The Big Problem with the Small Penis Rule:
Why It Does Not Limit Defamation Liability

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The small penis rule is an informal strategy for limiting defamation liability for authors of fiction. The rule recommends that when an author utilizes a fictional character to defame a real-life person, he should also give the character a small penis—the logic being that in order to sue, a plaintiff would have to admit that he is the fictional character, therefore admitting that he has a small penis, and thus dissuading such litigation. In this first-ever Article to address the issue, evidence is provided for why this is an unwise strategy and how it would likely cause an increase in defamation liability. Additionally, this Article covers alternatives available to authors of fiction, a real-life example from Michael Crichton, and the peculiarly gendered nature of the small penis rule.

I. Introduction

Imagine you are a famous fiction writer who received a bad review from a critic. Seeking revenge, you insert the critic in your next book in a not-so-subtle and not-so-flattering manner. You change his name from Michael Crowley to Mick Crowley. You refer to Mick Crowley as a Yale graduate who is a political journalist in Washington, D.C., both of which are true of the real-life Michael Crowley. In order to get revenge, you create a narrative in which Mick Crowley is a

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pedophile who sodomized a two-year-old. Concerned about a potential defamation lawsuit, you contact an attorney and describe the situation. Imagine your attorney recommended the following defamation mitigation strategy: include an additional element of derogatory falsehood toward Michael Crowley by attributing a small penis to the fictional Mick Crowley. You would be right to view such advice in a highly skeptical manner.

This odd scenario turns out to be almost identical to what real-life fiction author Michael Crichton did in his 2006 book *Next*.[1] Crichton was upset at a critical review from journalist Michael Crowley.[2] Crichton created the fictional character Mick Crowley, a Washington journalist and Yale graduate—both attributes of the real-life Michael Crowley.[3] The fictional Mick Crowley was also a child rapist with a small penis—neither of which there is any factual basis to believe are attributes of the real-life Michael Crowley.[4] While it is unknown exactly why Crichton gave Mick Crowley a small penis,[5] it is likely due to the "small penis rule."[6]

The small penis rule is an informal belief that an author can minimize defamation liability by attributing a small penis to a fictional character that is clearly a parallel of a real-life person.[7] The logic behind this rule is that nobody would want to sue for defamation in such an instance because the lawsuit would require that he admit he is the fictional person in question, thus implicitly admitting that he has a small penis.[8]

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[1] Michael Crowley, *Cock and Bull*, NEW REPUBLIC (Dec. 24, 2006), https://newrepublic.com/article/62416/cock-and-bull.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* The inclusion of this piece of the information regarding penis size is peculiar given the context. Mick Crowley is an ancillary character only described in two paragraphs, and the reference to his penis size is irrelevant to the character's role in the story.
[6] *Id.*
[7] *Id.*
[8] Dinitia Smith, *Writers as Plunderers; Why Do They Keeping Giving Away Other People's Secrets?*, N.Y. TIMES (Oct. 24, 1998), https://www.nytimes.com/1998/10/24/books/writers-as-plunderers-why-do-they-keep-giving-away-other-people-s-secrets.html (explaining the logic behind the rule as "No male is going to come forward and say, 'That character with a very small penis, "That's me!"'").

The small penis rule is less of a legal principle and more of a literary legend. It was first coined in a *New York Times* article in 1998.[9] While there are numerous references to the rule in non-academic writings, only one publication in a law journal mentions the small penis rule—and only on one page.[10] A search of all cases in Westlaw returns no reference to the rule. This Article is the first to address in detail the small penis rule. Part II analyzes the weaknesses of the rule. Part III considers the challenges a plaintiff would have in such a defamation lawsuit. Part IV explains the one benefit to using the rule. Part V provides alternative recommendations for authors to utilize. Part VI looks at other, related issues, including the peculiarly gendered nature of this practice.

