11. THE JAPANESE CULTURE, COPYRIGHT INFRINGEMENT, DEFAMATION, AND SEX TRAFFICKING

A Study of The Fictional Life of a Geisha *

Why, in the West, is politeness regarded with suspicion? Why does courtesy pass for distance, if not, in fact, evasion or hypocrisy? Why is an “informal” relation (as we greedily say) more desirable than a coded one?

I. INTRODUCTION

The geisha is a very vivid and significant part of the Japanese culture. Japanese people become quite passionate about defending the image and unraveling the real significance of the symbol of the geisha. Is the geisha an artisan

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1 This chapter discusses the legal issues underlying Arthur Golden’s depiction of the life of a geisha in his book, Memoirs of a Geisha. An actual geisha named Mineko Iwasaki provided Golden with information about the geisha life and tradition that Golden used to write his book. Four years after the publication of Golden’s book in 1997, Mineko Iwasaki sued Golden for copyright infringement and defamation. Mineko Iwasaki actually wrote two books on the geisha tradition after the publication of Golden’s book. In her books Mineko Iwasaki emphasizes that geishas are neither prostitutes nor whores but artists. “I wanted to stress the fact that geisha are consummate artists, fully committed to the highest standards of professionalism.” Mineko Iwasaki, Geisha, A Life (2002) in “A Conversation with Mineko Iwasaki.” In writing her books about the geisha life, Iwasaki presents a one-dimensional view of geishas as artists; in contrast, Arthur Golden’s view of the geisha is multidimensional.
courtesan, a prostitute or a whore? Since the 1700s, Western audiences have been fascinated by the geisha tradition that is alternately glorified by the Japanese society and outlawed by the Japanese legal system because it is considered by some to be a form of prostitution. The geisha is the only subculture in Japan that is ruled exclusively by women who are permissibly present among men and who thereby manage to alter the social dynamic of male/female relationships in Japan.

Arthur Golden’s *Memoirs of a Geisha* captures the duality of the geisha who is both revered as an artist and reviled as a sex slave. At its worst, the geisha tradition involves force, fraud, deception, and the horrifying practice of selling one’s own children into slavery for purposes of sexual exploitation. It is my contention

2. “The *okiya* owner is the queen of the realm, the atotori is the heir apparent, and the other members of the *okiya* are like the royal court.” IwAsaki, *Geisha, A Life*, supra note 1, at 39. After Arthur Golden’s *Memoirs of a Geisha* was published in 1997, IwAsaki, Golden’s informant, wrote two of her own books about the life of the geisha, which she describes metaphorically as a life of royalty. *Id. at 39. See also Mineko IwAsaki, Geisha of Gion* (2002).

3. “I also hoped to dispel the myth, once and for all, that geisha are prostitutes.” IwAsaki, *supra* note 1, at “A Conversation with Mineko IwAsaki.” *See also, Leslie Downer, Geisha: The Secret History of a Vanishing World* (2001), arguing that geisha are not prostitutes. However, the history of the geisha has always been entangled with prostitution. This link of the geisha with prostitution can be traced back to the 10th century glamorous courtesans in the Heian period, who were the predecessors of the geisha. The word *geisha*, meaning “art person,” entered the Japanese language in the 17th century. In modern times, geisha are sometimes thought of as prostitutes. The Japanese modern poet Hagiwara Sakutaro believes modern geisha are too much like prostitutes: “It’s too bad if geisha are called high-class prostitutes, but that, in fact, is what they have become . . . the geisha of the past were more admirable than what we have now—they were not so quick to offer their bodies,” quoted in Liza Dalby, *Geisha* 86 (1983).

4. *See generally Arthur Golden, Memoirs of a Geisha* (1997). The term *whore* signifies a prostitute, but carries a more negative connotation than the term *prostitute*. In the novel, the geisha is sometimes glorified, but sometimes disparaged and referred to as resembling a prostitute. “Like prostitutes, their lower-class counterparts, geisha are often in the unusual position of knowing whether this or that public figure really does put his pants on one leg at a time like everyone else” *Id. at 3*. In the novel, the geisha is even referred to indirectly and more disparagingly as a “whore.” For example, the translator’s fictional name is “Jakob Haarhuis,” which literally means “whorehouse” in Dutch.” *Id. at 4*. The translator’s name carries an ironic inference that the glorified and “royal” geisha is also associated with the image of the lowly whore who is paid for sexual services offered in a whorehouse, otherwise referred to in the novel as the geisha house or *okiya*. In Japanese a certain type of geisha exists that is actually named “whore”: *joro geisha*. *See infra* note 71 for a discussion of the evolution of the term *geisha*.


that the involuntary abduction of little girls into the geisha world is a variant of sex slavery. Recruitment of children for the purposes of sexual exploitation and slave labor cannot be justified by cultural relativism because slavery in any form is a universal crime that must be universally condemned. However, at its best, the geisha tradition is the bastion of Japanese culture, the symbol of the apogee of a nation, and the representation of Japan’s most respected values—the search for beauty and the love of the arts. To ban the geisha would be to violate the soul of Japan.

The duality of the geisha, who is perceived as both artisan and courtesan, is a leitmotif in Arthur Golden’s novel. *Memoirs of a Geisha* realistically reflects the Japanese society’s ambivalence towards the geisha tradition. The evolution of Japanese laws on prostitution also mirrors this perceptual duality of the geisha tradition. From 1872 to 1958, Japanese laws alternately ban and permit prostitution and the sex work of the geisha. This legal evolution reflects the shifting sands of official Japanese morality that Golden, an American writer, is able to capture in his novel with the help of a Japanese informant who is one of Japan’s most famous geishas.

In striving for historical accuracy and narrative verisimilitude, Golden obtains an intimate interview with a real geisha named Mineko Iwasaki. He tapes their conversations for several ten-hour sessions over the course of two weeks from May 10, 1992 to May 23, 1992 before writing his novel about the geisha life in Japan in the 1930s. With the informant’s consent, Golden transcribes Iwasaki’s intimate first-person account of her life as a geisha in the 1970s. This account contains valuable secrets the informant reveals to Golden about the closed geisha society. Golden then uses Iwasaki’s information as source material to write a fictional biography of a little girl named Chiyo who is sold by her own father at the age of nine into slavery, confinement, and debt bondage. As with many little girls in Japan who are abandoned and sold reluctantly into forced prostitution and slavery by their impoverished parents, Chiyo endures a harsh and sometimes cruel indoctrination into the geisha life and eventually becomes a famous

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7. Mineko Iwasaki is not the real name of the geisha who agrees to be interviewed during several taped sessions with Golden. “Iwasaki” is actually the name of the geisha house that five-year-old Masako was sent to by her father to become the heir apparent of the geisha house. Iwasaki “is my professional name. I got it when I was five years old. It was given to me by the head of the family of women who raised me in the geisha tradition. The surname of the family is Iwasaki. I was legally adopted as the heir to the name and successor to ownership of the business and its holdings when I was ten years old.” Iwasaki, Geisha, A Life, supra note 1, at 2.

geisha known as Nitta Sayuri. The essence of Golden’s novel is the transformation of Chiyo into Nitta Sayuri.

In Golden’s novel, Chiyo is magically changed from an abused little maid servant languishing in a geisha house into a glorified geisha. When she works in the infamous Gion district of Japan, Chiyo plays beautiful music on the shamisen and pleases rich and powerful business men with dance, artful conversation, and other charms. Chiyo receives money for her services, which she must surrender to the rigidly structured geisha house until she pays back her debt. Chiyo continues to live and work under these slave-like conditions of forced labor and debt bondage (which are thinly masked by the veneer of courtly manners and artistry) until she becomes rich and famous.

The fairy-tale quality of the novel, its unusual narrative style, and its poetic prose, created an instant literary success for Arthur Golden. However, four years after its publication in 1997, Iwasaki shocked the literary world by filing a lawsuit against Arthur Golden and his publishers claiming breach of a confidentiality agreement, quantum meruit, unjust enrichment, copyright infringement, defamation of character, misappropriation of property, and violation of her rights to privacy and publicity.

It seems that after she read the novel in Japanese translation, Iwasaki became outraged by the discrepancies she found between her own life and that of Golden’s purportedly fictional geisha. She claimed that the book is an insult to Japanese culture. As a point of honor and to get revenge, cultural clarity, or just to draw public attention to her own two books that she was writing about the geisha life, Iwasaki sued the author and his publishers in a New York court under Japanese law and New York law and asked for an accounting under the U.S. copyright laws. In her complaint, Iwasaki alleged she was the coauthor of Golden’s book and asked for “no less” than an “appropriate percentage” of what she believed was $10 million in sales for the novel. Among the unusual aspects of Iwasaki’s lawsuit was her claim of copyright infringement and defamation of character in a work of fiction and in the promotion of the book. Despite the existence of several defamation-in-fiction cases, Iwasaki’s lawyer stated that there was no legal precedent for such a lawsuit; however, the lawyer claimed that

9. “If I don’t sue, Arthur will have gotten away with insulting traditional Japanese culture. It is not only rude to me, but to all women. I don’t want even a single copy to contain our names,” she said. “We thought of asking that the books all be collected. It is not a matter of money. It is our honor,” Iwasaki said in an interview with Gary Tegler, “Memoirs of a Geisha” Muse Vents Spleen at Author, The Japan Times Online, May 1, 2001, http://www.japantimes.co.jp/cgi-bin/20010501k3.htm.
11. Iwasaki Complaint, supra note 8, at para. 20.
Iwasaki had a very strong case. Golden never responded to Iwasaki’s complaint, and Iwasaki ultimately voluntarily dismissed the lawsuit in 2003.

