of art. It is, perhaps, especially appropriate to use law as an analogy here, as some of these issues might have been resolved in the *Hellman v. McCarthy* libel case that ended with Hellman's death.[77]

Truth has close ties with the law. A trial is often said to be a search or "quest for truth."[78] Holding the banner aloft, the Supreme Court has said that "[t]he basic purpose of a trial is the determination of truth."[79] In a provocative lecture entitled *The Search for Truth—An Umpireal View*, former federal judge Marvin Frankel said: "Trials occur because there are questions of fact. The paramount objective in principle is the truth."[80]

We think of the adversary process as a powerful means of hammering out the truth. To help discover the truth in a legal context, we use various rules, devices and traditions. For example, the pretrial discovery process requires each side to provide the other side with relevant information before trial. Discovery of truth at trial is so fundamentally important that new constitutional rules are applied retroactively when they affect the integrity of the truth determining process.[81] We employ different kinds of truth-testing methods, the most obvious of which is cross-examination. According to legal scholar John Wigmore, cross-examination is the "greatest legal engine ever invented for the discovery of truth."[82]

Subverting the legal system's search for truth can bring penalties. Perjury,[83] suborning of perjury,[84] and obstructing justice[85] are the most ob-

76. *See infra* notes 98-107 and accompanying text.

77. *See infra* notes 185-211 and accompanying text.

78. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279. "At the level of high art [the courtroom process] is a crucible in which to purge the dross of events and distil essences of truth." Sedley, *Diary*, London Rev. Books, Mar. 5, 1987, at 21.

79. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966). New York State judge David W. Peck put it similarly: "The object of a lawsuit is to get at the truth and arrive at the right result." Peck, *The Complement of Court and Counsel*, in 1 Benjamin N. Cardozo Memorial Lectures 457, 459 (1970).

80. Frankel, *The Search for Truth—An Umpireal View*, 30 Rec. A. B. City N.Y. 14, 16 (1975).

81. *See, e.g.*, United States v. United States Coin & Currency, 401 U.S. 715, 723-24 (1971); Williams v. United States, 401 U.S. 646, 653 (1971); Stovall v. Denno, 388 U.S. 293, 298 (1967); Johnson v. New Jersey, 384 U.S. 719, 729 (1966).

82. 5 J. Wigmore, Evidence § 1367, at 32 (3d ed. 1940).

83. *See* 18 U.S.C. § 1621 (1982).

84. *See* 18 U.S.C. § 1622 (1982).

85. *See* 18 U.S.C. §§ 1501-1515 (1982).

vious crimes connected with depriving a court of the truth. In addition, disciplinary rules require attorneys to comply with their professional obligations to the truth.[86]

If the three volumes of her memoirs are considered Lillian Hellman's testimony, then the critics are, in effect, indicting her for literary perjury. Perjury in a legal context, however, requires more than false testimony; an essential element of perjury is the witness' knowledge, belief, and intent to give false testimony.[87] A witness has not committed perjury if she believes her testimony to be true even if in fact it is false. As any experienced trial lawyer knows, even truthful witnesses often give inaccurate testimony.[88]

One of the difficulties inherent in relying on testimony of witnesses—difficulties exacerbated by the litigation process—is faulty memory. Different witnesses perceive and remember the same event differently, without intending to lie or to be inaccurate.[89] A person might have a good memory for faces and a poor one for names or sounds. People also tend to forget unpleasant facts.[90] The very act of recounting what happened or what was observed is likely to produce further inaccuracies.[91] Finally, witnesses, in order to feel important in the dramatic trial situation (or in the dramatic literary memoir situation), are likely to convince themselves of many details that never happened, in effect to "improve" their testi-

86. *See* Model Code of Professional Responsibility DR 7-102 (1970).

One of the livelier legal controversies of the past several decades has concerned the precise extent of an attorney's professional responsibility to disclose material facts or to refrain from a material omission, and to prevent, or report to the court and opposing counsel, any untrue statement made by a client or a witness. *See, e.g.*, Frankel, *supra* note 80, at 37-40; Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).

87. *See* 18 U.S.C. § 1621 (1982) (witness must "willfully" make statement under oath "which he does not believe to be true"); *see also* Bronston v. United States, 409 U.S. 352, 357-58 (1973) (unresponsive answers not criminal under federal perjury statute); United States v. Sweig, 441 F.2d 114, 117-18 (2d Cir.) (knowledge of falsity at time statements made necessary for perjury conviction), *cert. denied*, 403 U.S. 932 (1971); United States v. Wall, 371 F.2d 398, 400 (6th Cir. 1967) (essence of crime of perjury is witness' belief concerning truth of statement).

88. *See, e.g.*, J. Maguire, J. Weinstein, J. Chadbourn & J. Mansfield, Cases and Materials on Evidence 223-28 (6th ed. 1973) (casebook discussion of inherent weaknesses of testimonial proof); F. Wellman, The Art of Cross-Examination 142-67 (1936) (chapter on "fallacies of testimony"); J. Wigmore, The Science of Judicial Proof §§ 191-202, at 386-410 (1937) (discussing accuracy of sense perception).

89. *See generally* E. Loftus, Eyewitness Testimony (1979); L. Taylor, Eyewitness Identification (1982); P. Wall, Eye-Witness Identification in Criminal Cases (1965).

90. *See* Siegal, *Inability to Remember—Its Analysis in Medicolegal Orientation*, 45 J. Crim. L. & Criminology 151, 152-56 (1954); *see also* Coburn & Fahr, *Amnesia and the Law*, 41 Iowa L. Rev. 369, 370-71 (1956) (discussing medical conditions associated with memory loss); Redmont, *The Psychological Basis of Evidence Practices: Memory*, 50 J. Crim. L. & Criminology 249, 255 (1959) (greater recall for pleasant than unpleasant experiences).

91. *See, e.g.*, R. Borchard, Convicting the Innocent xiii (1970); J. Frank & B. Frank, Not Guilty 200-02 (1957).

mony for the stage (or the book). Aware of the spotlight on them, people naturally act in a way that makes them look better.

Lillian Hellman knew of memory's central role, both in others and in herself. She understood from her own experiences how memory affects testimony.[92] As she said in 1980,

> There's only x amount you remember clearly—or you think you remember clearly. By the time you're 50, let us say, you've seen and known so many places there is a great deal you do not clearly remember. I think most people are not willing to see that or admit it if they do see it.[93]

Four years earlier, she had said, "Everybody's memory is tricky and mine's a little trickier than most. . . ."[94] So important to Hellman was the subject of memory that she devoted her last book, *Maybe*, to the intriguing process of memory. "I want always to go back to the theme of this book," she wrote. "To memory. To what is memory? Where does memory fit? Who and what influences or changes memory?"[95]

Lapses of memory might explain any inaccuracies in Hellman's memoirs. She was unusually candid about that subject. "But memory for us all is so nuts,"[96] she wrote in *Maybe*. "It's no news that each of us has our own reasons for pretending, denying, affirming what was there and never there."[97] Yet such candor still assumes the supremacy of truth.

3. Truth Is Not Supreme in Law

Even law, with all its respect for truth, falls short of making truth the supreme value. In many circumstances, the law elevates other values above truth. As Judge Frankel pointed out, "[M]any of the rules and devices of adversary litigation as we conduct it are not geared for, but are often suited to defeat, development of the truth."[98] The law, for example, recognizes several evidentiary privileges or rules[99] that prevent certain evidence from being introduced, because we put a higher premium on the values protected by the privileges, such as the confidentiality of the attorney-client relationship, than on truth. Other rationales, includ-

92. In a 1976 interview, Hellman described how she tried to verify a certain fact in her memoirs by writing to 11 people. "I got back eight answers. Seven had him [Dashiell Hammett] in places he could never have been, and the years were all wrong. I'm sure something remained in their head of the truth, but it was checkably inaccurate." Doudna, *A Still Unfinished Woman: A Conversation with Lillian Hellman, reprinted in* J. Bryer, *supra* note 9, at 195.

93. *Id.* at 277.

94. *Id.* at 195.

95. *Id.* at 279.

96. L. Hellman, Maybe 63 (1980).

97. *Id.* at 64.

98. Frankel, *supra* note 80, at 19.

99. These include attorney-client, priest-penitent, marital, doctor-patient, informant confidentiality and national security.

ing the need for deterrence, explain the exclusion of evidence obtained in violation of the Constitution.[100] Thus, truth is far from the only important value in the legal process.

Recognizing that other values compete with truth in the legal process has led to an attitude of greater realism. Bemoaning "[o]ur relatively low regard for truth-seeking,"[101] Judge Frankel stated that, "we are too much committed to contentiousness as a good in itself and too little devoted to truth,"[102] that "the search for truth fails too much of the time,"[103] and that "our adversary system rates truth too low among the values that institutions of justice are meant to serve."[104] "[I]n the last analysis," Judge Frankel concluded, "truth is not the goal."[105]

To former federal judge Simon Rifkind, Judge Frankel's conclusion was less than startling. Judge Rifkind responded that

> in actual practice the ascertainment of the truth is not necessarily the target of the trial, that values other than truth frequently take precedence, and that, indeed, courtroom truth is a unique species of the genus truth, and that it is not necessarily congruent with objective or absolute truth, whatever that may be.[106]

Rifkind's perceptive analysis of "courtroom truth" is instructive in addressing the charges of literary perjury made by Hellman's critics. Rifkind helpfully distinguishes truth in law from truth in poetry and prose:

> When the author of the Song of Solomon says, "I am the rose of Sharon and the lily of the valleys," no one believes that he is speaking of horticultural specimens. Nor is he suspected of suborning perjury when he causes a maiden to avow to her lover, "I have compared thee, o my love, to a company of horses in Pharaohs chariots." Manifestly, a poet's perception of the truth is different from that of a speaker of prose. So, too, I believe, the courtroom has developed its own version of truth.[107]

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100. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying exclusionary rule to states); Weeks v. United States, 232 U.S. 383, 398 (1914) (announcing exclusionary rule for federal courts).

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court upheld a good faith exception to the exclusionary rule, stating that " 'unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury.' An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains." *Id.* at 907 (citations omitted) (footnote omitted).

101. Frankel, *supra* note 80, at 23.

102. *Id.* at 34.

103. *Id.* at 17.

104. *Id.* at 15.

105. *Id.* at 20.

106. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, in H. Edwards & J. White, The Lawyer as a Negotiator 395, 406 (1977).

107. *Id.* at 406-07.

With these suggestive thoughts, we can better evaluate the literary perjury "indictment" filed against Hellman's memoirs. Literature, like law, has its own species of truth, which relies more on artistic insight than absolute factual accuracy.

4. Truth in Literary Autobiography

The controversy over Hellman's memoirs stems from the ambiguity of memoirs as an art form. Is autobiography factual history or literary art? Is there a difference? Central to the criticism of Hellman's memoirs is the assumption that autobiography must be a recitation of accurate facts.[108] Memoirs are not advertised as non-fiction novels; they do not usually carry the warning: "Caution. These memoirs contain some imaginary persons, events and conversations." Hellman's critics therefore understandably start with the premise that autobiography depends upon faithful history.

What if that premise is wrong?

Not all writing is an accurate recitation of facts. Fiction, poetry and drama, for instance, all thrive without necessarily being anchored in historical facts, although such facts may supply a setting or background. Other genres, such as the non-fiction novel, blend fact and fiction.[109] Yet in all these genres, even those most dependent on imagination, the authors doubtless claim that they deal in truth, and that their brand of truth is of a peculiarly profound and esoteric quality.[110]

Historians debate whether a work of history must be scrupulously accurate or whether imaginative literary style, which may affect or distort factual accuracy, is permissible.[111] According to E. H. Carr: "The belief in a hard core of historical facts existing objectively and independently of the interpretation of the historian is a preposterous fallacy, but one which it is very hard to eradicate."[112] Thus professional historians, whose task is to address facts and not fiction, disagree among themselves about the meaning and existence of faithful history.

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108. This assumption emerges clearly from the writings of Hellman's critics. Each critic attacks her, with varying degrees of venom, for distorting events or inventing facts. *See, e.g.*, W. Wright, *supra* note 5, at 426 ("The necessity to argue in defense of writers of nonfiction sticking to the truth is, for many, unthinkable."); Gellhorn, *supra* note 9, at 286-301; McCracken, *supra* note 9, at 43. This assumption also characterizes Mary McCarthy's deposition testimony. *See* C. Rollyson, *supra* note 5, at 516. In a recent book, Paul Johnson criticizes several writers, including Hellman, for "the characteristic intellectual's belief that, in his own case, truth must be the willing servant of his ego." P. Johnson, *supra* note 2, at 154.

109. Truman Capote's *In Cold Blood* and Norman Mailer's *Executioner's Song* are two well-known examples of the nonfiction novel.

110. "[I]t is one of the proudest boasts of imaginative authors . . . that they are conveying truth through their work." P. Gay, Style in History 190 (1974). "Imaginative writers normally claim that their fictions penetrate to truths of a high and general kind . . . . But these free-floating truths emerge from a context of untruths." *Id.* at 193.

111. *See id.* at 188-207.

112. E. Carr, What is History? 12 (Penguin ed. 1961).

Therefore, the controversy over Hellman's memoirs should not come as a surprise. Experts argue about whether history can be accurately written by professional historians. Such arguments sharply suggest *a fortiori* that memoirs, especially memoirs of an imaginative author, should be judged by a standard other than factual accuracy. "I don't think I rewrote history at all,"[113] Hellman said in 1977. "I wasn't out to write history."[114]

As Hellman's comment emphasizes, memoirs have a literary as well as historical purpose; they are a form of literature. Autobiography, like any other genre of literature, depends on creativity and imagination.[115] This is particularly true of literary memoirs, written as they are by creative and imaginative authors, whose talent subordinates facts to artistic vision.[116] Memoirs need not be artistic, but we should not reject them when they are.

From this perspective, the debate over Hellman's memoirs echoes Aristotle's famous comment that poetry is truer than history. A true rendering of an inner reality is what a creative writer tries to convey through her work. The author of a literary memoir may use her artistic skills to mold facts with an eye toward the story's probability and coherence.[117]

The Hellman debate may finally clarify what to expect from memoirs. Perhaps we err in expecting memoirs to contain absolutely accurate in-

113. D. Rather, *A Profile of Lillian Hellman* (1977), *reprinted in* J. Bryer, *supra* note 9, at 212.

114. *Id.* "[I]nventing as well as remembering her life . . . . is true . . . of any autobiography or memoir—because memory is selective. All writing is, in one sense, fiction, a construct. But in *Pentimento*, Hellman is calling it to mind." C. Rollyson, *supra* note 5, at 470.

115. As Hammett's biographer wrote of Hellman, fictionalization "is the impulse in autobiography too, however scrupulous the teller tries to be" to set "the imaginative world in better order than the real one." D. Johnson, *supra* note 1, at 305. According to her companion, "Lillian was in the process of dramatizing her life. She brought to the business of memory the art of fiction and she was beginning to forge for herself a new form. Because I was interested in what she was doing it never occurred to me at the time that people would take all the details of the story for literal truth, since it seemed so clear that she was fusing fact with fiction. . . . [S]he'd discovered a new form for herself in writing, a form that was neither fiction nor memory but a combination of both, which is probably what most recollection is." P. Feibleman, *supra* note 5, at 148.

116. W. Somerset Maugham addressed the theme of truth in art in *The Summing Up*, where he credited artistic power for departure from literal truths. "Realism is relative," Maugham wrote.

> The most realistic writer by the direction of his interest falsifies his creatures. He sees them through his own eyes. . . . It is not truth he attains, but merely a transposition of his own personality. And the greater his talent, the more powerful his individuality, the more fantastic is the picture of life he draws. It has sometimes seemed to me that if posterity wants to know what the world of today was like it will not go to those writers whose idiosyncrasy has impressed our contemporaries, but to the mediocre ones whose ordinariness has allowed them to describe their surroundings with a greater faithfulness.

W. Maugham, The Summing Up 231-32 (1938).

117. *See* C. Rollyson, *supra* note 5, at 525.

formation.[118] We should distinguish between autobiographical detail and autobiographical essence; the facts could be lies, but the book could be true. Truth can emerge from a context of untruths, just as it does in fiction.[119]

Hellman's critics have a limited understanding of the function of autobiography. Both biography and autobiography involve hazards. Freud, for example, understood those dangers: " 'Whoever turns biographer,' " he once wrote, " 'commits himself to lies, to concealment, to hypocrisy, to embellishments, and even to dissembling his own lack of understanding, for *biographical truth is not to be had. . . .*' "[120] If biographical truth does not exist, autobiographical truth is even less likely to exist; there the subject and central character is also the writer. Jerome Bruner, a psychologist writing a book on autobiography, recently said that there are clear "mythic patterns" in the stories people tell about their lives,[121] observing that "[p]eople model their account of their life on a myth, and so begin living it in those terms."[122]

The late Supreme Court Justice William O. Douglas is another memoirist who has recently come under fire for autobiographical mythmaking in his two volumes of autobiography.[123] According to Professor G. Edward White, the accuracy of Douglas's memoirs is "often questiona-

118. In this respect, memoirs differ significantly from journalism supposedly built on facts. This difference was highlighted recently when a writer for *The New Yorker* was criticized for changing quotations and inventing conversations for an article. The writer was quoted as saying that "she had acted only in an effort to get behind the facts to the truth." Scardino, *Ethics, Reporters and the New Yorker*, N.Y. Times, Mar. 21, 1989, at C20, col. 2. Another account relates how "writers at *The New Yorker* have occasionally displayed a certain condescension toward the facts in their search for deeper truth," and that one writer "admitted that he periodically fabricated facts in the magazine because 'there is a truth that is harder to get at and harder to get down towards than the truth yielded by fact.' " Taylor, *Holier Than Thou*, N.Y. Magazine, Mar. 27, 1989, at 35. Former New Yorker editor William Shawn said, "It doesn't mean one should discard facts or shouldn't respect facts, but the truth has to include something that goes beyond facts." *Id.* But *The New Yorker* staff was still admonished to stick to actual facts. *See id.* For a fascinating discussion of some of these issues, see Masson v. New Yorker Magazine, 881 F.2d 1452 (9th Cir. 1989) (dissenting opinion of Judge Kozinski is of particular interest).

119. *See* Lesser, *Autobiography and the "I" of the Beholder*, N.Y. Times, Nov. 27, 1988, § 7 (Book Review), at 1; *see also* C. Rollyson, *supra* note 5, at 489 ("As history, [Hellman's] comments are bunk; as autobiography, they reveal her extraordinary talent for projecting her personality on the times."); Roiphe, *This Butcher, Imagination: Beware of Your Life When a Writer's at Work*, N.Y. Times, Feb. 14, 1988, § 7 (Book Review), at 30, col. 3 (quoting Bernard Malamud on the "important distinction between autobiographical detail and autobiographical essence").

120. P. Gay, Freud: A Life for Our Time xv-xvi (1988) (quoting Freud) (emphasis added).

121. Goleman, *Personal Myths Bring Cohesion to the Chaos of Each Life*, N.Y. Times, May 24, 1988, at C11, col. 1 (quoting Bruner).

122. *Id.*

123. *See* White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 Va. L. Rev. 17, 17, 28 (1988). The memoirs in question are W. Douglas, Go East, Young Man (1974), and W. Douglas, The Court Years (1980).

ble."[124] Professor White notes that "[t]he version of events offered by Douglas in his autobiography invariably exaggerated his importance, while remaining silent about contributions made to his welfare by others."[125] White observes, in language that might well apply to Hellman's memoirs, that Douglas's autobiographical volumes are "complex literary documents, akin to works of fiction, in which the author creates one or more narrative personae, writes in various literary modes, and attempts to construct an image of a life and to draw lessons from that construction."[126]

Novelist Robertson Davies has characterized this mythmaking as " 'the inescapable problem of the autobiography: how much is left out, how much has been genuinely forgotten, how much has been touched up to throw the subject into striking relief? . . . [P]eople dramatize themselves when they have a chance.' "[127] Neither biography nor autobiography can be done " 'except by casting one person as the star of the drama, and arranging everybody else as supporting players.' "[128] An autobiography is " 'a romance of which one is oneself the hero.' "[129]

This view of autobiography commands growing acceptance today.[130] Literary biographer Leon Edel has stated that embellishment of autobiographical facts is "not an uncommon practice among literary figures."[131] Northrop Frye and other literary critics have argued that autobiography "is simply another form of prose fiction, its implied ethical contract with the reader calling for an overarching truth that is less 'factual' than literary and psychological."[132] The act of retracing one's steps is inevitably a

124. White, *supra* note 123, at 19. Professor White writes that "[a]ccuracy was clearly not a primary concern of Douglas' in writing about any portion of his life." *Id.* at 27.

