The Judges of History Rule

By ARTHUR SCHLESINGER JR.

Two recent decisions by federal courts cast judges in the odd role of telling authors how they should write history and biography. These decisions deserve more attention than they have received from scholars, and from journalists as well.

Russell Miller's "Bare-Faced Messiah: The True Story of L. Ron Hubbard" is a biography of the founder of the Church of Scientology. Mr. Hubbard, who died in 1986, bequeathed the copyrights on his writings to his church, which licensed them to New Era Publications, a Danish corporation. In 1988 New Era sought a permanent injunction to restrain Henry Holt & Co. from publishing "Bare-Faced Messiah" on the ground that Mr. Miller's quotations from Mr. Hubbard infringed the copyrights. The publisher argued in response that the "fair use" statute permits quotation "for purposes such as criticism, comment, news reporting, teaching, ... scholarship, or research."

District Court Judge Pierre Leval denied the injunction on the ground that New Era had failed to make its claim within a reasonable time—the doctrine lawyers call "laches." As for the merits, Judge Leval said that Mr. Miller had written "a serious book of responsible historical criticism." Verbatim quotation, the judge believed, was justified in order to prove points the author had asserted about Mr. Hubbard—mendacity, bigotry, paranoia and other unlovely traits that could not be persuasively demonstrated without use of Mr. Hubbard's own words. "The biographer/critic," Judge Leval wrote, "should not be required simply to express ... conclusions without defending them by example." In such circumstances, free-speech interests outweighed the interests of the copyright owner.

Personal Letters

But Judge Leval felt constrained by an earlier decision of the Second Circuit Court forbidding a biographer of J.D. Salinger to quote from Mr. Salinger's personal letters. He distinguished the two cases: In *Salinger*, Judge Leval noted, the quotations were for the purpose of enlivening the biography rather than of proving points about the subject. Still the Salinger decision created a strong presumption against fair use of unpublished materials. Judge Leval reluctantly concluded that a few of Mr. Miller's quotations from Mr. Hubbard's unpublished writings, because they were not necessary to prove historical points, failed the fair-use test and therefore infringed copyright. But the proper remedy, Judge Leval said, lay in a suit for damages, not in an injunction.

The case went on appeal to the Second Circuit. In a decision in April of this year, Judge Roger Miner, joined by Judge Frank Altimari, agreed on denying the injunction and did not doubt that "Bare-Faced Messiah" was a serious work but rejected Judge Leval's argument that the public interest in scholarship could outweigh the sanctity of copyright. "We conclude," the two judges wrote, "that laches is the sole bar to the issuance of an injunction." Had the suit been filed in time, they said, "Bare-Faced Messiah" would have been suppressed.

This was too much for James Oakes, the court's chief judge. In a powerful separate opinion, Judge Oakes further distinguished the *Salinger* case by pointing out that a living person, like Mr. Salinger, had privacy rights that did not apply to a dead man, like Mr. Hubbard. "I thought that *Salinger* might by being taken in another factual context come back to haunt us. This case realizes that concern."

Decisions by the Second Circuit itself, Judge Oakes continued, had recognized that public interest in the subject matter and the indispensability in particular cases of verbatim quotations are vital components of fair use. And the injunction Judges Miner and Altimari would so readily have granted had New Era sued in time? Suppression of the book, Judge Oakes observed, would operate as a prior restraint and thus involve the First Amendment.

Moreover, and here Judge Oakes went to the heart of the question, "Responsible biographers and historians constantly use primary sources, letters, diaries, and memoranda. Indeed, it would be irresponsible to ignore such sources of information."

Now, scholars in fulfilling their responsibility do not claim the right to invade every collection of papers that bears upon their topics of investigation. And of course they agree that people can impose restrictions on the use of their papers, whether in their own possession or as donated or sold to libraries. But in the "Bare-Faced Messiah" case the author found most of his material in court records or via the Freedom of Information Act. And when responsible scholars gain legitimate access to unpublished materials, copyright should not be permitted to deny them use of quotations that help to establish historical points.