*Memoirs of a Geisha* has sold and made millions for Arthur Golden since 1997. This is his first novel, and it has earned him worldwide acclaim. A beautiful, very successful feature film version of the book produced by Steven Spielberg and directed by Rob Marshall has earned enormous respect from the movie industry. The book is translated into more than twenty languages.

This chapter tries to answer the following two questions about the cultural tradition of the geisha: first, is the geisha tradition (as described by Golden in his fictional biography) a variant of sex trafficking and sexual slavery, which despite possible cultural justifications should be abolished by law? Second, did Iwasaki’s lawsuit have any legal merit? To answer these questions, this study will proceed in accordance with structuralist and post-structuralist literary critical methods by looking first at the text itself and then its context, subtext, and post-text to explain the plaintiff’s pre-text for suing. I will analyze the narrative structures and style of the text; the legal and historic context of the novel; the legal issues hidden in the subtext (which include sex trafficking, feminist legal theory, and the role of cultural relativism as a justification for the geisha tradition); the post-text (which are the merits, if any, of Iwasaki’s legal claims in the Complaint she filed four years after the publication of the fictional biography); and finally, the big issue, the pre-text, or why the real geisha sued Arthur Golden and his publishers.

II. TEXT

A. Structures of Voyeurism and Mirroring in *Memoirs of a Geisha*

The American author, Arthur Golden, is like a voyeur who hides behind two narrative masks (his Dutch translator, Haarhuis, and his Japanese narrator, Sayuri). Sayuri the narrator happens to be a female geisha. The translator and the narrator are both Golden’s fictional creations. Another figure lurks in the shadows of the text—a real geisha, Iwasaki, who lives in Japan and provides

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13. Even before the movie came out, people in the movie industry were anxiously awaiting the film; e.g., Cherry Norton, *Betrayal of a Geisha*, *Sunday Times* (London), Apr. 20, 2001, at 3G (“The story has proved so popular that it is in the process of being made into a . . . film [produced] by Steven Spielberg; some actors have already been cast and a crew has been scouting for locations in Kyoto.”). *See also The Evening Standard* (London), April 25, 2001: “A Steven Spielberg film of the book is due to be released next year.” Given the secrecy of the clients who service geishas in Japan, it is difficult to get permission to shoot scenes in the real Gion district. (*Memoirs of a Geisha* did become a film that won many awards for its cinematographic depiction of the geisha life).
Golden with information never before disclosed about the geisha world. Thus two fictional characters, the translator and the narrator, mirror two real people, the author and the real geisha. The reader plays the role of the grand voyeur who remains fascinated by the game of seductive unmasking that takes place during the act of reading.\textsuperscript{14}

Reading this novel and contemplating the lawsuit that ensues is a complex but pleasurable experience enhanced by the juxtaposition of reality and fiction. The interplay of reality and fiction in the novel creates an effect of mirroring and causes the establishment of parallel tensions that produce symmetry and order in the mind of the reader. In this fictional biography, the narrator creates tension between herself and the translator by imposing certain conditions on the translator that he must fulfill in order for Sayuri to proceed with the narration of her secret life as a geisha. A similar tension is created in reality between Golden and Iwasaki, who also allegedly imposed certain conditions on Golden prior to the publication of his novel. The parallelism thus created in the fiction and in reality produces a pleasurable effect of symmetry the reader enjoys while reading the novel and while reading the publicity about the lawsuit.

In the novel, Sayuri agrees conditionally\textsuperscript{15} to reveal secrets of the geisha life to the translator only if he agrees to publish the novel after her death. In a perfect parallelism, the real geisha mirrors the fictional geisha by allegedly agreeing conditionally\textsuperscript{16} to disclose precious mysteries of the closed geisha world to the author, but only if Golden promises to keep Iwasaki's name confidential. The artistic quality of this novel is found in the subtle play of mirrors and voyeurism producing pleasurable tension in the mind of the reader in the course of the act

\textsuperscript{14} Roland Barthes was a famous French literary critic and semiotician who wrote about the Japanese culture in \textit{l’Empire des Signes} (1970) and who elaborated a theory of reading texts based on a principle of eroticism in \textit{Le Plaisir du texte} (1973). For Barthes, the very act of reading is an experience of erotic pleasure. Golden's use of voyeurism as a narrative structure enhances a tension sustained in the pleasurable act of reading. See Susan Tiefenbrun, \textit{The Third Degree of Language: Mediation and Roland Barthes’s Semiotic Production}, 34, 1/2 Semiotica 34-1/2 at 143–66 (1981) for a survey of Roland Barthes' literary theories.

\textsuperscript{15} See Golden, supra note 4, at 4 (“Though she was eager to have her biography recorded, Sayuri did insist upon several conditions. She wanted the manuscript published only after her death and the deaths of several men who had figured prominently in her life.”). See also id., supra note 4, at 2 (“One day I asked her if she would ever permit her story to be told. ‘Well, Jakob-san, I might, if it’s you who records it.’ She told me.”).

\textsuperscript{16} See Iwasaki Complaint, supra note 8, at para. 9 (“When Ms. Iwasaki first met Golden in 1992, she agreed to be interviewed about her geisha life, Gion, and her family’s experiences there on certain express conditions. The first condition was complete anonymity for herself and her family. The second was total confidentiality regarding the personal stories and information she related from her life and career as well as her family’s experiences.”).
of reading and of contemplating the merits of the legal act inspired by the novel.

The play of mirrors and the act of voyeurism produce not only narrative tension, but beneficial confusion in the mind of the reader. This confusion is the basis of Iwasaki’s lawsuit and her claims of copyright infringement, defamation of character, and violation of right to privacy and publicity relating to a work of fiction. The confusion between the author and his personae begins on the very first page. A fictional translator appears, calling himself a historian, scholar of Japan, and an academician, which are the very same characteristics that coincidentally happen to describe the author, Arthur Golden. As the story unfolds, the translator, Jakob Haarhuis, sounds more and more like the author of the book. Haarhuis admits to having translated the narrator’s special Kyoto dialect, but his translation is more like that of a skilled author, such as Golden. The so-called translation is in delicate and poetic English, flavored with exotic spices and imagery, which transports the readers to Japan in the 1930s. As a guarantee of the authenticity and accuracy worthy of an academician, the translator confesses that he also used the narrator’s secretary to verify and transcribe Sayuri’s first-person account of her intimate life as a geisha.

The parallel confusion between the real and the fictional geisha begins after the publication of the novel and the filing of the lawsuit by Iwasaki. The narrator in Memoirs of a Geisha is an elderly and famous female geisha named Nitta Sayuri who (according to the translator) resided in New York for many years and who is now dead. But Sayuri is not Iwasaki, the real geisha, who decides to sue the author. Sayuri is a fictional narrator who (the translator tells us) came to the United States in 1956, which is the watershed year when prostitution became illegal in Japan. This is a legal fact that Golden, the historian, knew quite well. According to the narrator, in Sayuri’s sunset years she lived in a suite in the Waldorf Towers in New York, and it was during this forty-year period that she agreed to describe the intimate details of her life as a geisha to Haarhuis, who captured it all on cassette. In contrast, the real geisha Iwasaki actually stayed in Japan until her retirement from the geisha life at the age of twenty-nine, married a Japanese artist, and currently resides in a Kyoto suburb with her husband and children, where she permitted Golden to interview her for his

17. Golden, supra note 4, at 1–2.

18. See id., at 2. (The translator refers to a “lengthy” chapter about her “in the book Glittering Jewels of Japan, or in the various magazine articles about her that have appeared over the years.”). The publicity about the narrator makes her a “public figure.” Similarly, Iwasaki is a public figure in Japan, and the publicity surrounding Golden’s Memoirs of a Geisha in the United States and Europe arguably make Iwasaki also a public figure in the United States, Europe, and Japan.

19. Id. at 2.
The similarities and differences between the real geisha and the fictional geisha, and between the narrator and the translator, are the bases of the lawsuit filed by Iwasaki against the author and his publishers for claims of copyright infringement, right of privacy, and defamation of character arising out of a work of fiction.

B. Voyeurism and Failure to Satisfy Conditions Precedent to Publication

The dispute between the real geisha and the author focuses on Golden’s success or failure to satisfy certain conditions precedent to the publication of the novel. In her Complaint, Iwasaki alleges that she agreed to provide information to Golden on condition this information serve only as a “fact check” to correct any errors in a book that Golden had already written about the geisha life. Golden did write two earlier drafts of a book about a geisha, both of which were in third-person narrative, but he abandoned these two drafts and adopted a first-person narrative style after he heard Iwasaki’s revealing personal account of her life as a geisha.

Similarly, the fictional geisha also stipulates that she must first die as a condition precedent to the publication of Haarhuis’ novel about her life as a geisha. Sayuri’s death in the novel actually satisfies the condition precedent she had imposed on the translator. But the real geisha claims Golden did not fulfill her first condition because he abandoned his earlier works and wrote an entirely new novel based on her information and her life story.