125. *Id.* at 30.

126. *Id.* at 19.

127. R. Davies, World of Wonders 135-36 (Penguin ed. 1975).

128. *Id.* at 136.

129. *Id.* at 257.

130. *See supra* notes 111-29; *infra* notes 131-37. One is struck by the number of discussions about this subject in recent years. Rarely does an issue of the Sunday *New York Times* not have an article relating in some way to the debate. *See, e.g.*, sources cited *supra* note 119; *infra* notes 136, 138, 145, 146; *see also* Davies, *The Making of a 'Dublin Smartie'*, N.Y. Times, Oct. 30, 1988, § 7 (Book Review), at 42, col. 1 ("Like everyone else who lives by his imagination, [George Bernard] Shaw constructed a coherent, interesting romance about his own life with a good deal of added color and detail that is either pleasing or pathetic. . . . Perhaps we should remember Ibsen's words about the necessity to everyone of a 'Life Lie,' which sustains one's self-esteem when truth will not do so."); Henahan, *Did Ives Fiddle With the Truth?*, N.Y. Times, Feb. 21, 1988, § 2, at 1, col. 1 ("sustained effort by [composer Charles] Ives to rewrite his own history").

131. W. Wright, *supra* note 5, at 26. Ernest Hemingway also has been criticized recently for autobiographical lies. *See* P. Johnson, *supra* note 2, at 154; J. Meyers, Hemingway: A Biography 15-16, 27 (1985); Crews, *Pressure Under Grace*, N.Y. Rev. Books, Aug. 13, 1987, at 30. But, as Johnson notes, Hemingway thought that " '[i]t was not *unnatural* that the best writers are liars . . . [because a] major part of [a writer's] trade is to lie or invent.' " P. Johnson, *supra* note 2, at 154.

132. Kaplan, *Play It Again, Nathan*, N.Y. Times, Sept. 25, 1988, § 7 (Book Review), at 3.

Novelists have agreed with this assessment of autobiography. In his recent autobiogra-

conscious and unconscious act of personal mythmaking, accurately reflected in the title of a recent book, *Inventing the Truth: The Art and Craft of Memoir*.[133]

The case of architect Frank Lloyd Wright illustrates the ambivalent attitude toward the genre of autobiography. A biography by Brendan Gill takes the architect to task, much as Hellman's critics do, for misstating facts in his autobiography.[134] Gill demonstrates that Wright's memoirs are largely false and unreliable, that they contain manifold distortions, fantasies, prevarications and chronological inaccuracies that have kept scholars busy proving why this or that episode could not possibly have occurred in the way Wright described it.[135]

Another reviewer, however, saw the greater accomplishment beyond the factual inaccuracies, noting that "in his texts as much as in his architecture, Wright sought a poetic rather than a literal truth, and more often than not found it . . . . [H]e believed he could re-create his life story to accord with a similarly self-determined vision of his place in the world."[136] For all its errors, Wright's autobiography, wrote the reviewer, "remains by far the most vivid and, in some essential sense, the most veracious evocation of its chimerical author."[137]

In other media, such as film, critics have acknowledged a distinction between artistic truth and factual accuracy. One film critic argued, in an article tellingly headlined *Facts Don't Always Give the True Story*,[138] that "films revolving around real individuals draw a distinction between what is authentic—technically faithful to the facts—and what is true."[139]

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phy, *The Facts*, Philip Roth wrote that autobiography is "probably the most manipulative of all literary forms." P. Roth, The Facts 172 (1988).

133. Inventing the Truth: The Art and Craft of Memoir (W. Zinsser ed. 1987). Sidney Hook's review of this book was appropriately titled: *How to Blow Your Own Horn Effectively*, Wall St. J., Nov. 23, 1987, at 24, cols. 4-6. In writing about Hook's own recent autobiography, Out of Step (1987), Hilton Kramer noted that "we are given a glimpse of the various ways in which even such renowned literary figures have, like so many lesser mortals, often edited their memories to suit the needs of the day." Kramer, *The Importance of Sidney Hook*, Commentary, Aug. 1987, at 17, 18. Both Hook and Kramer are among Hellman's critics.

134. *See* B. Gill, Many Masks: A Life of Frank Lloyd Wright (Ballantine paperback ed. 1987).

135. *See id.* at 23-26, 52-54, 485-88, 502.

136. Filler, *Looking for Mr. Wright*, N.Y. Times, Dec. 13, 1987, § 7 (Book Review), at 15.

137. *Id.* The reviewer noted that "Wright's own retelling comes closest to capturing the broad, messy sweep of his ultimately triumphant career . . . striking a distinctive harmony in tune with an authentic inner voice." *Id.*

138. Maslin, *Facts Don't Always Give the True Story*, N.Y. Times, Nov. 8, 1987, § 5, at 25, col. 1.

139. *Id.* at col. 3. According to the critic,

> The best of these films, even when they take liberties with facts, use real personalities to create a larger, more colorful reality than their source material may have had. On the other hand, when films are reverential about their models and slavish about their facts, they have a way of losing track of a larger truthfulness.

Id.

In composing her best-selling memoirs, Hellman may have understood, as the film critic wrote, that an "audience's willingness to accept certain facts about real-life characters usually has more to do with a film's overall persuasiveness than with the facts themselves."[140]

Hellman, of course, complicated matters by writing, in the introduction to a 1979 one-volume edition of all three of her memoirs, "I tried in these books to tell the truth. I did not fool with facts."[141] But to place too much weight on Hellman's after-the-fact statement of intent is to fall victim to the intentional fallacy, just as surely as it is blindly to accept a poet's later statement of what he intended his verses to mean.[142]

Putting aside Hellman's subsequent statements of intent, her critics, by invoking the correspondence theory of truth,[143] miss the inexplicable but beautifully controlled sympathy between the author and her readers.[144] These critics refuse to be enchanted, humored, taught. They want one kind of truth—strict factual accuracy, ignoring another kind of truth—insight.[145]

Hellman's memoirs deserve a more sympathetic, and less hostile reception, such as that given by critic Wilfred Sheed. Although he referred to her memoirs as something Hellman "had quite self-evidently teased into dramas,"[146] he nevertheless concluded that "her 'dishonesty' was a perfectly legitimate literary device, virtually a branch of rhetoric."[147]

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140. *Id.*

141. L. Hellman, Three 9 (1979).

142. *See* W. Wimsatt & M. Beardsley, *supra* note 16, at 4-5.

143. According to the "correspondence" theory of truth, "truth consists of the *agreement* of our thought with reality. A belief is called 'true' if it 'agrees' with a fact. Or, stated otherwise, a belief is true if the ideas contained in it *correspond* to objects as they are in fact." J. Randall & J. Buchler, Philosophy: An Introduction 146 (1971).

144. As Peter Feibleman wrote in his recent biography:

> Strange that the special fabric of longing [Hellman] worked so hard to weave would one day be examined thread by thread, picked bare by all those nimble writers whose finest tools are a magnifying glass and a pair of tweezers, until the impact of the whole was lost to them because of it.

P. Feibleman, *supra* note 5, at 149.

145. Another critic recently summed up the situation by stating that an American

> gets agitated at the very idea of telling his life's story. He begins to act like a suspicious character: his hands shake tellingly, his mouth twitches. He *knows* he's telling lies, and he knows equally well we're going to catch him at it. So he brazens it out, either by ignoring the question of truth . . . or by purposely allying his autobiographical venture with fiction. "I'm an *artist*," he yells, "so don't expect unvarnished truth from me! What you get here is *better* than truth!"

Lesser, *supra* note 119, at 1. The artist "gives us, in fact, a record that is truer than literal truth—true, that is to say, by reason of its heartfelt, all-overcoming eloquence." Russell, *Ideas as Ammunition in the French Revolution*, N.Y. Times, Mar. 12, 1989, § 5, at 35, col. 2.

146. Sheed, *Her Youth Observed*, N.Y. Times, Apr. 19, 1987, § 7 (Book Review), at 5.

147. *Id.*

5. Truth as a Hellman Theme

Truth, as a theme, runs through Hellman's writings. In *The Children's Hour* one of the characters says: "Look: everybody lies all the time. Sometimes they have to, sometimes they don't. I've lied myself for a lot of different reasons, but there was never a time when, if I'd been given a second chance, I wouldn't have taken back the lie and told the truth."[148] In *The Little Foxes*, a character says: "Every time I ever told a lie in my whole life, I wipe my hands right after."[149] In *Days to Come*, the following exchange occurs:

> Ellicott: That's the second time you've lied about being in town. Why?
> Julie: Maybe because I like to lie. Maybe it's because I'm tired of your questions.[150]

At the end of *An Unfinished Woman*, Hellman wrote, "I do regret that I have spent too much of my life trying to find what I called 'truth,' trying to find what I called 'sense.' I never knew what I meant by truth. . . ."[151]

Factual accuracy or inaccuracy is not necessarily the only or the most relevant measure of the "truth" of Hellman's memoirs. Just as law esteems other values than truth, so does literature. Both "courtroom truth" and "literary autobiographical truth" often fail to correspond perfectly with historical facts. Both versions of truth, legal and autobiographical, serve important purposes, albeit each must be approached with caution, lest an unsuspecting lay person believe juries are always correct or that a literary autobiography is absolutely and historically accurate in every respect.

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148. Six Plays, *supra* note 21, at 52.

149. *Id.* at 208.

150. *Id.* at 89.

Another Part of the Forest is a whole play based on a lie. The life of Marcus, the main character, is a lie. If the truth were known about his betrayal of the Confederacy during the Civil War, his southern neighbors would have lynched him. This underlying theme is depicted often in the play. One character says, "Writing can't lie. Specially writing in ink." Six Plays, *supra* note 21, at 313. Another says: "Oh, now, I don't believe what you're saying. One lie, two lies, that's for all of us: but to pile lie upon lie and sin upon sin, and in the sight of God." *Id.* at 381.