II. Analysis of Effectiveness

Critically evaluating the logic behind the small penis rule illuminates its impracticability in limiting liability for defamation. Using the Crichton example to illustrate, the reference to a small penis would not demonstrate how the fictional Mick Crowley does not refer to the real-life Michael Crowley. Rather, it just provides an additional defamatory statement from which Michael Crowley could seek compensation for. Even worse, this second defamatory statement may be more actionable in a potential defamation suit than the initial defamatory statement. This is because the other defamatory claim—about being convicted of raping a two-year-old—is so extreme and easily refutable[11] that few people would attribute such a trait to the real Michael Crowley.

Additionally, implementing the small penis rule is likely to prove a bad strategy at trial because it is in effect a confession that the author was aware he was engaging in defamation in the

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[9] Crowley, *supra* note 1.

[10] Mark Arnot, Note, *When Is Fiction Just Fiction? Applying Heightened Threshold Tests to Defamation in Fiction*, 76 FORDHAM L. REV. 1853, 1854 (2007). *See also* Hon. Albert J. Matricciani, Jr., *Law and Literature: Defamation by Fiction*, 42 MD. B.J. 52, 56 (2009) (quoting this portion of Arnot's article).

[11] Anyone who knows the prominent journalist Michael Crowley would be aware that he is not incarcerated, a good indication that he was not convicted of raping a two-year-old. Furthermore, the fact that there is no indication outside of a work of fiction that Michael Crowley was a convicted child rapist also functions to put people on notice that he likely is not.

first place. After all, the small penis rule is promoted as a strategy for mitigating an already-existing risk of defamation liability.[12] Therefore, one would need only implement the rule for such a purpose. Furthermore, an author's use of the tactic shows that instead of attempting to reduce defamation liability—by renaming the character, for example—he instead chose to make matters worse by attributing further negative traits to the character. Courts would likely not view such a decision favorably. This distinction is particularly relevant to defamation cases involving public figures because there plaintiffs have the additional burden of proving actual malice.[13] For purposes of public figure defamation, actual malice refers to a statement that was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[14]

The small penis rule is further flawed because—despite what its proponents claim—it does not require the plaintiff to admit that he has a small penis in order to sue for damages. A potential plaintiff could simply list the small penis accusation as an additional defamatory statement from which to seek compensation, thus explicitly stating that the small penis accusation is false.[15]

III. Plaintiff Challenges at Trial

While the additional accusation of a small penis is only likely to make matters worse in a potential defamation suit, this does not mean that such a claim is per se defamation. There would still be defenses available to potentially avoid liability. The general rule is that statements of opinion are not actionable in defamation, because unlike factual statements, they cannot be proven false.[16] One could argue that accusing someone of having a small penis is more of a statement of

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[12] Smith, *supra* note 8.
[13] Gertz v. Robert Welch, Inc., 418 U.S. 323, 327–28 (1974).
[14] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).
[15] The separate issue of how a potential plaintiff may choose to forego litigation in an effort to avoid even being associated with a lawsuit involving the notion of having a small penis is discussed later in this Article. *See infra* Part IV.
[16] *Gertz*, 418 U.S. at 339–40 ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

opinion than one of fact. "Small" is a relative term that requires a subjective determination; there is no objective standard for what constitutes a "small" penis. However, as the Supreme Court explained in *Milkovich v. Lorain Journal*, "expressions of 'opinion' may often imply an assertion of objective fact."[17] Relatedly, in *Cianci*, the Court explained how it "would be destructive of the law of libel if a writer could escape liability for accusations of [defamation] simply by using, explicitly or implicitly, the words 'I think.'"[18]

Another issue that should be considered by a potential plaintiff is how much compensation he is likely to receive for his efforts. In other words, how great could his damages really be that he is seeking compensation for? A plaintiff's attorney could no doubt provide a long list of potential damages that would rival the creativity of Crichton himself. These could include harassment, loss of privacy, inability to sleep, public anxiety, loss of consortium, and emotional distress. Of course, in order to be compensated for any of these, the plaintiff would need to prove that such damages were actually incurred. As was on display during an unfortunate exchange between Marco Rubio and Donald Trump at a presidential primary debate in 2016, penis size is something very important to some men.[19] But regardless, the average person is unlikely to experience significant damages from being associated with a fictional character with a small penis.