Iwasaki claims to have required the satisfaction of a second condition precedent to the publication of Golden’s book. Because Golden failed to keep her name anonymous and all her personal information confidential, he did not satisfy the second condition precedent. Consistent with the voyeuristic structures of the novel and despite the force of Iwasaki’s alleged conditions precedent, Arthur Golden brazenly writes Iwasaki’s name clearly in the acknowledgment of the book, as if to lift the veil of the hidden geisha. Writing Iwasaki’s name in the

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20. Iwasaki, supra note 1, at 294.
21. Iwasaki Complaint, supra note 8, a para. 10.
22. “And so I wrote this book twice in third person first, before I finally decided,” Golden said in an Interview on Good Morning America (ABC television broadcast Jan. 24, 1999).
23. See Golden’s statement in Day, supra note 5, at 91: “Mineko took my understanding of a geisha’s daily existence and stood it on its head. I had to throw out my entire 800-page draft and start from scratch.”
25. “Although the character of Sayuri and her story are completely invented, the historical facts of a geisha’s day-to-day life in the 1930s and 1940s are not. In the course of my extensive research I am indebted to one individual above all others. Mineko Iwasaki, one of Gion’s top geisha in the 1960s and 1970s, who opened her Kyoto home to me during May 1992, and corrected my every misconception about the life of a geisha—even though
acknowledgment of the book is Golden’s dramatic literary act, which Iwasaki perceives of as an illegal act, a breach of trust, and a breach of contract, which constitute the crux of some of the legal issues in the lawsuit. Golden's motivation for this act can easily be explained literally as a manifestation of voyeurism, a narrative and stylistic structure the author uses throughout the novel to create artistic effects. This study will attempt to provide a legal analysis of the literary act that inspired and produced the lawsuit.

C. Play of Reality and Fiction Inside and Outside the Novel
Golden admits that Iwasaki is the source of his fictional geisha. There is no doubt that Golden used the real geisha’s transcription as a launching pad for the creation of his own fictional character. But Golden then changed Iwasaki’s words, selected only parts of her transcript, rearranged her thoughts and expressions into his own creation, and wrote with poetic license in his own idiom, as permitted by the First Amendment of the U.S. Constitution—and as required by the craft of fiction writing.

Golden adamantly insists the fictional geisha is entirely different from the real geisha, and this difference is essential to his defense against a claim of copyright infringement as well as defamation. Golden said, “Mineko would not recognize herself in Sayuri” because “they occupied different eras. Mineko reigned magnificent in Kyoto in the Sixties and Seventies, whereas Sayuri traveled to Kyoto from the fishing village where she was born in the early Thirties.”

Iwasaki was a real geisha in the 1960s and 1970s. Sayuri represents the demimonde of the geisha tradition in Japan in the years 1930 to 1946. Despite these differences, Iwasaki bases her legal claims on the similarity of the two women and their geisha lives.

D. Motivation of Informants Inside and Outside the Novel
What are the underlying motives of the real and the fictional geishas who both violate a public trust by revealing hidden secrets about the geisha tradition? Breaking with the geisha code of silence, both the real and the fictional geishas shock the world by making personal statements that are memorialized on tapes and that expose the underbelly of a slowly disappearing Japanese geisha tradition.

everyone I knew who had lived in Kyoto, or who lived there still, told me never to expect such candor.” Golden, supra note 4, at 433.


27. “[T]hese butterflies of the night regard their roles as a kind of public trust, but in any case, the geisha who violates that trust puts herself in an untenable position.” Golden, supra note 4, at 3.

28. “A geisha’s unwritten code of honor theoretically prevents her from divulging what she overhears. . . .” Dalby, supra note 3, at 61.
According to Golden, Iwasaki actually met him in Kyoto where “over several days, she explained all there was to know about the life of a geisha, walked [Golden] around the Gion district and introduced him to others who had inhabited the same strange world.”\(^{29}\) In the novel Sayuri, too, reveals her secrets to the translator while they are both safely located in New York. The reasons Sayuri and Iwasaki both agree to reveal the secrets of the Japanese geisha tradition in violation of their public trust remains a mystery in the novel as well as in reality. If Iwasaki actually consented to have her secrets published in Golden’s novel, then her claims of a breach of a verbal confidentiality agreement, defamation, and copyright infringement are baseless.

At the beginning of the novel, the translator questions Sayuri’s motives for revealing secrets about her life as a geisha: “Why had she wanted to document her life?” “What else do I have to do with my time these days?” she replied. “As to whether or not her motives were really as simple as this, I leave the reader to decide.”\(^{30}\) Consistent with the narrative technique of mirroring and the sustained interplay of reality and fiction, Golden frequently questions Iwasaki’s motives for revealing secrets about her life as a geisha in numerous interviews about his book.\(^{31}\) In one of those interviews, Golden remarked, “While there was no shame to what she did while she was in the geisha life . . . in retirement, it is a past that carries some stigma.”\(^{32}\) Although it is still not clear to Golden what actually motivated Iwasaki to reveal her secrets to him, he insists that he and Iwasaki never entered into a confidentiality agreement,\(^{33}\) and he disputes her claim to breach of contract, defamation, and copyright infringement. This study will analyze some of Iwasaki’s reasons for revealing hidden secrets, for breaking the code of silence in the geisha world, and for deciding to sue Golden for writing the *Memoirs of a Geisha*.

### E. Structure of Confession and Its Legal Consequences

Sayuri’s accounting of her life as a geisha to the translator in Golden’s novel falls in the category of very old and respected literary genre known as the *confession*.\(^{34}\)

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31. Golden has given numerous interviews and public addresses in which he questions why Iwasaki decided to give him this information.


33. “Denying there had been any confidentiality agreement, Golden states in an interview that Iwasaki had at one point asked him to set up a US publicity tour for her.” See Feeney, *supra* note 12.

34. Confessional literature derives from a central ritual of the Christian faith and the confession of one’s sins. The *Confessions of St. Augustine* (4th and 5th century A.D.) is the first example of confessional literature. But not all confessional literature is religious. Jean-Jacques Rousseau’s *Confessions* (1781) reveal the author as he is, not as he ought to be. Chateaubriand’s *Memoirs d’Outre Tomb* (1849), Dostoevsky’s *Notes from the
Confessional literature depends on secrecy, revelation, and voyeurism to capture and sustain the attention of the reader. Confessions imply the expiation of sins by the very act of narration, which is a catharsis for the narrator. By confessing, the narrator cleanses herself of past sins. Similarly, Iwasaki’s decision to disclose intimate details of her life as a geisha to Golden may be her way of expiating her own deep-seated sense of sin. In interviews and in her own two books, Iwasaki repeatedly insists that she and all geishas are artists and not prostitutes. This insistence may be the speech act that evidences Iwasaki’s underlying sense of guilt.

Iwasaki’s own confession to Golden mirrors the confession of Sayuri in the novel. However, Iwasaki’s accounting of her geisha life had dangerous consequences for her and for her family in Japan. After the novel was published and the Japanese translation was distributed in Japan, the geishas were convinced that Iwasaki had betrayed them, broken the sacred geisha code of silence, and sullied the honor of the profession. The geishas of Japan cried out against Iwasaki, causing disgrace to herself, her children, and her family. Her sister geisha actually begged Iwasaki to commit hara-kiri. Instead of suicide, Iwasaki decides to sue.

Arthur Golden is not a naïve author. He emanates from the savvy Sulzberger-Ochs family that for a century published the *New York Times*. Like the translator, "..."
Golden studied Japanese history and art at Harvard and Columbia. He spent fourteen months in Japan in the early 1980s. Prior to the post-text scandal that develops in Japan, Golden had immersed himself in the Japanese language and culture. He knew how difficult it would be to get a Japanese informant to reveal secrets about the geisha life, and he felt empowered by a clear expression of publication approval from the real geisha. It seems very unlikely that an author with a family history and real-life experience in the world of publication would knowingly violate an alleged confidentiality agreement and risk a suit for defamation, right to privacy, and copyright infringement.

F. Structure of Narrative Tension and Memoirs as a Genre
The author’s ambivalence towards the geisha, whom he represents in the novel as both artisan and courtesan, reflects a cultural dialectic that has its roots in the history of Japanese society. The tension Golden sustains artistically throughout the novel between the goodness and the badness of the geisha and of the whole geisha tradition is the source of Iwasaki’s anger and, in part, the motivation for her filing a law suit against Golden.

The title of the novel crystallizes the sustained narrative tension. Memoirs of a Geisha contains the two poles of a dialectic that appear in myriad forms known as binary structures: fact/fiction; novel/reality; secrecy of geisha life/revelation in Memoirs; intimacy of Memoirs/opacity of Japanese society; politeness of geisha society/animosity of the geisha underworld; tradition/modernity; narrator/informant; translator/author; geisha/prostitute; and artisan/courtesan.

As the translator reminds us, memoirs are a narrative form that is not just a biography of one person, but tells the story of a whole world. The term memoirs also signifies the disclosure of intimate secrets. Memoirs are a literary genre, a subset of confessional literature, which sets up the confessor’s sin as a basic premise. The reader of Memoirs of a Geisha enjoys eavesdropping on the informed narrator-cum-confessor who reveals in her Memoirs some of the most hidden secrets about the mysterious, sinful yet sacred, and closed world of a Geisha.

G. Voyeurism, the Sex Trafficker, and Slavery in the Novel
The voyeuristic structure of the novel and its hidden messages about sex trafficking and slavery are recreated in miniature in a symbolic scene at the beginning of the novel. This scene illustrates the similarities of child abduction for purposes of sex trafficking and the recruitment of children for the geisha life. Chiyo’s father has decided that his two daughters, little Chiyo and her sister, Satsu, should be adopted by Mr. Tanaka, the wealthy head of the Japanese Coastal

37. Downer, supra note 3, at 172: “Despite the many pious words which had been spoken and written to the contrary, there had always been gray areas where the geisha and prostitute worlds crossed . . . Geisha and prostitutes were part of the same community.”
38. Golden, supra note 4, at 1.
Seafood Company. Mr. Tanaka is really a trafficker of geisha and prostitutes in disguise who works through fraud, force, and deception to bait his prey, two little girls, who will end up as slaves in a brothel and a geisha house.