151. L. Hellman, An Unfinished Woman 284 (1969).

In a 1964 article about Arthur Miller's play *After the Fall*, Hellman parodied a writer who sacrificed other values to truth. " 'It was agony to put all this down,' " she wrote, " 'but that's what a great writer is here on earth to do. Truth, and only truth, and more truth.' " W. Wright, *supra* note 5, at 294 (quoting Hellman). In a letter to Thornton Wilder, Hellman wrote: " 'I have been hampered, of course, by the truth. . . .' " *Id.* at 334. Elsewhere, she said: " 'What a word is truth. Slippery, tricky, unreliable.' " *Id.* at 324. In her famous 1952 letter to the House Un-American Activities Committee, Hellman wrote: "I was raised in an old-fashioned American tradition and there were certain homely things that were taught to me: to try to tell the truth, not to bear false witness . . . ." L. Hellman, Scoundrel Time 93 (1976). Hellman's words illustrate an understanding that truth is elusive; they demonstrate an obsession with truth and its relationship to art, an obsession spanning a lifetime.

Does it matter, for example, if there was a Julia? Or whether Hellman knew her? Isn't the nobility of the Julia character as portrayed in *Pentimento* what is important? The story of Julia is one of heroes and villains, conflict, courage, and sadness, told with beauty and skill. If a work of literature accomplishes that much, hasn't it achieved literary truth?[152]

The real problem with Hellman's memoirs may lie in readers' expectations. Advertising a book as a "true story" generates different expectations than advertising it as "fiction." Hellman at least appeared to present the memoirs as accurate.[153] But even that assumption is undercut by her explanation of "pentimento" as a subjective and impressionistic technique.[154] Readers may have to realize, however, that as a genre, literary memoirs are not necessarily literally accurate. Like a character in John Irving's novel, *The World According to Garp*, readers might want to say to memoirists: "You have your own terms for what's fiction, and what's fact, but do you think other people know your system?"[155]

II. HER LIFE AND THE LAW

Although Hellman's writings abound with legal themes, we must also look at Hellman's life for whatever light it sheds on Hellman's attitude toward law. The relation of art to life is, of course, complex. In Hellman's case, the correlation between her personal life, her interior life and their effects on the legal aspects of her writing is anything but obvious. Nevertheless, the results are enlightening.

In Hellman's life, as in her writings, the law provides a salient recurring theme. She was involved in several notable lawsuits, some of which continue to have a lasting effect on the law.[156] Even apart from these lawsuits, she was a champion of rights under law.[157] Hellman's preoccupation with the law could have come from many causes. She was a strong, sometimes abrasive personality who jealously guarded her own

152. Rollyson shows unusual sensitivity when he writes: "In *Pentimento*, Julia is a figure in the autobiographer's imagining of the past, a fantasy functioning more like an alter ego or dramatic complement to the playwright's personality than a historically verifiable presence in her life. It is essential to the writer's purpose that we do not know more about Julia, for 'Julia' is meant to be about the way Hellman conceived of her life . . . ." C. Rollyson, *supra* note 5, at 61.

153. *See supra* note 141 and accompanying text.

154. In a prefatory note to *Pentimento*, Hellman wrote:

> Old paint on canvas, as it ages, sometimes becomes transparent. When that happens, it is possible, in some pictures, to see the original lines: a tree will show through a woman's dress, a child makes way for a dog, a large boat is no longer on an open sea. That is called pentimento because the painter "repented," changed his mind. Perhaps it would be as well to say that the old conception, replaced by a later choice, is a way of seeing and then seeing again.

L. Hellman, Pentimento 1 (1973).

155. J. Irving, The World According to Garp 227 (Pocket Books ed. 1979).

156. In addition to the several cases discussed in this article, *see infra* notes 172-223, 249, Hellman also joined in a suit to stop "Nixon from claiming the Watergate tapes and papers as his personal property." C. Rollyson, *supra* note 5, at 482.

157. *See infra* notes 163-71 and accompanying text.

rights—just the sort of personality to be litigious. She frequently threatened to sue people,[158] yet her litigiousness was combined with an understanding of law as an instrument for policy, for social or economic change, and as a way of vindicating and asserting one's rights.[159]

A. *Civil Liberties*

Civil liberties are the jewel in the crown of the American legal system. We hear again and again about the genius and vital importance of our Bill of Rights. At the core of the civil liberties is a group of rights assured to individual members of society. Prominent among those basic individual rights are those guaranteeing freedom of expression,[160] including the right to form and hold beliefs and opinions on any subject, and to communicate ideas, opinions and information through any medium, including speech, writing, music and art.[161]

So essential are these rights to democratic government that the Supreme Court has from time to time referred to them as "preferred" freedoms.[162] Such rights are "preferred" because they are an indispensa-

158. *See* P. Johnson, *supra* note 2, at 301 (threatened lawsuits over play, letter to the House Un-American Activities Committee and over 1981 revival of *The Little Foxes*); C. Rollyson, *supra* note 5, at 393 (threatened to sue directors seeking to film Hammett's life story); *id.* at 482 (suit seeking to bar former President Nixon from claiming Watergate tapes and papers as his personal property); *id.* at 537 ("always threatening to sue people"); *id.* at 546 (threatened Francis Ford Coppola if he made movie with Hammett as detective character); W. Wright, *supra* note 5, at 49 (threatened to sue former lover if he published her love letters); *id.* at 263 (threatened to sue students for improper typing).

159. Her acquaintance with lawyers also may have contributed to her view of the law. Hellman had several friends who were lawyers. Among them were Harvard Law Professor Mark De Wolfe Howe, *see* L. Hellman, Pentimento 224, 226-27 (1973), Arthur W. C. Cowan, a wealthy, eccentric, conservative Philadelphia lawyer who funded liberal causes, *see id.* at 211-62; and Ephraim London, a prominent New York attorney.

She respected and appreciated the help of attorneys Abe Fortas, Joseph Rauh and Daniel Pollitt in connection with the House Un-American Activities Committee ("HUAC") appearance. To Ephraim London, her attorney in the *McCarthy* libel case, she wrote a card saying, "My Hero!" C. Rollyson, *supra* note 5, at 524.

Hellman also included lawyers in her memoirs. In *Pentimento*, Hellman devoted a whole section to describing her relationship with attorney Arthur Cowan, *see* L. Hellman, Pentimento 211-62 (1973), and in *Scoundrel Time*, she recounted her legal representation in connection with her appearance before HUAC. *See* L. Hellman, Scoundrel Time 53-58 (1976).

So surrounded by attorneys was Hellman that in 1952, following her HUAC appearance and Hammett's legal troubles, she wrote to literary critic Van Wyck Brooks of "combing lawyers out of my hair." C. Rollyson, *supra* note 5, at 342.

160. *See generally* T. Emerson, The System of Freedom of Expression (1970); M. Ernst, The First Freedom (1946); H. Kalven, A Worthy Tradition: Freedom of Speech in America (1988).

161. *See* sources cited *supra* note 160.

162. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 88 (1949); Thomas v. Collins, 323 U.S. 516, 530 (1945). Justice Frankfurter spoke of "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society." *Kovacs*, 336 U.S. at 95 (Frankfurter, J., concurring). According to Justice Cardozo, some freedoms form "the matrix, the indispensable condition" of all others. Palko v. Connecticut, 302 U.S. 319, 327 (1937). Thus, "legislation which restricts those polit-

ble condition for all other rights. Lillian Hellman did more than her share to defend these preferred freedoms.

Her most famous effort occurred during the dark days of McCarthyism. In the early 1950s, the House Un-American Activities Committee subpoenaed Hellman to testify about her left-wing politics and associations. Hellman responded with her well-known letter of May 19, 1952, in which she explained that she would answer questions about herself but not about others. She refused to name names. This letter contained her most memorable line: "I cannot and will not cut my conscience to fit this year's fashions . . . ."[163]

The Committee declined her offer. A few months later she appeared before the Committee and took the same position that she had in her letter. She was blacklisted and felt in her own life the serious personal and economic effects of slander which she had depicted in *The Children's Hour*.[164]

Her confrontation with HUAC is the most well-known incident in this regard, but it was not the first time she had expressed these views. Her 1941 play, *Watch on the Rhine*,[165] attacked fascism. Earlier, in 1940, Hellman had spoken against the evils of totalitarianism:

> I am a writer and I am also a Jew. I want to be quite sure that I can continue to be a writer and that if I want to say that greed is bad or persecution is worse, I can do so without being branded by the malice of people who make a living by that malice. I also want to be able to go on saying that I am a Jew without being afraid of being called names or end in a prison camp or be forbidden to walk down the street at night. Unless we are very careful and very smart . . . and very protective of our liberties, a writer will be taking his chances if he tells the truth, for as the lights dim out over Europe, they seem to flicker a little here too.[166]

In 1947 Hellman had written an article for the Screen Writers Guild about political investigations in that industry. "All of us," she wrote,

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ical processes which can ordinarily be expected to bring about repeal of undesirable legislation" must be "subjected to more exacting judicial scrutiny" than most laws. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). The literature on the "preferred freedoms" approach is extensive. *See, e.g.*, L. Tribe, American Constitutional Law chs. 11-15 (2d ed. 1988); Mason, *The Core of Free Government, 1938-40: Mr. Justice Stone and "Preferred Freedoms,"* 65 Yale L.J. 597 (1956); McKay, *The Preference for Freedom*, 34 N.Y.U. L. Rev. 1182 (1959).

163. L. Hellman, Scoundrel Time 93 (1976); *see also* W. Wright, *supra* note 5, at 246-47. Hellman's memorable line calls to mind the following statement by conservative lawyer John W. Davis in the 1930s: "Any lawyer who surrenders this [professional] independence or shades his duty by trimming his professional course to fit the gusts of popular opinion in my judgment not only dishonors himself but disparages and degrades the great profession to which he should be proud to belong." W. Harbaugh, Lawyer's Lawyer 199 (Oxford paperback ed. 1973).

164. *See infra* text accompanying notes 254-59.

165. *See supra* notes 52-64 and accompanying text.