It is important to note that the plaintiff is not required to prove falsity in a defamation action. Rather, truth is "an affirmative defense which must be raised by the defendant and on which he has the burden of proof."[20] In the present context, if a plaintiff did happen to have a small penis—however defined—that would be an absolute defense even if the defendant did not know

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[17] Milkovich v. Lorain J. Co., 497 U.S. 1, 18–19 (1990) ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth . . . [T]he statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.'").

[18] Cianci v. New Times Publ'g Co., 639 F.2d 54, 64 (2d Cir. 1980).

[19] Gregory Krieg, *Donald Trump Defends Size of His Penis*, CNN (Mar. 4, 2016, 1:32 PM), https://www.cnn.com/2016/03/03/politics/donald-trump-small-hands-marco-rubio/index.html.

[20] RESTATEMENT (SECOND) OF TORTS § 581A cmt. b. (AM. L. INST. 1977).

about that fact at the time he made the small penis accusation.[21] However, courts would likely be disinclined to allow a defendant to partake in a discovery process aimed at evidentiary considerations as to the size of the plaintiff's penis. This unwillingness on behalf of courts would be an incentive for them to dismiss such defamation lawsuits as mere opinion, thus avoiding such unpleasant evidentiary considerations.

IV. Benefit of Using the Small Penis Rule

It is important to note the distinction between avoiding ultimate liability by winning at trial and avoiding liability by not being sued in the first place. The latter is highly preferable to the former, as even a victory at trial can incur the potential downsides of cost, time, harmed reputation, travel, and uncertainty. While implementing the small penis rule is unlikely to put the odds in one's favor at trial—and would likely even make things worse—if it keeps a trial from ever occurring, it could be considered beneficial in that sense. Whether the defamed party decides not to pursue litigation because he wants to avoid the embarrassment of even being associated with the notion of a small penis or if he mistakenly believes the myth that the small penis rule would result in a loss at trial, either of these two results is preferable to a successful defense of a defamation suit at trial. In this sense, the mythic status of the small penis rule could become a self-fulfilling prophecy. If enough people believe it, it could cause people who have a legitimate defamation case to forego litigation. However, those advising authors about this benefit should consider the legal principle that it is an ethical violation to misstate the law for the purpose of causing others to mistakenly believe they have no case against one's client.[22]

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[21] Knowledge of the falsity is not an element of a prima facie claim of defamation, but lack of knowledge can limit the damages a plaintiff may be entitled to. *See* RESTATEMENT (SECOND) OF TORTS § 559 cmt. d.

[22] Rule 4.1 of the *Model Rules of Professional Conduct* prohibits an attorney from knowingly "mak[ing] a false statement of material fact or law to a third person." MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 2019). This applies whether the false statement is made by the attorney, MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 1, or by the client with the attorney's assistance, MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 3.

V. Alternative Recommendations

Nothing in this Article should be interpreted as a recommendation that authors engage in the small penis rule. It is a risky strategy with the potential for severe downsides and is ethically problematic at best. Furthermore, as this Part will demonstrate, it is not necessary. There are other strategies for limiting defamation liability that are not accompanied by the risks and downsides of using the small penis rule. Most obviously, the author could simply change the character's name or other identifiable traits so that a reasonable reader would not associate the fictional character to a real-life character.[23]

Providing a disclaimer that all characters are fictional would also help protect against defamation liability.[24] This is far from an absolute defense, however, as the efficacy of disclaimers for this purpose depends on factors such as how prominent the disclaimer was.[25] Another practical option would be for the author to create an alternative method to humiliate the character that would not implicate real-life repercussions. Courts have implied that the more "fanciful or ridiculous" the behavior, the less likely it is to be taken seriously by the reader and therefore the less likely to be considered defamation.[26]

An author could also minimize liability by attributing less fact-based and vitriolic characteristics and actions. In the Crichton example, instead of making the Mick Crowley character

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[23] Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966) ("In order for a libelous statement to be actionable, the plaintiff must show that it was published 'of and concerning' him.").