Mr. Tanaka looks like any ordinary father. He has a daughter, Huniko, whom Chiyo meets on her first visit to his house. On that day Chiyo is treated royally by the Tanaka family, and she and her “adopted” sister Huniko play gleefully with each other all afternoon. In the evening, the two girls decide to spy on Mr. Tanaka from behind a little hole, like the reader- voyeur who spies on the geishas through the eyes of the narrator. It is there that Chiyo gets her first glimpse of the flower and willow world as she watches Mr. Tanaka engage in the nightly pleasures of a teahouse in Senzura. Little did the innocent Chiyo know that Mr. Tanaka’s real idea of “adoption” was to buy her for a small sum from her father and then, without her consent and probably without her father’s knowledge, sell her for a hefty sum to a geisha house in the Gion district of Kyoto. That hefty sum will be the start of Chiyo’s ever-increasing debt to the geisha house that she must repay by servicing men.

Despite the shock and abuse Chiyo suffers at the hands of Mr. Tanaka and his agents, her attitude toward her trafficker is one of ambivalence, which is not uncommon among abused women. In Chiyo’s wildest dreams, she could not have imagined that Mr. Tanaka, whom she considered her savior, would cause her to become a slave to men, to the geisha house, and especially to Hatsumomo, the most cruel and beautiful of all geishas. Upon meeting the pretty little Chiyo-chan for the first time, Hatsumomo becomes instantly jealous and refers to her disparagingly as “garbage.” Thereafter, Hatsumomo makes it her life’s ambition to destroy Chiyo’s chances of becoming a full-fledged geisha in the typically hierarchical and rigid social structure that exists in a geisha house.

Chiyo continues to have ambivalent thoughts about her trafficker during her bitter experiences of sex slavery, debt bondage, victimization, and marginalization caused by the heinous practice of trafficking and the nonconsensual sale of human beings for sexual exploitation. On the one hand, she thinks about Mr. Tanaka with affection because she perceives of him as her savior; on the other hand, however, she also thinks of him with hatred and disgust because he sold her into slavery. When she was still living at home, she claims to have had “fantasies of adoption” by Mr. Tanaka. “But the truth is that the afternoon when I met Mr. Tanaka Ichiro really was the best and the worst of my life.” She expresses

39. Id. at 28.
40. See Dalby, supra note 3, at Preface (xiv) (discussing the “flower and willow world” which is the term given to the geisha society (i.e., karyukai in Japanese).
41. Golden, supra note 4, at 37.
42. Id. at 20.
43. Id. at 7; see also id. at 21: “Certainly it was true a part of me hoped desperately to be adopted by Mr. Tanaka after my mother died; but another part of me was very much afraid.”
this ambivalence towards her trafficker at the beginning of the novel and repeats it again\(^4^4\) later just before she falls in love with the ineffable Mr. Chairman, who is her Prince Charming, her “bodhisattva with a thousand arms who would help me.”\(^4^5\) Mr. Chairman becomes the savior that Mr. Tanaka never really was. Women who are poor and uneducated in Japan and in many countries around the world where sex trafficking is practiced often become dependent on men for survival.\(^4^6\) Mr. Tanaka, Mr. Chairman, and the geisha lifestyle are various manifestations of that dependency created by bad economic conditions and deep-seated anti-feminist views about the value of women in a patriarchal society.

Mr. Tanaka is the prototype of the trafficker who works through fraud, coercion, and deception to snare innocent victims of poverty and ignorance into a life of sex slavery. He deceives Chiyo’s father by claiming he will “adopt” Chiyo and her sister into his own family and give them both a better life than her own father could provide.\(^4^7\) Tanaka uses the word *adoption* because in 1936 selling human beings was prohibited by edict and by the Emancipation of Prostitutes and Geisha Act of 1872,\(^4^8\) but it was not illegal to adopt children. Like abused children who end up abusing their own children, Mr. Tanaka is recreating his only life by playing the role of trafficker. Tanaka was sold to a family when he was a young boy as a result of the early death of his mother and father.\(^4^9\)

The sale of children in poor agricultural communities was part of the cultural tradition in Japan during the lean years, and this tradition still exists in many countries today. In Iwasaki’s own biography, she reports that like her sister, she too was sold to a geisha house by her own father.\(^5^0\) However, Iwasaki repeats a bit too often that she went to the geisha house consensually and by her own free will in order to save the honor of her impoverished family and to become the heir

\(^{44}\) *Id.* at 105.

\(^{45}\) *Id.* at 119.

\(^{46}\) See Golden’s statement in Foege, *supra* note 5 (“Some geishas—a few still exist—accrue wealth and power by manipulating clients’ affections.”).

\(^{47}\) See *Golden*, *supra* note 4, at 21 (Sayuri’s father says, “I can’t picture the girls living anywhere else.” Mr. Tanaka responds, “I understand, but they’d be much better off, and so would you.”).


\(^{49}\) *Golden*, *supra* note 4, at 20.

\(^{50}\) Iwasaki, *supra* note 1 at 10 (“My father found positions for both Yaeko and Kikuko and was given contract money for their apprenticeships . . . my sisters were devastated at having to leave the safe haven of my grandparents’ house. Yaeko never got over her feelings of being abandoned.”).
apparent of the geisha house. Iwasaki loves her father dearly, but it is clear to this reader that she also resents him deeply for abandoning her and for selling her to the geisha life. If we read between the lines of her romanticized biography, Iwasaki is arguably transferring her own hidden anger towards her father onto Golden whom she believes betrayed her confidence, much like her own father who abandoned and sold Iwasaki to a geisha house.

In Golden’s novel, Mr. Tanaka works by deception to catch his bait, Chiyo and her sister, Satsu. He promises Chiyo that he will bring her back home after one night. Once Chiyo and Satsu arrive in his big house in Senzuru, Mr. Tanaka feeds them well and provides entertainment. But by the end of the day, Chiyo and Satsu are caught off guard, forced to undress, brutally handled by Mrs. Fidget who tests their virginity with her own dirty fingers, and pinches them on the neck so hard that Chiyo “felt as if [she’d] fallen into a tub of creatures that were biting [her] everywhere.” The two girls are then driven off forcibly to Kyoto by a stranger, Mr. Bekku. On the train to Kyoto, Chiyo and Satsu are given no food to eat and are made to watch Mr. Bekku gulp down a lotus leaf of sweet rice. Chiyo remarks, “I felt as sore as a rock must feel when the waterfall has pounded on it all day long.”

Like the typical sex slave trafficker that he is, Mr. Tanaka works with an agent, Mr. Bekku, and engages in fraudulent, deceptive, and coercive behavior to transport young women into a milieu of sexual exploitation for financial gain. Mr. Tanaka is particularly cruel to Satsu, who is less beautiful than Chiyo, and who Tanaka sends to a brothel to lead the miserable life of a prostitute. Chiyo is beautiful enough to be sold to a geisha house (okiya) in Gion where she works her way up from a maid servant to become “one of the twenty greatest geisha in Gion’s past.” From that fateful day when Chiyo leaves Mr. Tanaka’s house to live in the okiya in Kyoto, she will continuously search for her sister, but never again be able to experience the tenderness of family love. She will be forced to pay back a constantly increasing debt to the geisha house for providing her with an

51. Id. at 25 (“My father assured me that we were just going for a visit and we could leave anytime that I wanted to.”); see also id. at 28 (“If we get there and you don’t like it, we can turn right around and come home, I promise.”); Id. at 33 (“And your sister Tomiko has gone to the Iwasaki okiya to uphold our honor.”).
52. GOLDEN, supra note 4, at 21.
53. Id. at 33.
54. Id. at 34.
55. Id.
57. GOLDEN, supra note 4, at 105.
education in the arts. This is known as debt bondage or the crime of peonage (a form of involuntary servitude), which is typically practiced by sex traffickers.

When Chiyo reaches the geisha house in Gion, her only source of kindness is doled out sparingly by the greedy “Mother” who manages the okiya and whose affection Chiyo describes as being “what a fish might feel for the fisherman who pulls the hook from its lips.”\textsuperscript{58} Chiyo soon learns the harsh reality: “My father sold me into slavery.”\textsuperscript{59} She pleads for help “to set me free” and to “free a little girl from slavery.”\textsuperscript{60} Her pleas fall on deaf ears, like many of the millions of women and children sold into sex slavery each year not only in Japan but all over the world.\textsuperscript{61}

H. Style of the Novel, the Simile, and Its Relevance to Iwasaki’s Legal Claims

The reader’s awareness of a “style” and, thus, of an author in the novel supports the contention that this literary work, which is based on fact, is really pure fiction, and the characters in the book are merely inventions of the author. The very nature of literary creation is its balance of fact and fiction. To the extent an author manipulates the style of this fictionalized biography, the success of Iwasaki’s defamation claim will, and should be, weakened in order to preserve poetic license, freedom of speech, and artistic creation. The author should be free to create without being in fear of legal consequences.

In a defamation-in-fiction claim, the plaintiff must show that the statements made in the book are false statements of fact, not opinion, and that these factual statements are “of and concerning” the plaintiff.\textsuperscript{62} The merits of Iwasaki’s claim to the defamation of her character are weakened by the constant reminder of a poetic style in Golden’s novel. Style is the sign of fantasy, opinion, and fiction. Style evidences the author’s choice to deviate from fact and reality for the purposes of creative expression. To win a defamation-in-fiction claim, Iwasaki has to prove that the main character is really her, not Sayuri, and that Golden is making false statements of fact about a real person (Iwasaki). But in \textit{Memoirs of a Geisha}, Golden creates a totally new fictional character, different from Iwasaki, whom he names Sayuri. Despite certain similarities between Sayuri and Iwasaki, the

\textsuperscript{58} Id. at 49.
\textsuperscript{59} Id. at 82.
\textsuperscript{60} Id. at 101.
\textsuperscript{61} See generally, Tiefenbrun on Trafficking, supra note 56 (discussing the extent of the sex trafficking industry. More than two million women are trafficked around the world each year, and 50,000 of these women are trafficked into the United States where they are thrown forcibly into brothels to service as many as sixty men a day).
Iwasaki’s defamation claim against Golden and his publisher is nothing more than a tug-of-war based on similarities and differences fought with freedom of speech banners flying high in the literary and legal backdrop.