166. W. Wright, *supra* note 5, at 168. Hellman made this speech at a luncheon of the American Booksellers Association.

"who believe in this lovely land and its freedoms and rights . . . [want] to keep it good and make it better . . . . It's still not un-American to fight the enemies of one's country. Let's fight."[167]

In light of Hellman's palpable efforts in this area, it is curious to read the revisionist critiques of her role during the McCarthy era. Her critics claim that she has overemphasized her courage and badly maligned the rest of the intellectual community by suggesting that most of them were cowards in the face of McCarthyism.[168] It is easy, a generation later, to say that Hellman needed little or no courage to do what she did. While it is true she was not entirely alone in her defiance, there were not then as many staunch defenders of free expression as there should have been.[169]

Decades after those confrontations, Hellman continued to push for civil liberties. She organized a group called the Committee for Public Justice that during the 1960s and 70s spoke out in favor of first amendment and other constitutional rights,[170] and investigated FBI abuses, CIA invasions of privacy, and wiretapping violations by the government.[171]

B. *Libel Law*

Even though libelous speech is not protected speech, it is still ironic when a proponent of free expression sues someone for libel. The irony increases when both plaintiff and defendant are well-known and accomplished literary figures and the case becomes a famous court battle. Hellman's libel suit against fellow writer, Mary McCarthy, even if not Hellman's brightest moment, became important as a legal precedent and is perhaps as entertaining as anything either litigant ever wrote. It grew out of what some perceive as a "good humored" assault[172] on Hellman by author and long-time antagonist Mary McCarthy[173] on a television

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167. *Id.* at 214.

168. *See, e.g.*, S. Hook, *supra* note 9, at 503; V. Navasky, Naming Names 423 (Penguin ed. 1980); C. Rollyson, *supra* note 5, at 329-30, 489-502; W. Wright, *supra* note 5, at 248-54; Glazer, *supra* note 9, at 38; Howe, *supra* note 9, at 378-79; Kazin, *supra* note 9, at 28.

169. *See, e.g.*, V. Navasky, *supra* note 168, at 423-24. According to Gary Wills, "One has to remember the period in order to understand the impact" of Hellman's role:

> She could have been held in contempt . . . . The engagement was especially dangerous . . . . Lillian's stand made it much easier for those who followed her to defy that dread request for names. Eric Bentley calls her stand a "landmark" in his book on the Committee, and Walter Goodman notes that Arthur Miller repeated her arguments almost exactly when he appeared. Murray Kempton found her testimony a sign of hope in that darkest farthest reach of McCarthyism.

G. Wills, *Introduction* to L. Hellman, Scoundrel Time 30-33 (1976).

170. *See* W. Wright, *supra* note 5, at 337-42, 346-49, 364.

171. *See id.* at 337.

172. Sheed, *supra* note 146, at 5.

173. The political differences between Hellman and McCarthy started in the 1930s with the Moscow purge trials, which divided the intellectual left, including Hellman and McCarthy, and continued through the Spanish Civil War. The differences resurfaced in 1949 at the Conference for World Peace at the Waldorf-Astoria. Hellman was one of the

interview show.

In 1979, Mary McCarthy taped an interview for the Dick Cavett Show in which Cavett asked her: "Who are some authors who are overrated, and we could do without, given a limited amount of time?" McCarthy responded with a variety of late authors' names. Cavett then asked: "We don't have the overphrased [sic] writer anymore?" Answered McCarthy: "At least I'm not aware of it. The only one I can think of [is] a holdover like Lillian Hellman, who I think is tremendously overrated, a bad writer, and dishonest writer, but she really belongs to the past, to the Steinbeck past, not that she is a writer like Steinbeck." Cavett followed up: "What is dishonest about her?" Replied McCarthy: "Everything. But I said once in some interview that every word she writes is a lie, including 'and' and 'the.' "[174]

McCarthy's television comments inevitably remind a reader familiar with Hellman's work of the line in *The Children's Hour* when one of the slander victims declares: "there isn't a single word of truth in anything you've said."[175] Hellman, like her character in *The Children's Hour*, felt that there wasn't a single word of truth in any of McCarthy's comments and responded with the famous libel suit. At the age of 75, she sued McCarthy, Cavett, the producer, and the broadcaster in New York State Supreme Court, seeking $2,250,000 in damages.

A libel suit has all of the ordinary dangers of litigation plus its own peculiar ones. Starting any litigation is to embark on a serious and uncertain adventure. Litigation is never pleasant and always expensive. Trial preparation, appeals and other delays slow down the legal process. A libel suit, moreover, opens up the plaintiff to all sorts of exposure.

Hellman's decision to sue for libel was, therefore, important. Probably no one would have criticized her if she had abstained from the legal battle; indeed there were many reasons for abstaining. By bringing suit, Hellman put her integrity and honesty as a writer squarely on the line. Every word she ever wrote in a long lifetime of writing would be scrutinized and checked by lawyers and paralegals looking for factual errors.

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evening's major sponsors and McCarthy was one of its very vocal dissenters. *See* C. Rollyson, *supra* note 5, at 203, 512; W. Wright, *supra* note 5, at 387-89. Competition between two literary figures may have fueled the fight. In a 1980 interview, after filing her suit, Hellman spoke of how McCarthy had always given "my plays bad reviews," and had "been unpleasant to me the few times I've been near her." Warga, *Hellman at 75: Fragile But Furious, reprinted in* J. Bryer, *supra* note 9, at 276. Hellman thought McCarthy was jealous: "I just don't understand jealousy of literary work." Hellman added: "I long ago learned literary ladies come in two classes. Not necessarily writers, but literary ladies. They're either the nicest people in the world, the most trustworthy or they're sort of low down in a way that is hard to understand. They have no standards or low standards." *Id.* at 276-77.

174. Hellman v. McCarthy, N.Y.L.J., May 29, 1984, at 7, col. 2-3 (Sup. Ct. N.Y. Co.) (decision on summary judgment).

175. Six Plays, *supra* note 21, at 49. One is also reminded of Simone de Beauvoir saying to Jean-Paul Sartre: "All your books are full of lies." Goodman, *Sartre and Friends in Two-Part Series*, N.Y. Times, May 28, 1987, at C22, col. 2.

She would start a legal war that was bound to be long and nasty, and, given the parties involved, would cost her some supporters in the literary world. There was the further possibility that even if Hellman ultimately won, she might only be awarded a nominal amount, a not uncommon outcome in libel cases. Or, Hellman might win in front of a jury, only to have an appellate court reverse or substantially reduce the verdict.

Hellman must have been acutely aware of all these considerations.[176] She had to consider whether she was overreacting to the situation and whether she had, in her mid-seventies, the stamina to see this legal ordeal through to the end. There were also alternatives. She could have responded with her tongue or able pen.

The Hellman-McCarthy libel suit was a classic legal confrontation, pitting two important societal interests against each other. On one hand was the fundamental interest in free expression and public discussion—a "preferred freedom"—represented by McCarthy. On the other was Hellman's interest in her personal and professional reputation. As the United States Supreme Court determined in 1966, the individual's right to the protection of his good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[177] Hellman thought she was vindicating this "pervasive and strong" interest in her reputation. She commented: "But I am not a liar and I do not believe it is anybody's right to call me a liar in space without proving it."[178]

Much has been written about the Hellman-McCarthy legal feud,[179] but little if anything has been written about the legal outcome of the case.[180] In this sense, Hellman's own case illustrates the lasting effects of libel she

176. Her attorney certainly would have explained the difficulties that she would face as a libel plaintiff. Hellman was represented by Ephraim London, an experienced and cultured New York attorney.

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

178. Warga, *Hellman at 75: Fragile But Furious, reprinted in* J. Bryer, *supra* note 9, at 276. Hellman understood that freedom of speech is not the only precious freedom, and that the thorny problem is to reconcile the individual's interest in her reputation with freedom of speech. Recognizing this problem, Hellman was careful in her own writing to avoid being sued for libel. *See* Meras, *Lillian Hellman Hasn't Gone Fishin', reprinted in id.* at 285. "I changed people [in my writing] not for gentlemanly reasons . . . but to avoid lawsuits." *Id.*; *see also* Doudna, *A Still Unfinished Woman: A Conversation with Lillian Hellman, reprinted in id.* at 199 (changed names in her writing to avoid causing pain to people and to avoid litigation).

179. *See, e.g.*, Goodman, *Literary Invective*, N.Y. Times, June 19, 1983, § 7 (Book Review), at 35; Kakutani, *Hellman-McCarthy Libel Suit Stirs Old Antagonisms*, N.Y. Times, Mar. 19, 1980, at C21; Kaus, *The Plaintiff's Hour*, Harper's, March 1983, at 14; Mailer, *An Appeal to Lillian Hellman and Mary McCarthy*, N.Y. Times, May 11, 1980, § 7 (Book Review), at 3; Simon, *Literary Lionesses*, Nat'l Rev., May 16, 1980, at 614; Slade & Ferrell, *Literary Quarrel Turns Litigious*, N.Y. Times, Feb. 17, 1980, § 4, at 7.

180. One possible reason for the lack of commentary on the legal outcome is the fact that the court's decision on summary judgment has not been printed in the bound volumes, either official or unofficial, of case reports. The only printed versions are in *The New York Law Journal* (the daily legal newspaper for New York courts) and the *Media Law Reporter*. *See* Hellman v. McCarthy, 10 Media L. Rep. (BNA) 1789 (1984).

had described in *The Children's Hour*. Everyone still remembers what McCarthy said about Hellman, particularly the reference to "and" and "the," but few know that a judge later ruled that Hellman's suit should proceed to trial, finding that McCarthy's comments could be defamatory and the product of actual malice.[181] These fascinating legal points, generally unknown, are at least as interesting as the personalities involved and have remained hidden too long behind the famous personalities of the litigation.

The case culminated in a ruling by New York State Supreme Court Justice Harold Baer, Jr. in May 1984, denying defendants' motion for summary judgment except as to Dick Cavett.[182] As to the other defendants, the case was slated for trial on the merits.[183] One month later Hellman died. Although the outcome of the trial will never be known, this ruling was itself a victory for Hellman because her libel suit survived a serious challenge.[184]

There were five basic steps in Justice Baer's legal analysis, each of which was important and somewhat controversial. The court first determined the appropriate legal standards to use in deciding the motion for summary judgment.[185] Ordinarily, courts look with disfavor on summary judgment as it is a drastic remedy that cuts off a litigant's right to a trial.[186] For this reason, summary judgment may be granted only where there is no material issue of fact to be tried.[187] After noting the legal debate whether a lesser standard should apply in libel cases because summary judgment "assists in ensuring free and uninhibited debate by obviating protracted and expensive litigation,"[188] Justice Baer rejected

181. *See* C. Rollyson, *supra* note 5, at 523.