[24] Arnot, *supra* note 10, at 1855.

[25] *See, e.g.*, Stanton v. Metro Corp., 438 F.3d 119, 128 (1st Cir. 2006) (reversing a lower court's dismissal of a defamation claim due to a presence of a disclaimer, because "given the placement of the disclaimer in the article and the nature of the publication in general, a reasonable reader could fail to notice it"); Smith v. Huntington Publ'g Co., 410 F. Supp. 1270, 1273–74 (S.D. Ohio 1975) ("[A]s a matter of law, no reasonable person could have reasonably believed that the article pointed to the plaintiff in the light of a clear statement by the author in boldface print that the names were fictitious.").

[26] Bryson v. News Am. Publ'ns, Inc., 672 N.E.2d 1207, 1221 (Ill. 1996) ("[A]lthough the story *Bryson* is labeled as fiction, the story itself is not so fanciful or ridiculous that no reasonable person would interpret it as describing actual persons or events.").

a convicted child rapist with a small penis, he could have included commentary from another character criticizing his Ivy League education or his journalistic work. Not only would this have been protected as opinion—assuming the journalistic criticism did not misrepresent factual matters—but this more substantive response would have also been a more effective strategy to get revenge against Crowley. This could be a clever way to provide substantive criticism of Crowley's real-life journalism. As Michael Crowley summarized, Crichton instead responded to constructive criticism by "hitting below the belt," which, in effect, "conced[es] that [Crowley] has won."[27] Finally, if Crichton wanted to avoid the effort involved in finding substantive reasons to criticize Crowley's work, he could have simply created a fictional Mick Crowley character that clearly resembles the real-life Michael Crowley and have him killed off in an outlandish and embarrassing manner.[28]

VI. Other Considerations

One may be tempted to view anything stated in a work of fiction as immune from a defamation cause of action because such a claim would require a factual assertion and works of fiction are, by definition, fictional. This is misguided, however, as case law provides no such work of fiction defense for defamation.[29] Likewise, the label of fiction does not protect an author from claiming that the false representation is not attributable to the plaintiff. The standard is whether a reasonable reader of the work of fiction could interpret it as referring to the plaintiff.[30]

Although not relevant to the ultimate determinations on defamation liability, it is interesting to note the inherently gendered nature of the small penis rule. Males certainly did not

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[27] Crowley, *supra* note 1.
[28] *See supra* note 26 and accompanying text for why such a "fanciful or ridiculous" derogatory treatment is unlikely to evoke defamation liability.
[29] *See, e.g.*, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 442 (10th Cir. 1982) ("The test is not whether the story is or is not characterized as 'fiction' . . . .").
[30] Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980) (addressing the "of and concerning" requirement).

have a monopoly on being victims of defamation in 1998 when the phrase was coined. It is unclear why a tactic that would only apply to males was devised, as opposed to a more universal tactic. Perhaps it stems from the egocentrism present in those who seek to use such a tactic. If one first assumes that the practitioners of the small penis rule are overwhelmingly male, it becomes easy to see how they could better understand the embarrassment that would come from being associated with having a small penis. Likewise, male authors may be uncertain as to what would be a comparable female equivalent.

VII. Conclusion

The small penis rule is far from a legal "rule" and would be more accurately referred to as a "myth" or "legend." While it may serve to dissuade the defamed person from pursuing legal recourse, it provides no benefit during a defamation trial. If anything, it makes defending against a potential defamation lawsuit worse—as it is an additional level of defamation to seek compensation for—and helps demonstrate malice by the defendant. Authors are well-advised to implement alternative strategies in their efforts to mock real-world people.