Golden uses many stylistic devices to capture the specificity and otherness of the geisha world in Japan of the 1930s and 1940s—a world that is quite different from that of Iwasaki, who was a geisha in the 1960s and 1970s. There is a good reason why Golden uses the simile as one of his main stylistic devices: his aim in writing a fictionalized biography is to concretize the main character, to make her seem as real as possible and as similar to the kind of geisha who lived and worked in Japan in the 1930s and 1940s. The simile is the rhetorical figure that most effectively accomplishes this literary goal. When the reader sees a simile based on a clever comparison between two dissimilar entities, the reader is immediately reminded that hidden behind the narrative there is an author manipulating the comparison through the artful combination of words. The presence of the author is another subtle reminder that this biography of a geisha is pure fiction. Golden uses similes with abandon throughout the novel to create the effect of a prose poem. It is precisely because this fictional biography reads like poetry in prose that Iwasaki would have difficulty convincing a judge and a jury that this book is factual when it is clearly literary and fictional. Similes help establish a fairy-tale quality in the novel, which has been described by many as being a Cinderella story. If it is the author who is manipulating the words, and if it is a fairy tale that he is creating, Iwasaki’s legal claim to the defamation of her character is weak, and her claim to copyright infringement is baseless.

I. Duality and the Narrative Representation of the Geisha as a Prostitute

Duality is the overriding stylistic and structural device in the novel that the author employs in order to capture both the beauty and magic of the geisha fairy-tale world as well as the stark, dark reality of child abuse, sex slavery, and human cruelty that pervade the geisha underworld. In Memoirs of a Geisha, the exquisite delicateness of the geisha as artist coexists contrapuntally with the horrors of the helpless children abducted into a world of sexual exploitation represented by the

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63. Dorothy Weber, Iwasaki’s lawyer, said of the book that it is “so compelling, you really feel it is a true story, even though it is a novel.” She said her client’s position is that “the reason it is so compelling is that it is her story.” Elizabeth Mehren, Geisha Charges Writer’s Fiction is Her Truth, L.A. TIMES, Apr. 26, 2001, at E3.

courtesan or prostitute. Golden crystallizes this ambivalence about the geisha in a poetic passage full of similes and an extended metaphor in which the geisha is depicted as a work of art emerging as a statue from the terrible coldness of a snow-covered garden:

When I first learned the news of my family, it was as though I’d been covered over by a blanket of snow. But in time the terrible coldness had melted away to reveal a landscape I’d never seen before or even imagined. I don’t know if this will make sense to you, but my mind on the eve of my debut was like a garden in which the flowers have only begun to poke their faces up through the soil, so that it is still impossible to tell how things will look. I was brimming with excitement; and in this garden of my mind stood a statue, precisely in the center. It was an image of the geisha I wanted to become.

Golden’s simultaneously negative and positive portrayal of the geisha as both artisan and prostitute is a leitmotif that establishes verisimilitude, creates narrative tension, and disturbs Iwasaki, the reader. She claims the author has dishonored her and her entire profession by putting too much emphasis on the sexual functions of the geisha. Iwasaki also claims Golden has misunderstood the real nature of the geisha, who is above all a highly trained artist, not a prostitute. Outraged and insulted, she sues him for defamation of character.

In a defamation case, the defendant’s defamatory statement may concern a group rather than an individual, but the statement will generally be defamatory as to the plaintiff only if the group is a relatively small one. Iwasaki’s defamation claim is weakened by the fictional quality of the biography, by the large size of the geisha group Iwasaki claims to represent, and by the difficulty she has in proving that the novel is “of and concerning” herself in view of the differences that exist between the real and the fictional geishas.

Golden’s position is defended in that he emphasizes throughout the novel that there is a distinction between the geisha and the prostitute. The narrator discusses the etymology of the term geisha, which comes from the word gei, meaning “artist.”

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65. See Hoh, supra note 35 (“In 1994 the Gion maiko (trainee) Kaori Takagi shocked the geisha world by suing her teahouse for physically abusing her—and then opening a geisha disco, DJ Palace, in Kyoto’s upscale Gion district.”); see also Dalby, supra note 3, at Preface (xix) (discussing this civil suit brought by a disgruntled Kyoto apprentice against the geisha house for exploitation).


67. See Tegler, supra note 9.

68. Restatement (Second) of Torts, §564A (1977). It is unlikely that the plaintiff could recover if the group were larger than twenty-five persons. Certainly, there are more than twenty-five geishas in Japan.

69. See Golden, supra note 4, at 141. “But a geisha must study a great many arts besides shamisen. And in fact, the ‘gei’ of ‘geisha’ means ‘arts,’ so the word ‘geisha’ really means ‘artisan’ or ‘artist.’”
of the geisha in contrast to the clothes of the prostitute. The *obi* (cumberbund) worn by the geisha is tied in the back rather than in the front where the prostitute ties her *obi* because, unlike the geisha, the prostitute has to take the sash on and off all night.\(^70\) It is important to note that Chiyo's sister is sent to a brothel, not a geisha house, and the vivid contrast between the sisters' different ways of life is underlined in the novel. Golden also stresses the difference between the geisha and the prostitute in both his novel and in public interviews because he knows that in the mind of the reader, there is an association between the two terms that is borne out in the language,\(^71\) in the history, and in the evolution of the laws of Japan.

### J. Geisha and the Sex Act in the Novel

The link between the geisha and the prostitute is derived not only from language but from similarities in their geographic location and activities. These similarities have created a negative association of the geisha with the prostitute in the mind of the Japanese people. The geisha, who is respected as an artist, has always lived in the same neighborhood as the prostitute. The geisha frequently services the same clients as prostitutes. By virtue of this geographic propinquity, the immorality of the prostitute is transferred to or associated with the geisha. To reflect that duality, Golden provides numerous examples of the geisha’s rigorous training as an artist, on the one hand, and also includes evidence of the geishas having sex\(^72\) with their clients, on the other. For example, Golden adds a vivid yet

\(^{70}\) *See id.* at 83.

\(^{71}\) The word *geisha* has changed its meaning from the time it first appeared in the 1600s. The first geishas were men who entertained at parties where the prostitutes (*yujo*) entertained men. The male geisha were also called jesters (*hokan*) or drum bearers (*taikomochi*). When in 1751 the first female drum bearer entered one of the parties, she was referred to as a *geiko*, which is the term used today in Kyoto to designate a geisha. It is the term used frequently in Golden's book. In the eighteenth century, geisha were purely entertainers referred to as *shiro* (white) geisha. There were many forms of entertainers at that time. One type was a *korobi* geisha who “tumbled” for guests at parties. The *kido* (gate) geisha were entertainers who stood at the entrance to carnivals, played the shamisen, and attracted business. The *joro* (whore) geishas were hired for their sexual skills. *See* Hoh, *supra* note 35. Dancing girls (*odoriko*) entertained in the feudal towns around 1770. They began to be called *machi* geishas or “town geishas.” The town geishas were different from the geishas who appeared in the licensed quarters of the cities. *Machi* geishas were also referred to as *neko* or cat, which signifies by connotation the availability of their sexual services. Thus, a study of the evolution of the term *geisha* reveals linguistic and historical links with the term *prostitute*. *See* Dalby, *supra* note 3, at 56—57.

\(^{72}\) Commenting on the sexual activity of geisha in an interview with Miles O’Brien, Golden said, “Japanese men hire women to sit and kind of entertain them. That’s really the role that geisha play. They’re entertainers more than anything else. And, of course, sex does enter into it. Maybe you could say sex enters into most things, but it enters into this in a kind of borderline prostitution-like way, in the sense that a geisha can be available as
subtle detail about the rice paper used ostensibly for cleaning up the geisha and the client after sex:

When I’d dressed that morning, I’d tucked several sheets of a very absorbent rice paper into the back of my obi. I hadn’t expected to need it until afterward, when the Minister would want them for wiping himself off. . .”73

Sayuri admittedly has sex albeit reluctantly twice a week with the General, and she says these acts are “nothing more than an unpleasant twice-weekly routine.”74

Another example of Golden’s indirect affirmation of the geisha’s sexual activity is illustrated in the long account of the ritual of mizuage, an old tradition among young geishas known as deflowering, where a rich man such as Dr. Crab pays a good deal of money for the privilege of making the geisha lose her virginity.75

Golden includes these and other details of the sexual activity of the geisha to reflect the duality of the term geisha, which connotes both artistic respectability and sexual immorality.