Judges Oakes and Leval understand the requirements of historical scholarship. Judges Miner and Altimari do not appear to have a clue. Yet at the moment they are the judges who are making the law. As matters stand, the *Salinger* ruling, torn from context and broadly construed, is controlling. If an author quotes "more than minimal amounts" of unpublished copyrighted materials, as the *Salinger* decision had it, "he deserves to be enjoined." The courts have not defined "minimal amounts," but publishers, I understand, take it to mean about 50 words. The "Bare-Faced Messiah" decision strikes a blow against the whole historical enterprise.

A second decision, handed down in August by the Court of Appeals for the Ninth Circuit, is another blow against scholarship. Janet Malcolm, a professional writer on psychiatric matters, wrote a series of articles for the New Yorker, later published in book form by Knopf under the title "In the Freud Archives." The articles were largely based on interviews Ms. Malcolm had taped with Jeffrey Masson, a psychoanalyst who had served as projects director of the Freud Archives.

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Mr. Masson then brought a libel suit against Ms. Malcolm, the New Yorker and Knopf. As a public figure, Mr. Masson had to prove malice and, as proof of malice, Mr. Masson contended that defamatory quotations ascribed to him by Ms. Malcolm were in fact fabricated. The quotes could not be found on the tapes, and the two judges who decided the case for Ms. Malcolm and her publishers conceded that, for the purpose of their decision, "we assume the quotations were deliberately altered."

For all historians and most journalists, this admission would have been sufficient to condemn the Malcolm articles. But Judge Arthur Alarcon, joined by Judge Cynthia Holcomb Hall, took the astonishing position that it is perfectly OK to fabricate quotations so long as a judge finds that the fabrications do not alter substantive content or are rational interpretations of ambiguous remarks.

In his eloquent dissent, Judge Alex Kozinski observed that when a writer uses quotation marks in reporting what someone has said, the reader assumes that these are the speaker's precise words or at least his words purged of "uh" and "you know" and grammatical error. While judges have an obligation under the First Amendment to safeguard freedom of the press, "the right to deliberately alter quo-

tations is not, in my view, a concomitant of a free press."

Ms. Malcolm, for example, wrote that Mr. Masson described himself as "the greatest analyst who ever lived." No such statement appears on the tapes. The majority cited Mr. Masson's remark "It's me alone . . . against the rest of the analytic world" as warrant for the Malcolm fabrication. But, as Judge Kozinski noted, the context shows that Mr. Masson's "me alone" remark referred not to his alleged pre-eminence in his profession but to the fact that his position on a particular issue was not shared by anyone else.

Ms. Malcolm had Mr. Masson describing himself as "an intellectual gigolo." Again, no such statement appears on the tapes. The majority decision contended that the phrase was a rational interpretation of Mr. Masson's description of himself as a "private asset but a public liability" to Anna Freud and that in any case it was not defamatory. Judge Kozinski found the derivation entirely strained and writes that "for an academic to refer to himself as an intellectual gigolo is . . . a devastating admission of professional dishonesty."

The Cumulative Effect

These were only two of a series of fabrications that had, in Judge Kozinski's words, the cumulative effect of making Mr. Masson "appear more arrogant, less sensitive, shallower, more self-aggrandizing, and less in touch with reality than he appears from his own statements." As Robert Coles wrote in a review of Ms. Malcolm's book, Mr. Masson emerges "as a grandiose egotist . . . and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such: his own words reveal this psychological profile." We now know that the words were not always his own.

"There is one sacred rule of journalism," John Hersey has said. "The writer must not invent." Should the green light Judges Alarcon and Hall have given to the fabrication of quotations become standard practice, it will notably reduce the value of journalism for historians—and for citizens. As Judge Kozinski put it: "To invoke the right to deliberately distort what someone else has said is to assert the right to lie in print. . . . Masson has lost his case, but the defendants, and the profession to which they belong, have lost far more."

The historical profession will survive these decisions. Perhaps in time the Supreme Court will correct them. But writing history is tough enough without judges gratuitously throwing obstacles in the scholar's path.

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