182. *See* Hellman v. McCarthy, N.Y.L.J., May 29, 1984, at 7, col. 2 (Sup. Ct. N.Y. Co.).

183. Given Judge Baer's ruling in 1984 removing the last obstacle to a trial, it is somewhat puzzling to learn that in late 1986 one of Hellman's antagonists—Martha Gellhorn—said: "That case of Mary McCarthy . . . would never have come to trial, because there isn't anything you can't prove Hellman a liar on." Davie, *Life as Fiction*, *supra* note 8, at 60.

184. *See* R. Smolla, Law of Defamation § 12.07 (1988) (discussing summary judgment in libel cases).

185. *See* Hellman v. McCarthy, N.Y.L.J., May 29, 1984, at 7, col. 2 (Sup. Ct. N.Y. Co.).

186. *See, e.g.*, Egelston v. State University College, 535 F.2d 752, 754 (2d Cir. 1976) (emphasizing that "summary judgment must be used sparingly 'since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury' ") (quoting Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975)); Andre v. Pomeroy, 35 N.Y.2d 361, 364, 320 N.E.2d 853, 854, 362 N.Y.S.2d 131, 133 (1974) ("Since [summary judgment] deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues.").

187. *See, e.g.*, Fed. R. Civ. P. 56; N.Y. Civ. Prac. L. & R. § 3212 (McKinney 1970 & Supp. 1989); *see also* Hellman v. McCarthy, N.Y.L.J., May 29, 1984, at 7, col. 2 (Sup. Ct. N.Y. Co.).

188. Hellman v. McCarthy, N.Y.L.J., May 29, 1984, at 7, col. 3 (Sup. Ct. N.Y. Co.). Before Hutchinson v. Proxmire, 443 U.S. 111 (1979), "a consensus appeared to be

McCarthy's argument and concluded that a libel case calls for the same summary judgment test as any other lawsuit.[189] Thus, the court had to determine if there was a material triable issue of fact to warrant denial of summary judgment.

The court proceeded to determine if the language complained of was susceptible of the particular defamatory meaning ascribed to it by Hellman.[190] The court conceded that "the average listener might perceive the language 'every word she writes is a lie' as rhetorical hyperbole."[191] But, added Justice Baer, "the same listener could find that the thrust of the remarks taken together meant that the plaintiff misrepresents the facts in her writings."[192] Thus, the court ruled that the contested statements were reasonably susceptible of a defamatory connotation, and it was for the jury to determine " 'whether that was the sense in which the words were likely to be understood by the ordinary and average reader.' "[193]

The court's next step was to decide whether Hellman was a public figure,[194] in order to establish the applicable standard of proof. If the court determined she was a public figure, the law would impose on Hellman a higher standard of proof: the "actual malice" test announced in 1964 in the Supreme Court's landmark first amendment case of *New York Times Co. v. Sullivan*.[195] This standard asks whether the defendants uttered the statements in question knowing them to be false or with reckless disregard for their truth or falsity.[196] Surprisingly, Justice Baer said: "At this stage of the lawsuit and on the record before me, I am unable to find as a matter of law that the plaintiff is a public figure."[197]

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emerging that summary judgment was 'favored' in defamation cases." R. Smolla, *supra* note 184, § 12.07[1][b], at 12-32; *see, e.g.*, Guam Federation of Teachers v. Ysrael, 492 F.2d 438, 441 (9th Cir. 1974) ("When civil cases may have a chilling effect on First Amendment rights, special care is appropriate."), *cert. denied*, 419 U.S. 872 (1974). *Hutchinson* cast some doubt on this consensus, *see Hutchinson*, 443 U.S. at 120 n.9, and several courts took a more "neutral" position on summary judgment in defamation cases. *See* R. Smolla, *supra* note 184, § 12.07[2][a], at 12-33. Yet the weight of authority still favors the use of summary judgment in defamation cases. *See, e.g.*, Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 303 (2d Cir. 1986) ("claim should be dismissed so that the costs of defending against the claim . . ., which can themselves impair vigorous freedom of expression, will be avoided"), *cert. denied*, 479 U.S. 1091 (1987).

189. *See McCarthy*, at 7, col. 2. Justice Baer placed himself squarely in the "neutral" camp on the issue of summary judgment in libel cases. *Accord* Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 940 (2d Cir.) ("neither grant nor denial of a motion for summary judgment is to be preferred"), *cert. denied*, 449 U.S. 839 (1980).

190. *See McCarthy*, at 7, col. 2.

191. *Id.* at 7, col. 3.

192. *Id.*

193. *Id.* (quoting James v. Gannett Co., 40 N.Y.2d 415, 419, 386 N.Y.S.2d 871, 874 (1976)).

194. *See id.* at 7, col. 3, 12, col. 4.

195. 376 U.S. 254 (1964).

196. *See id.* at 267-92.

197. Hellman v. McCarthy, N.Y.L.J., May 29, 1984, at 12, col. 4 (Sup. Ct. N.Y. Co.).

Although the court admitted Hellman is "widely known and, indeed, widely read,"[198] it said something "[m]ore is required"[199] than notoriety. According to Justice Baer, the gist of the public figure line of cases is to afford enhanced constitutional protection for libel defendants "when, coupled with some general notoriety, the language complained of was used by the defendant in the context of plaintiff's participation in a public issue, question or controversy."[200] Under this standard, Hellman did not qualify as a public figure. This holding is open to question.[201]

The fourth step in the analysis considered whether McCarthy's comments were statements of opinion or fact.[202] According to the United States Supreme Court, opinions cannot be the basis of a libel claim because there is no such thing as a false opinion.[203] Justice Baer looked at McCarthy's remarks and said, "To call someone dishonest, to say to a national television audience that every word she writes is a lie, seems to fall on the actionable side of the line"[204] and "does not clearly pass the test as an opinion."[205] As statements of fact, McCarthy's comments could therefore support a libel claim.

Finally,[206] the court assumed for the purposes of the motion that the constitutional shield of *New York Times Co. v. Sullivan*[207] and its progeny applied. On that assumption, the court probed the issue of "actual

198. *Id.*

199. *Id.*

200. *Id.*

201. A commentator described Justice Baer's public figure ruling as "[o]ne of the few aberrations from the pattern" that "[w]riters, artists, and critics of all kind are usually held to be public figures, at least with regard to critiques of their literary or artistic endeavors." R. Smolla, *supra* note 184, § 2.21[6], at 2-67. He also noted that:

> While it is of course true that Lillian Hellman did not invite Mary McCarthy to appear on television and label Hellman a dishonest writer, Hellman did write and have published a great many plays and books, and by that voluntary activity did in fact thrust herself into the arena of literary criticism. The better view, and the view certainly more in line with the mainstream of authority, is that any writer, artist, or critic of Hellman's stature is a public figure as a matter of law in connection with any statements concerning his or her creative efforts.

Id. at 2-68.

202. *See* Hellman v. McCarthy, N.Y.L.J., May 29, 1984, at 12, col. 4 (Sup. Ct. N.Y. Co.).

203. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

204. Hellman v. McCarthy, N.Y.L.J., May 29, 1984, at 12, col. 4 (Sup. Ct. N.Y. Co.).

205. *Id.* at 12, col. 5.

206. The court also addressed the media defendant's argument that mere publication by them through the broadcast was protected by a privilege of neutral reportage. *See id.* The media defendants relied on a then recent case from the Second Circuit. *See* Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113 (2d Cir.), *cert. denied*, Edwards v. N.Y. Times Co., 434 U.S. 1002 (1977). Justice Baer rejected that argument on the ground that such a privilege has neither been recognized by New York State courts nor adopted by the Supreme Court. *See McCarthy*, at 12, col. 5. For this proposition, Justice Baer quoted Judge Simons' opinion in Hogan v. Herald Co., 84 A.D.2d 470, 478, 446 N.Y.S.2d 836, 842 (4th Dep't), *aff'd*, 58 N.Y.2d 630, 458 N.Y.S.2d 538 (1982).

207. 376 U.S. 254 (1964).

malice."[208] Under the *Times v. Sullivan* formula, a libel plaintiff must prove actual malice. "Conceivably," said Justice Baer,

> Ms. McCarthy's remarks casting doubt on Ms. Hellman's honesty and veracity might rise to the level of reckless disregard and indifference. The record reflects that Ms. McCarthy had only limited exposure to the works of the prolific Ms. Hellman. Moreover, her repetition of the remark which appeared in the *Paris Metro* tends to negate innocent error and may evidence ill will, which, while not necessary to prove "actual malice," is some proof of it.[209]

The court reached a similar conclusion as to the corporate defendants.[210] Justice Baer held that "material triable issues of fact present themselves as to whether the alleged libel and the media defendants' broadcast of that statement rise to the level of reckless indifference and disregard."[211]

The five issues before the court were difficult ones, most of which have yet to be authoritatively passed on by the highest appellate courts. But the unsettled nature of the issues only highlights the importance of the rulings in the *Hellman v. McCarthy* libel case. They provide guideposts for future courts, litigants, and lawyers, and make important contributions to a continuing legal debate.