Iwasaki claims that most geishas do not engage in sexual activity.76 Iwasaki assumes that Golden has associated her personally with illicit sex and with the deflowerment ceremony described in his novel. She claims the statements made in the novel are false and defamatory about her and about all geishas. But if geishas do not engage in any sexual activity, why was the traditional ceremony of deflowerment ever established? It is true that mizuage77 no longer exists as a custom among geishas. The time gap between the events of the novel (which take place in the 1930s), and the reality of Iwasaki’s own experiences when she rose to fame in the 1960s and 1970s may explain why she vehemently denies

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ever having gone through such a ceremony. “The selling of her virginity, that rite of passage, did not happen,” said Iwasaki’s lawyer in an interview.78

Ironically, Iwasaki’s Complaint is a result of Golden’s successful craftsmanship as a fiction writer. The constant use of comic names that are plays on words (Mrs. Fidget, Dr. Crab) remind readers that this book is pure fiction. The male author hides so well behind his female narrator that the real geisha confuses her own identity with that of the narrator, even though they are two different people. Whenever the narrator draws attention to the immoral side of the fictional geisha, the real geisha is offended. Iwasaki’s personal perception of the geisha is closer to that of the artisan, not the prostitute. The real geisha’s protest is due to the author’s artistic manipulation of a disturbing tension between the symbol of the geisha and the symbol of the prostitute. Decoding these symbols is a reflection of a historic and cultural contextual reality. Golden sustains that tension throughout the novel by his use of contrast, antithesis, metaphor, and simile as well as a panoply of rhetorical figures creating the pleasurable effect of ambivalence79 about the geisha that unfortunately culminated in a lawsuit against him by the offended informant.

III. CONTEXT

A. Evolution of Japanese Laws on Prostitution and the Geisha

The duality between geisha and prostitute, artisan and courtesan, is reflected in the evolution of the laws passed in Japan80 and in changes in the standards of morality in Japanese society from the early Heian period in 794 to 1195 until the twenty-first century.81 In 1612, the Japanese feudal government considered a petition to build a red-light district in Edo, the capital of Japan; five years later the government granted its consent to regulate a licensed quarter called Yoshiwara

78. Id.

79. “The book is lies, all lies,” the real geisha said in an interview given to London’s The Sunday Times. “Golden has mixed up the well-respected and highly educated geisha profession with that of common prostitutes in order to ‘spice up the story for Western audiences.’ He has insulted all true geishas . . . There was no money put on virginity in my circles. The geisha world is not a place where you sell your body.” Norton, supra note 13.

80. See infra text accompanying notes 81–104 (discussing the Japanese laws pertaining to the regulation of prostitutes, courtesans, and geisha).

81. See Downer, supra note 3, at 25–53 for a history and development of geisha and prostitution in Japan. See also Dalby, supra note 3.
in the city of Edo.\textsuperscript{82} During the Edo period (1600–1867) prostitution was legal in Japan, but only if properly licensed and controlled.\textsuperscript{83}

Under the Meiji regime in October 1872, the government announced a Proclamation for the Emancipation of Prostitutes and Geisha Act,\textsuperscript{84} which required prostitutes to be licensed. However, geishas did not have to obtain such a license. As a result of the Emancipation of Prostitutes and Geisha Act, geishas were free to return to their parents’ homes,\textsuperscript{85} a reminder that the abduction of little girls into the geisha life was nothing less than slavery. Several years later, geishas were required to obtain a license to do their work as a geisha and a separate license to do prostitution, if they decided to engage in this activity to supplement their earnings.

In 1901, the government passed the Regulation for Control of Prostitutes,\textsuperscript{86} attempting to limit prostitution to only those women officially registered with the government. In 1908, realizing the Regulation for Control of Prostitutes was not eliminating unregistered prostitution, the government passed the Ministry of Home Affairs Ordinance No.16.\textsuperscript{87}

After World War II, many Japanese women became prostitutes to support themselves and their families. More than seventy thousand prostitutes catered to the U.S. military.\textsuperscript{88} Prostitution was booming in Japan after the war, and the Japanese government debated how to alleviate the problem.\textsuperscript{89} In 1946, the Japanese government promulgated Imperial Ordinance No.9\textsuperscript{90} that punished persons who make women act as prostitutes. However, this law did not punish prostitutes or even ban prostitution because the Japanese view prostitutes as victims and do not believe they should be punished.\textsuperscript{91} During this period, both the national and local Japanese governments continued to regulate prostitution

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\textsuperscript{83} Dalby, \textit{supra} note 3, at 54.
\textsuperscript{84} Emancipation of Prostitutes and Geisha Act of 1872. See \textit{Ministry of Justice Materials, supra} note 48, at 2.
\textsuperscript{85} Dalby, \textit{supra} note 3, at 65.
\textsuperscript{86} Regulation for Control of Prostitutes, \textit{reprinted in} \textit{Ministry of Justice Materials, supra} note 48, at 4-7.
\textsuperscript{87} Ministry of Home Affairs Ordinance No. 16, \textit{cited in} \textit{Ministry of Justice Materials, supra} note 48, at 7.
\textsuperscript{88} \textit{Ministry of Justice Materials, supra} note 48, at 8.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 19, Ordinance No. 9.
\textsuperscript{91} Morrison, \textit{supra} note 82, at 467.
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and passed related laws such as the Child Welfare Law,\(^{92}\) the Labor Standard Law,\(^{93}\) the Employment Security Law,\(^{94}\) the Venereal Disease Prevention Law,\(^{95}\) and the Enterprises Affecting Public Morals Law.\(^{96}\) These laws indirectly restricted prostitution but only marginally affected geishas in Japan.

Despite the profusion of laws passed in 1947 and 1948 indirectly restricting prostitution and marginally affecting geishas in Japan, prostitution did not stop growing as an industry throughout the nation. Police had little interest in enforcing regulations, and brothel owners had significant legislative influence in their local areas.\(^{97}\) Because of the ineffectiveness of Imperial Ordinance No. 9 and the complicity of national and local government officials in Japan who turned a blind eye to prostitution, Japan eventually passed the Anti-Prostitution Act of 1956,\(^{98}\) which went into effect in 1958 and which banned prostitution. This law came about because of the influence of the occupation forces in Japan who drafted a new constitution giving women the right to vote and the right to be elected to public office. Women lobbied in Japan, and on May 24, 1956 the Japanese government enacted Law No. 118, The Prostitution Prevention Law\(^ {99}\) (otherwise referred to as Showa 33 or The Anti-Prostitution Act). This law significantly reduced the number of prostitutes, made mizuage or the practice of deflowerment of geishas illegal, and gave geishas more respectability.\(^ {100}\) However, the Anti-Prostitution Act of 1956 did not have any real impact on the great number

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93. Labor Standard Law, No. 49 (1947) (stipulating that, unless permitted by law, no person shall obtain profit from the arrangement of the employment of others). Id. at 44–46.

94. The Employment Security Law, No.141 (1947) (providing criminal punishment for anyone conducting or engaging in the labor exchange labor recruitment or labor supply project for the intention of inducing workers to do works injurious to the public health or morals). Id. at 47–48.

95. Venereal Disease Prevention Law, No. 167 (1948) (punishing any sufferer from venereal disease liable to infect others, who has engaged in prostitution. Punishment is penal servitude not exceeding two years or a fine not exceeding 10,000 yen). Id. at 49–50.

96. “Fuzoku” Business Law, No 122 (1948) (law to control businesses that are likely to create a moral hazard). Id. at 51–53.

97. See Morrison, supra note 82, at 467.


99. See Morrison, supra note 82, at 471 (discussing the role of the female lobby in Japan). Women in Japan worked diligently to get the Anti-Prostitution Act of 1956 finally passed.

100. See Downer, supra note 3, at 173: “After the bill was passed, the geisha moved several steps closer toward respectability—though they never made it all the way; the ambivalence remains to this day.”
of children being sold by their parents. As late as the mid-seventies, children from impoverished rural villages were still sold and used as maids in geisha houses. Nevertheless, the law did help to change attitudes in Japan, and child abduction practices were being viewed as unacceptable.

After 1956, the watershed year for prostitution in Japan, geishas become even more clearly distinguished from prostitutes. Geishas are prohibited by the Anti-Prostitution Act of 1956 from accepting fees for sexual services. The institution of compulsory education up to the age of fifteen also impacted the geisha profession and meant that the training of geishas, which typically took several years and was very rigorous before the war, had to be seriously curtailed. However, despite the changes in behavior and attitudes brought about by the Anti-Prostitution Act of 1956, geishas continued to flourish. By the mid-1970s there were reportedly seventeen thousand geishas in Japan, but today there are only a few real geishas in all of Japan. The postwar decades were a boom period for the geishas who serviced the rich and powerful industrialists and politicians in the teahouses of Shimbashi and Akasaka where discretion was guaranteed by the geisha code of silence.

The decline of the geisha started in the 1970s after the oil crisis of 1973 and continued to decline during the rise of Japan’s economy in the modern era. The Anti-Prostitution Act of 1956 clearly had a serious affect on the minds of the Japanese who began to see the geishas as rooted in old world traditions. Thus, in the course of the evolution of Japanese laws, geishas and prostitutes were banned, reallowed, emancipated and banned again, and both geishas and prostitutes had to find their way in the ebb and flow of official Japanese morality.

B. History of the Geisha Tradition

The geisha tradition arose out of a tension between two conflicting cultures: (1) the rigid strictures of Confucianism demanding order and absolute obedience to authority, and (2) the more flexible counterculture that was thriving in the walled cities of pleasure created entirely with government approval. In the highly controlled Confucian society of seventeenth-century Japan, prostitution was tolerated but regulated. In view of the widespread practice of arranged marriages in Japan, the Shogun recognized male society’s need for sexual satisfaction. For this reason, Kyoto developed into a thriving center of prostitution. To reconcile

101. Id.
102. Id. at 174. The numbers of geisha were higher in the boom period of the 1920s, which is the period described in Golden’s novel. Iwasaki was a geisha in a different boom period of post-war Japan in the mid-1970s.
103. See id. at 174–75.
104. See id. at 34–35.
105. See Dalby, supra note 3, at 54. See also Morrison, supra note 82 (discussing the history of prostitution in Japan and the laws enacted to prohibit this activity).
the conflicting needs of order and pleasure, the Shogun made prostitution legal, but he permitted the prostitutes to engage in sexual services only within the confines of the walled cities of pleasure where a true counterculture developed.\textsuperscript{106} The geishas grew out of this Japanese counterculture where they flourished in the pleasure quarters. But it is from this early source and the geishas’ connection with the counterculture that we can trace the dubiousness of the geishas’ morality in the mind of the Japanese.

The inhabitants of the pleasure quarters of Shimbara were like caged birds, virtual slaves who were indentured to their brothel owners.\textsuperscript{107} The indentured women in the pleasure cities of Kyoto came mostly from the lower classes. They were the beautiful children of poor agricultural families or debt-ridden townsfolk. The children were procured by pimps who scoured the countryside to find suitable young children for sex slavery. The pimps paid the parents for the child and resold the child to a brothel. As buying and selling of persons was illegal at this time, the procurers would bind the child with an employment contract for a fixed period of time, usually ten years.\textsuperscript{108} For the poor parents in impoverished agricultural villages, sending their child off to the pleasure quarters was nothing out of the ordinary. The recruitment of children for sex slavery is still done to this day in Asia,\textsuperscript{109} and a variant of this international crime is described in vivid detail in \textit{Memoirs of a Geisha}.

In the seventeenth and eighteenth century, poor parents would attempt to justify the sale of their children by believing they were giving their daughters a better chance in life, an opportunity to go to Kyoto to eat fine food and wear beautiful clothes, and a chance to receive the luxury of an education in the arts. The child who was sold had absolutely no right to protest and was bound according to the Confucian code by filial duty to her father and to her family first before she could think of her own self. Girls sold to the pleasure quarters were considered virtuous and admirable for having sacrificed themselves for their family.\textsuperscript{110}

In the seventeenth century, most children who were recruited against their will at the age of six or seven ended up living in the posh quarters of Shimabara but were considered the property of the brothel owner. Before they even arrived into the pleasure city, the children had already incurred an enormous debt for the privilege of being abducted! To repay this debt, they would have to work night and day as soon as they were old enough to fulfill the pleasures of men. This is

\begin{thebibliography}{11}
\bibitem{106} See Morrison, \textit{supra} note 82, at 35.
\bibitem{107} See Dalby, \textit{supra} note 3, at 57.
\bibitem{108} Downer, \textit{supra} note 3, at 57.
\bibitem{109} \textit{Id}. See Chapter 10 of this book for a discussion of the sale of children and women for sexual services in China.
\bibitem{110} \textit{Id}.
\end{thebibliography}
the typical system of debt bondage normally associated with one of the most hideous of all crimes known as sex trafficking.\textsuperscript{111}

In the sex entertainment system of the seventeenth century, Japanese courtesans and prostitutes were both slaves of debt, chattels to be bought and sold, and they did not own their own bodies. Courtesans and prostitutes were part of this floating underworld that continued into the eighteenth century and from which the geisha would ultimately appear in 1751. The entertainment system in Japan of the seventeenth century bears a striking similarity to the geisha world of the 1930s and 1940s described by Golden in his novel.

Unlike the courtesan who dressed flamboyantly, the geisha was regulated by official ordinances to dress in an understated, sophisticated manner. The geisha did not sell her body but only her arts. Soon geishas became known as women who had greater taste than the courtesans, who tied their obi in front while geishas tied theirs chastely at the back like ordinary townswomen.\textsuperscript{112}

The question of the difference between the geisha and the prostitute has always been complicated, and Japan’s feudal government made a considerable administrative effort to preserve a distinction between the two groups of women.\textsuperscript{113} In 1779, geishas were recognized as practicing a distinct profession.\textsuperscript{114} These female geishas descended from a long line of banished actresses and entertainers whom the Shogun refused to tolerate in the mid-seventeenth century.\textsuperscript{115} “[A] registry office (Kenban) was set up to enforce rules of conduct for [the geishas]”.\textsuperscript{116} They were not permitted to sit next to prostitutes’ (yujos) guests or associate with the prostitutes’ business, establishing what seems to be a clear distinction between the geisha and the prostitute. When legal prostitution is abolished in 1956, the Anti-Prostitution Act did not apply to geishas.\textsuperscript{117} The fact that many of the laws regulating prostitutes then and now in Japan do not apply to geishas is a sign that geishas are not prostitutes,\textsuperscript{118} at least in the eyes of the law.

An open atmosphere of lasciviousness existed in the pleasure districts in the early nineteenth century that provoked the government in 1841 to pass a series

\begin{thebibliography}{9}
\bibitem{111} See Tiefenbrun on Trafficking, \textit{supra} note 56. See also Nora Deimleitner, \textit{Forced Prostitution: Naming an International Offense} 18 \textit{Fordham Int’l L.J.} 163 (1994). For the development of sex trafficking as a lucrative industry, see Susan Tiefenbrun, \textit{Sex Sells But Drugs Don’t Talk: Trafficking of Women Sex Workers and An Economic Solution}, 24, 2 \textit{Thomas Jefferson L. Rev.} 161 (Spring 2002). The traffic of women for sexual exploitation is the third most lucrative international crime after the traffic of weapons and of drugs.
\bibitem{112} Downer, \textit{supra} note 3, at 80.
\bibitem{113} Dalby, \textit{supra} note 3, at 57.
\bibitem{114} Id.
\bibitem{115} See Downer, \textit{supra} note 3, at 49–50.
\bibitem{116} Dalby, \textit{supra} note 3, at 57.
\bibitem{117} See Downer, \textit{supra} note 3, at 49–50.
\bibitem{118} Dalby, \textit{supra} note 3, at 57.
\end{thebibliography}
of edicts known as the Tempo Reforms to address public morality.\footnote{Id. at 60.} Several thousands of prostitutes and geishas were rounded up from the unlicensed districts and dumped into Yoshiwara. In contrast to the prostitutes, geishas were allowed to return to their work so long as they promised to restrict their activities to music and dance. Thus, for the first time the law of 1841 recognized the difference between geishas and prostitutes.\footnote{See Downer, supra note 3, at 42.}

The golden age of the geisha was in 1860. The fact is that Japan had a system of legalized prostitution at that time and until 1956 raised Victorian eyebrows and created doubts in the minds of the foreigners as to the degree of civilization of this nation.\footnote{Dalby, supra note 3, at 63.} And yet, looking at the Japanese-licensed quarters of the nineteenth century, we can see a type of civility and concern for cultural sophistication that matched only the salons of seventeenth-century France.

A major event occurred in 1872 that changed the course of the rise of geisha power and influence in Japan. In June 1872, a Peruvian ship, the Maria Luz, dropped anchor in Yokohama Harbor for repairs. The ship was carrying a cargo of 230 Chinese slaves. This incident created an international uproar, and the captain of the ship was arrested and tried. The slaves were finally declared free and sent back to Hong Kong. During this episode, the Peruvians let everyone know that the Japanese also trafficked in slaves—namely the women of Yoshiwara. This assertion was not exactly correct because the sale of human beings had been declared illegal as early as 1612\footnote{See Downer, supra note 3, at 107.} in Japan. To comply with this law, services by prostitutes and courtesans in Yoshiwara were referred to as “term employment.”\footnote{Id.} Nevertheless, these women were not free to leave the employment area or to change jobs. The Meiji government, embarrassed about what the employment conditions of the geishas, prostitutes, and courtesans looked like to the Western powers, decided to make Japan appear as “civilized” as any other Western country. Therefore, “four months after the Maria Luz incident, the Meiji government passed the Emancipation of Prostitutes and Geisha Act of 1872, prohibiting the sale and trade of human beings.”\footnote{Downer, supra note 3, at 108.}

The Emancipation of Prostitutes and Geisha Act of 1872 recognized that “prostitutes and geisha have lost their human rights”\footnote{Ministry of Home Affairs Ordinance No. 16, supra note 87, cited in translation by Downer, supra note 3, at 108.} and should not be subject to the age-old practice of debt bondage. “Prostitutes and geisha . . . are treated no different from cows and horses. Human beings cannot logically demand

\begin{itemize}
\item 119. Id. at 60.
\item 120. See Downer, supra note 3, at 42.
\item 121. Dalby, supra note 3, at 63.
\item 122. See Downer, supra note 3, at 107.
\item 123. Id.
\item 124. Downer, supra note 3, at 108.
\item 125. Ministry of Home Affairs Ordinance No. 16, supra note 87, cited in translation by Downer, supra note 3, at 108.
\end{itemize}
payment of obligations from cows and horses. Therefore, the said prostitutes and geisha should not pay debts or the balance of installments.”

Because of the association of women with cows and horses, the Emancipation of Prostitutes and Geisha Act of 1872 (“the Act”) is commonly referred to as the Cattle Release Act of 1872. The most important provision of the Act includes the cancellation of all debts of geishas or prostitutes to their geisha houses and houses of prostitution. But because geishas were not in the same state of bondage as many prostitutes, this law was less consequential to them.

Employment contracts for apprentices were limited to seven years and subject to renewal only by agreement of both parties. The city governments acquired the right to license and register any woman working as a geisha or prostitute. Thus, the geisha now had the official right to work, but she had to be licensed. Geishas who wanted to pursue their profession had to register in City Hall. After 1872, the prostitutes who actually wanted to continue their work could also obtain a license. Thus, the geisha who chose also to practice as a prostitute had to have two licenses, one for entertainment (gei) and one for the sale of sex. The geisha continued to flourish despite the 1872 Cattle Release Act.