Beyond the legal issues lurks the broader issue of the appropriateness of such a suit, which Justice Baer began to address:

> Conceivably, there are those who believe that constitutional protection should be broadly applied where one author/critic sets out after another author/critic, and there are those, too, I suppose, that consider the plaintiff-author endowed with an adequat [sic] verbal arsenal to respond in kind and, indeed, with ample access to print and other media to vent just such a response.[212]

Although Justice Baer found this point of view irrelevant to the law, others regard it as the principal issue. Writer Wilfred Sheed, for example, thought Hellman's lawsuit "foreclosed what might have been an epic debate between two serious writers"[213] over the basic question, "what is truth?"[214]

C. *Movie Rights v. Television Rights*

In the late 1960s, Hellman sued Samuel Goldwyn Productions and Columbia Broadcasting System for breach of contract.[215] It was a case

208. *See* Hellman v. McCarthy, N.Y.L.J., May 29, 1984, at 7, col. 3-4 (Sup. Ct. N.Y. Co.).
209. *Id.* at 12, col. 5.
210. *Id.*
211. *Id.*
212. *Id.* at 12, col. 4.
213. Sheed, *supra* note 146, at 5, col. 1.
214. *Id.*
215. *See Hellman*, 32 A.D.2d 287, 301 N.Y.S.2d 165 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 175, 257 N.E.2d 634, 309 N.Y.S.2d 180 (1970). A new biography of Goldwyn refers to the case. *See* A. Berg, Goldwyn 499 (1989).

of first impression to determine whether a contract for movie rights to a play also included television rights. In a 1940 contract, Hellman granted Samuel Goldwyn, Inc. all motion picture rights to her play *The Little Foxes*. Goldwyn in turn licensed CBS to exhibit Goldwyn's movie of *The Little Foxes* on television. After CBS televised the movie, Hellman claimed that the television showing was unauthorized and unjustly enriched Goldwyn and CBS at her expense.[216]

Hellman argued that television rights should be the subject of a separate transaction.[217] She argued that television rights should be retained because, in 1940, television was in its infancy and thus not contemplated by the contracting parties.[218] This argument was buttressed by her retention of the radio rights to the play. The widespread economic and legal ramifications of the case made it the subject of intense interest throughout the entertainment industry.[219]

Hellman lost, but not without a fight up to the highest court in New York State. In 1970, the New York Court of Appeals unanimously affirmed the granting of defendant's motion for summary judgment dismissing Hellman's case.[220] After analyzing the contract, the Court of Appeals described Hellman's position as "without merit."[221] It distinguished a precedent where the court had held that " 'talkie rights,' unknown at the time of the contract, were not within the contemplation of the parties."[222] According to the Court of Appeals,

> Construction of the entire agreement reveals neither ambiguity nor triable issues. The intent of the parties is clear from the language of the contract. Goldwyn's licensing of CBS was a proper exercise of its powers under the contract. This, then, was a proper case for summary judgment on behalf of the defendant.[223]

Although the particular outcome of this case did not favor Hellman, it reveals much about her attitude toward the law. She demonstrated that she would fight to protect her economic rights under the law. She displayed no fear of using the law imaginatively to clarify what she believed to be ambiguities in contract language, and she was prepared to operate within the system to challenge the wealthy and powerful. Finally, she proved that she would go to bat not only for herself but for other writers whose rights were affected by changing technology. From this perspective, the case was a victory.

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216. *See Hellman*, 32 A.D.2d at 288, 301 N.Y.S.2d at 166.

217. *See id.* at 288, 301 N.Y.S.2d at 166.

218. *See* Hellman v. Samuel Goldwyn Prods, 26 N.Y.2d 175, 180-81, 257 N.E.2d 634, 636, 309 N.Y.S.2d 180, 183 (1970).

219. *See* W. Wright, *supra* note 5, at 313.

220. *See* Hellman v. Samuel Goldwyn Prods., 26 N.Y.2d 175, 257 N.E.2d 634, 309 N.Y.S.2d 180 (1970).

221. *Id.* at 180, 257 N.E.2d at 636, 309 N.Y.S.2d at 183.

222. *Id.* at 180-81, 257 N.E.2d at 636, 309 N.Y.S.2d at 183 (quoting Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 83-84, 188 N.E. 163, 165 (1933)).

223. *Id.* at 181, 257 N.E.2d at 636, 309 N.Y.S.2d at 183.

D. *Copyright in Letters*

One event in Hellman's life raised a legal question that continues to confound courts. In the 1970s, a former lover of Hellman named David Cort announced that he was going to print fifty-year-old love letters that Hellman had written to him.[224] Hellman threatened to sue Cort to prevent the publication.[225]

Hellman, apart from any emotional outrage, was acting on a rule of copyright law stating that the "[a]uthor of letters is entitled to a copyright in the letters."[226] Although the paper on which the letter is written belongs to the recipient, it is the author who has the right to publish it or to prevent its publication.[227] Before 1978, "unpublished letters, like other unpublished works, were protected by common law copyright."[228] The Federal Copyright Act of 1976[229] "preempted the common law of copyright . . . and brought unpublished works under the protection of federal copyright law, which includes the right of first publication among the rights accorded to the copyright owner."[230] Thus, because Hellman was the author of the letters, under the common law of copyright or as a matter of federal copyright, she was on solid legal ground in asserting her right to stop their publication.

Undoubtedly, Hellman was aware of a famous case decided not too long before involving Ernest Hemingway. In 1968, the New York Court of Appeals ruled on a suit[231] brought by Hemingway's estate and widow against Random House and A.E. Hotchner, author of the book *Papa Hemingway*. The issue in the *Hemingway* case was whether conversations could become the subject of common law copyright, "even though the speaker himself has not reduced his words to writing."[232] Although the Court ruled that Hemingway had implicitly authorized publication of his conversations,[233] in the course of its opinion, it distinguished conversations from personal letters.[234] An author, said the Court, has a common law copyright in the contents of a personal letter.[235]

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224. W. Wright, *supra* note 5, at 49.

225. *Id.*

226. Salinger v. Random House, Inc., 811 F.2d 90, 94 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987); *see* Folsom v. Marsh, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901); 1 Nimmer on Copyright § 5.04, at 5-32 (Supp. 1988); W. Patry, Latman's the Copyright Law 130 (6th ed. 1986).

227. *See* Baker v. Libbie, 210 Mass. 599, 605-06, 97 N.E. 109, 111-12 (1912).

228. *Salinger*, 811 F.2d at 94.

229. 17 U.S.C. § 301(a) (1982).

230. *Salinger*, 811 F.2d at 94 (citation omitted).

231. *See* Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968).

232. *Id.* at 344, 244 N.E.2d at 252-53, 296 N.Y.S.2d at 774-75.

233. *See id.* at 349-50, 244 N.E.2d at 256, 296 N.Y.S.2d at 779.

234. *See id.* at 350-52, 244 N.E.2d at 256-58, 296 N.Y.S.2d at 779-81.

235. *See id.* at 346, 244 N.E.2d at 254, 296 N.Y.S.2d at 777.

The same issue arose in a recent case involving an unauthorized biography of writer J.D. Salinger, the reclusive author of *The Catcher in the Rye*. *See* Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987). In 1986, Salinger

E. *Wills and Estates*

Not even death could halt Hellman's involvement with the law. Her last will and testament itself became the subject of a lawsuit.[236] The central issue was whether Hellman bequeathed her interest in her literary works to her literary property fiduciaries or to her residuary estate to be divided into two funds and to be administered by two separate sets of trustees.[237]

After Hellman died in June 1984, three persons named in her will as "Literary Property Fiduciaries" brought a legal proceeding in the Surrogate's Court of New York County to construe the will.[238] These three petitioners claimed that Hellman's will spelled out their duties, compensation, and specific powers, but it did not explicitly give them a trust to administer.[239] Hence they argued that the will should be construed as creating a trust of Hellman's copyright interests in her own literary works with the three petitioners as trustees.[240] In addition, the petitioners argued they should be appointed trustees of the literary works of Dashiell Hammett, which were bequeathed to a trust under the will.[241] The

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sought a preliminary injunction to stop Ian Hamilton and Random House from publishing a book containing several of Salinger's previously unpublished letters. *Id.* at 94. The letters were in various university libraries, to which they had been donated by the recipients. The trial court denied the injunction, *see* Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987), and the Court of Appeals reversed, both courts agreeing that the main issue was whether the biographer had made "fair use" of his subject's unpublished letters. *See* Salinger v. Random House, Inc., 811 F.2d 90, 95 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987). Both courts also agreed that the author of personal letters is entitled to copyright in those letters. *See id.* at 94.

If Cort had in fact gone ahead and published Hellman's letters, perhaps Hellman, given her litigious personality, would have made good her threat and sued. Presumably, a court would have recognized her copyright in the letters, based on the *Hemingway* case and a long line of precedents. The outcome of the case might then have turned, as it did in the *Salinger* case, on the precise way in which Cort published the letters, that is, on whether Cort had made "fair use" of them. The purpose of Cort's use and the amount and substantiality of the portion of the letters used would have been highly relevant to that determination. *See id.* at 96-100.

Most recently, the Second Circuit rejected the argument that the first amendment should be taken into account in determining whether publication of a book may be barred on copyright grounds, even when only a small amount of previously unpublished material, like letters, is quoted. *See* New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989) ("first amendment concerns not accommodated by the Copyright Act" irrelevant to issuance of injunction). The decision extends *Salinger* and challenges "[t]he right of historians and biographers to quote from letters, diaries and other unpublished primary source material." *See* McFadden, *Court Challenges Scholars' Right to Quote from Private Documents*, N.Y. Times, Apr. 28, 1989, at A1, col. 5.

236. Estate of Lillian Hellman, 134 Misc. 2d 525, 511 N.Y.S.2d 485 (Surr. Ct. N.Y. Co. 1987).

237. *See id.* at 529, 511 N.Y.S.2d at 488.

238. *See id.* at 526, 511 N.Y.S.2d at 486.

239. *See id.*

240. *See id.*

241. *See id.*

executors of the will agreed that a construction of the will was necessary, but took no position on the issue.

The case came before Surrogate Marie Lambert,[242] whose decision on Hellman's will reflects great sensitivity to Hellman's presumed intent. "The testatrix," said the Surrogate, "was a complex person who executed a complex will."[243] She continued, "While her literary works can be characterized as creative genius, her will cannot."[244] Surrogate Lambert then referred to "amorphous and conflicting provisions" in Hellman's will.[245]

To resolve these conflicts, the Surrogate ruled that "the sole purpose for the creation of the literary property fiduciaries was that [Hellman's] literary work would be handled in a unified, expert and appropriate manner."[246] In language well suited to her literary subject, the court held that:

> bestowing the mantle of the traditional trustee upon the literary property fiduciaries does not adequately reflect the special burdens imposed by a literary property res. The management of literary property is more than the economic stewardship of a limited and wasting monopoly conferred upon an author under the copyright laws. How such literary property is exploited affects not only economic aspects of the author's works, but the esteem in which the author is held. As such, management of a literary work requires a delicate balance between economic enhancement and culturual [sic] nurture. Traditional trustees, emphasizing prosperity rather than posterity may be forced to concern themselves solely with keeping the books rather than keeping the flame.[247]

Surrogate Lambert concluded that the literary property fiduciaries should handle all aspects relating to the literary works.[248] This decision demonstrates how a court, faced with an ambiguous will, should interpret it in light of the decedent's intent and public policy. In Hellman's case, intent and public policy coincided for the purpose of protecting literary works after the author's death.[249]

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242. Surrogate Lambert, a former plaintiff's personal injury lawyer, is, at age 68, an activist judge who has a hard time staying above the courtroom fray. Lambert often acts as advocate for the party she thinks is right. She is said to be less concerned with what the law is than with finding a result that is just, fair, and equitable. Surrogate Lambert once said, "I think I'm always on the side of truth and justice. You can always predict that if somebody doesn't tell me the truth, or tells me a half truth, I'm going to react." Pollock, *Lambert Sets Her Own Rules*, Manhattan Lawyer, May 11, 1987, at 20, 21.

243. Estate of Lillian Hellman, 134 Misc. 2d 525, 526, 511 N.Y.S.2d 485, 486 (Surr. Ct. N.Y. Co. 1987).

244. *Id.*

245. *Id.*

246. *Id.* 529, 511 N.Y.S.2d at 488.

247. *Id.*

248. *See id.*

249. *Cf.* Valente & Michaels, *Literary Property in Estate Planning and Administration*, N.Y.L.J., Oct. 27, 1987, at 1, col. 1 (discussing complexity of Hellman's will and special sensitivity required where literary property involved). The award of legal fees in the

III. HER LAST LEGAL STATEMENT

Shortly before her death, Lillian Hellman used the context of a lawsuit to utter what in effect was her last important public statement. Vanessa Redgrave had sued the Boston Symphony Orchestra ("1350") for breaking a contract with her under political pressure in 1982.[250] Before the cancellation was made public, the BSO's stage manager accused the Symphony of blacklisting, a subject not unknown to Lillian Hellman.[251]

In the spring of 1984, the BSO had moved for summary judgment dismissing Redgrave's claim.[252] As Ms. Redgrave's attorney, I asked Hellman if she would submit an affidavit on blacklisting in opposition to the BSO's motion. She agreed.

In an affidavit dated May 22, 1984, Lillian Hellman went on public

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estate proceeding became another issue for the Surrogate to resolve. *See* Estate of Lillian Hellman, N.Y.L.J., June 10, 1987, at 14, col. 3 (Surr. Ct. N.Y. Co.). In that decision, Surrogate Lambert again stated: "This construction proceeding was occasioned by the conflicting and ambiguous terms of the will regarding the decedent's intellectual property. . . . The pre-residuary dispositions raised a number of questions requiring this Court's guidance." *Id.*

As if the foregoing legal episodes were not enough, there were others in Hellman's life. When *The Children's Hour* was banned in Boston because of its controversial theme, Hellman joined the producer in bringing an unsuccessful lawsuit to lift the ban. W. Wright, *supra* note 5, at 101. After she and the same producer, Herbert Shumlin, ended their professional partnership, Hellman was involved in litigation with the Internal Revenue Service over the division of tax refunds stemming from the partnership. *Id.* at 205.

Perhaps her most painful exposure to the law was watching its effect on her companion Dashiell Hammett. Hammett, subpoenaed to testify in court about communist associations, refused to testify and went to jail. D. Johnson, *supra* note 1, at 3-12, 238-64; C. Rollyson, *supra* note 5, at 312. Hellman saw the resulting physical deterioration of Hammett, knew the magnitude of his legal expenses, and helped to meet those expenses. *See* C. Rollyson, *supra* note 5, at 312-13, 342; W. Wright, *supra* note 5, at 241. It is simply inconceivable that such an exposure to the law would not affect Hellman deeply and lastingly.

One anecdote about Hellman and the law sheds more light on her irascible and litigious nature. In the 1950s, Hellman was working on an adaptation of Jean Cocteau's *The Lark*, a play about Joan of Arc. Hellman asked Harvard literature professor Harry Levin for help, and he found two students to translate from French to English. When the translation was done, Hellman refused to pay the students on the ground that their translations were single-spaced rather than double-spaced. Threats of litigation followed before the dispute resolved itself. W. Wright, *supra* note 5, at 263-64.

250. For descriptions of the *Redgrave* case, see Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189 (D. Mass. 1985), *vacated*, 831 F.2d 339 (1st Cir. 1987), *modified*, 855 F.2d 888 (1st Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 869 (1989). Additional opinions are located at 557 F. Supp. 230 (D. Mass. 1983) (motion to dismiss complaint) and 399 Mass. 93, 502 N.E.2d 1375 (1987) (certified questions of state law from federal court of appeals).

251. Redgrave and Hellman had met during the filming of "Julia." In 1983, while filming "The Bostonians," Redgrave visited with Hellman on Martha's Vineyard and read aloud to her for hours.

252. *See* Defendant's Motion for Summary Judgment dated Mar. 28, 1984, Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189 (D. Mass. 1985) (No. 82-3193), *vacated*, 831 F.2d 339 (1st Cir. 1987), *modified*, 855 F.2d 888 (1st Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 869 (1989).

record in support of Redgrave's case.[253] Hellman had nothing to gain personally from doing so—just the feeling of once again doing what she thought was right although others might disapprove.

Hellman began her affidavit by pointing out that she had "first-hand knowledge, unfortunately, of how blacklists work in the entertainment industry."[254] Her own experience had taught her "how writers and performers can be economically punished for their political views."[255] Consequently, she considered herself "an expert witness on blacklists."[256]

She recalled telling her own story of being blacklisted in *Scoundrel Time*. "It is not a pleasant story," she said in her affidavit, "it was not a pleasant thing to live through. But it is vital that Americans know and understand what happened to me in the 1950's."[257] Then she went on to describe those events:

> As a direct result of my congressional appearance and the press coverage of it, I suffered greatly. My life changed dramatically. There were many who did not call me and who were worried about the consequences of seeing me. I could not earn a living. In effect I was banned from writing movies. . . .
>
> I believe I was typical of blacklist victims. One day I could work at my craft, the next day I could not. One day the offers would pour in, the next day there would be no offers.[258]

Movingly, Hellman then described her confusion at being blacklisted:

> I was shocked and angered by what happened to me. But my shock and anger was directed primarily against what I thought had been the people of my world. As I wrote in *Scoundrel Time*, "I had, up to the late 1940's believed that the educated, the intellectual, lived by what they claimed to believe: freedom of thought and speech, the right of each man to his own convictions, a more than implied promise, therefore, of aid to those who might be persecuted." It never occurred to me that I or anyone else could be punished for exercising my inherited rights; "certainly there could be no punishment for doing what I had been taught to do by teachers, books, American history. It was not only my right, it was my duty to speak or act against what I thought was wrong or dangerous." . . .
>
> Then, as now, "lives were being ruined and few hand [sic] were raised in help. Since when do you have to agree with people to defend them from injustice?"[259]

253. *See* Affidavit of Lillian Hellman at 4, Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189 (D. Mass. 1985) (No. 82-3193), *vacated*, 831 F.2d 339 (1st Cir. 1987), *modified*, 855 F.2d 888 (1st Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 869 (1989).

254. *Id.* at 1.

255. *Id.*

256. *Id.*

257. *Id.* at 2.

258. *Id.* at 2-3.

259. *Id.* at 3-4.

Hellman's eloquent but little known affidavit in the *Redgrave* case, which helped defeat summary judgment, was to be her last important public statement. She died five weeks later on June 30, 1984.

Hellman was one of the first to realize the implications of the *Redgrave* case and of its "ominous resemblance to the political blacklists of thirty years ago."[260] She saw, as her affidavit so eloquently demonstrates, that the case echoed arguments made during the McCarthy era by studios defending their firing and blacklisting of writers and performers who had suspect political views or associations.[261] Hellman understood that blacklisting begins when employers—especially great commercial, artistic, and cultural institutions—cave in to intolerance.[262]

When people criticize Lillian Hellman for lacking commitment or sincerity, I must disagree. Courage, commitment and a deep understanding of American liberty she had aplenty, right up to the end of her life.[263]

CONCLUSION

Law played a large part in Lillian Hellman's work and life. Her popular and controversial memoirs raise important questions about the meaning and value of truth in law as well as in art. In her life, she freely and frequently exercised her fundamental legal rights, speaking out on behalf of freedom of thought and freedom of speech, defying an intrusive congressional committee with simple American political courage and suffering financially as a result, petitioning or threatening to petition the courts to protect her when she thought she was wronged. She used the law not only for herself but for others as well.

Lillian Hellman was, as the court noted in the dispute over her will, a "complex person." There are those who found her difficult, mercurial, nasty and unlikable, and some incidents in her life did show her to be prickly at times. But much the same could and has been said of figures like Rousseau, Shelley, Marx and Nietzsche, whose personalities were often less than winning but whose work was important.[264] We do not

260. *See* Heins, *The Clearing of Vanessa Redgrave*, The Nation, Dec. 12, 1987, at 714.

261. *See id*; *see also* Hentoff, *The Case of the Frightened Symphony*, The Progressive, Feb. 1985, at 25-27 (criticizing BSO for firing Redgrave for political reasons).

262. *See* Heins, *supra* note 260, at 715; *see also* V. Navasky, *supra* note 168, at 423 (Hellman "a private in a virtual army of resisters," taking risk for common good).

263. As Vanessa Redgrave stated, "[t]he moral superiority of Lillian Hellman . . . was real, and existed on the basis of what she did when put to the test, and how she paid for fighting for principles. . . ." Redgrave, *supra* note 8, at 12.

Vanessa Redgrave greatly admired Lillian Hellman and her stand against the House Un-American Activities Committee. When Redgrave decided to sue the BSO for what she considered blacklisting, she may have regarded that decision as akin to Hellman's test with HUAC. At the trial in 1984, Redgrave briefly wept on the witness stand when a question reminded her of her friend, Lillian, who had died a few months before. Lillian Hellman's example, which is "why she is loved and respected," *id.*, doubtless influenced Vanessa Redgrave during a similar ordeal.

264. For the most recent of such discussions, see generally P. Johnson, *supra* note 2 (critical profiles of several intellectual figures).

have to like a writer's personality; the test is what she wrote and did. In Hellman's case, it is precisely her abrasiveness that may have impelled her to use the law, whereas others, more docile, less quarrelsome and less contentious, would never have contemplated confrontation through the courts. The complexity of Lillian Hellman's personality intertwined with the complexities of the law to knit together a spellbinding literary-legal life.