The link between prostitutes and geishas is reflected in the very name of the Emancipation of Prostitutes and Geisha Act of 1872. The word emancipation clearly identifies the practices of both prostitutes and geishas as forms of slavery. Even though the Emancipation of Prostitutes and Geisha Act of 1872 permitted prostitutes to work if they were licensed, the effect of the Act was devastating to the trade of the prostitute, but not to the geishas. In reality, this law was neither an Anti-Prostitution Act nor an Anti-Geisha Act, but merely created a highly regulated, government-controlled profession requiring licenses for both.

After 1872, geishas who had been forcibly recruited and abducted into the geisha houses were permitted to return home to their parents, but many did not want to do so. In contrast, many prostitutes did go home and brothels were forced to close. But brothels quickly reopened under the new name of “rental parlors.” Statistics support the dramatic effect that the Emancipation of Prostitutes and Geisha Act of 1872 had on prostitution and the opposite effect it had on geishas. For example, just prior to the enactment of the Act, there were 5,759 prostitutes and 280 geishas in seven licensed districts of Japan. After 1872, there were only 1,367 prostitutes, but the number of geishas in these same regions increased to 417, further evincing the difference between geishas and

126. Id., cited in translation by Downer, supra note 3, at 150.
127. The Cattle Release Act is the popular term for the Emancipation of Prostitutes and Geisha Act of 1872. See Downer, supra note 3, at 108.
128. Dalby, supra note 3, at 65.
129. Downer, supra note 3, at 108.
130. Id.
131. Id.
prostitutes and the ineffectiveness of the Act to reduce or eliminate the geisha tradition.

In 1874, the local government responded to the geishas’ desire to work by modifying the Emancipation of Prostitutes and Geisha Act of 1872. Geishas were clearly permitted to continue to work; however, a monthly tax was imposed on their wages. The wage tax on geishas was used for the financing of a Women’s Handicraft Workshop\textsuperscript{132} where geishas were taught practical skills such as spinning, weaving, reading, accounting, dancing, or music to enable them to find more respectable work. Classes in the handicraft workshop were compulsory, and if the geisha missed classes, she was not permitted to work as a geisha.\textsuperscript{133} Seeking to become Westernized, the reformers of the new Meiji government instituted these compulsory workshops for geishas to rehabilitate them and force them to learn a decent and accepted skill. However, after attendance became optional, few if any geishas ever attended because conditions in the workshop resembled a sweatshop.\textsuperscript{134} The government had substituted one form of slavery for another.

By the turn of the century, geishas had developed into political supporters and activists. In 1904, the Japanese declared war on Russia, and the geishas organized themselves into a National Conference of the Confederation of Geisha Houses to coordinate their war support activities.\textsuperscript{135} The Confederation was a form of self-regulation that formalized rules of conduct for geishas and set a standard for the profession; by common consent, it had the power to enforce sanctions for transgressions. A charter with twelve articles was drawn up, and the board’s approval was required for newly entering geishas. Any geisha found guilty of misconduct could be expelled by the board. Accordingly, the National Confederation of Geisha Houses was a professional guild organization, established to fix codes of conduct and standards for the profession.\textsuperscript{136} However, the effectiveness of the Confederation began to decrease in the 1920s because of the increase in the numbers of geishas. In 1920, there were about ten thousand geishas, compared to 1905 when there were only 2300 in Tokyo.\textsuperscript{137}

The rise of the geisha in the 1920s and 1930s continued until World War II, but some changes developed that affected geishas long before the attack on Pearl Harbor. Cafes with hostesses started to appear in prewar Japan. As the cafes grew in Japan, so did the number of hostesses who entertained and performed many of the same functions as the geisha. The growth of the cafe industry in prewar Japan challenged the geishas who could not find customers willing to pay

\textsuperscript{132} Dalby, supra note 3, at 65.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Dalby, supra note 3, at 70.
\textsuperscript{136} Id. at 71.
\textsuperscript{137} Id.
their hefty price. By 1934, there were over 100,000 café girls and reportedly only 72,000 geishas; in 1935, there were reportedly 74,200 geishas in all of Japan.  

At this point the geishas started to realize they had to rethink their image and their place in society. They were clearly not prostitutes, as the geishas were considered the “grand ladies of Tokyo and Kyoto.” They were also no longer part of the counterculture because they were the fashion plates of Japanese society. In the 1930s, the geishas began to question themselves, wondering if they should modernize, wear Western clothes, give up the sacred shamisen, learn the piano, or go to the university and become really educated to be able to keep up meaningful conversations with the rich and the powerful men they serviced. This is the prewar era in which Golden’s Sayuri lived and worked as a geisha.

The war hit everyone very hard in Japan, and by 1944 the geishas had to stop working and leave the closed quarters. On March 4, 1944, all restaurants and teahouses were officially banned. Geishas were not yet officially banned, but they were moving into other trades for want of clients.

At the close of the World War II, General Douglas MacArthur arrived in Japan with the American and other Allied occupation forces. The few women who remained in the cities (whether they were geishas, prostitutes, or simply destitute women and widows) managed to stay alive by sexually servicing the Allied forces army men. The Recreation and Amusement Association, set up to entertain the GIs in Japan, was coined “the world’s biggest white-slave traffic combine.”

General MacArthur was outraged by this dangerous and unhealthy trade. In 1946, he declared all brothels off-limits to GIs and issued a directive banning contractual prostitution. One year later in 1947, the Americans drafted an imperial edict for the Japanese people outlawing all officially

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138. In 1935 a book called The Geisha Reader was published in Tokyo; it reported there were 74,200 geisha of Japan in 1935. Dalby, supra note 3, at 82. Dalby reports that “in 1976 there were approximately seventeen thousand geisha in all of Japan.” Id. Please note that the numbers of geishas, prostitutes, and courtesans cited by various authors vary and cannot possibly be accurate given the clandestine nature of the activities of these women. This is also true of the figures reported for trafficked women in various U.S. government reports. See, e.g., Tiefenbrun, supra note 56, at 111, n.4. The statistics regarding geishas cited in this study may have been taken from various Japanese official consensus, but they are not reliable or even consistent.

139. Downer, supra note 3, at 194.

140. Id. at 201, citing a young Japanese writer Kafu Nagai (1879–1959) who reported that on March 4, 1944, “From tomorrow restaurants and tea houses are to be banned... Geishas have not yet been banned, but they appear to be moving into other trades for want of engagements. Without theaters and geishas, the music of Edo, based upon the shamisen, will perish.” Kafu’s Diary, vol. xxii, p. 317.

141. Downer, supra note 3, at 204.

142. Imperial Ordinance No. 9 (1947), Ministry of Justice Materials, supra note 48, at 10. In January 1946, the Supreme Commander for the Allied Powers wrote a memorandum mandating that the Japanese government eliminate all laws and ordinances
sanctioned prostitution. But this law banning prostitution, like the Emancipation of Prostitutes and Geisha Act of 1872, punished aiders and abettors of prostitution, not the prostitutes themselves, and this law, like its predecessor, was unenforceable.  

It is important to note that geishas were excluded from the 1947 directive and the imperial edict banning prostitution. On occasion top American officers enjoyed geisha parties. Basically, when prostitution was outlawed, the numbers of prostitutes declined; the working conditions also got much worse for both the prostitutes and the geishas because of the association of the two in the mind of the Japanese as well as the Americans occupying Japan at the time. Hostesses at bars, cabarets, and dance halls as well as whores, prostitutes and geishas were referred to disparagingly by the American GIs in Japan as “geisha gals.” This catch-all term for anyone of dubious morality was used widely during the post-war period in Japan and accounts for some of the reasons the geisha’s reputation is fraught with contradiction.

After the war and during the seven years in which the Americans and Allied forces occupied Japan, many cultural practices changed in Japanese society. World War II caused the geishas practically to disappear, and their build-up in numbers and prosperity was gradual. By 1947, there were 1,695 geishas in Tokyo and only 2,478 in all of Japan.

permitting licensed prostitution and nullify all contracts that bound (either directly or indirectly), women to act as prostitutes. The Japanese government acted one year later by promulgating Imperial Ordinance No. 9 that punished persons who make women act as prostitutes. See M. Takeyasu, Prostitution in Japan, 5 Int’l Rev. Crim. Pol. 50, 51 (1954).

Imperial Ordinance No. 9, Article 1: “Any person who induces a woman to commit prostitution in an embarrassing way against her will, even if not by using violence or by intimidation, shall be sentenced to imprisonment with labour [sic] for not exceeding three years, or to a fine not exceeding 10,000 yen.”

Imperial Ordinance No. 9, Article 2: “Any person who makes a contract and agreement of letting a woman commit prostitution shall be sentenced to imprisonment with labour [sic] for not exceeding one year, or to a fine not exceeding 5,000 yen.”

Imperial Ordinance No. 9, Article 3: “Any person who attempts to commit crimes of the preceeding two articles shall be punished.”

143. As a result of the ban on prostitution promulgated in Imperial Ordinance No. 9 of 1947, the government was no longer officially able to regulate the activities of the prostitutes. Prostitution became privatized and protected by international organized crime networks called the yakuza or members of the Japanese mafia. The yakuza protected the bordello owners and provided assurances by physical force that the women would not run off without repaying their debts to the illegal brothel owners. See Downer, supra note 3, at 206.

144. Id. at 207.
145. Id. at 206.
146. Id.
147. Id., citing Dalby, supra note 3, at 182.
A new constitution was drafted in 1947 recognizing men and women as equal in politics, law, and education. This equality was utterly revolutionary for the Japanese society. Public kissing, for example, was introduced for the first time on stage and screen. After the war, the geishas returned to Japan dressed in their usual exquisite kimonos signifying the return of old, traditional Japanese values. The sight of a geisha must have pleased the Westernized Japanese who were quite fearful of losing their identity to the conquering foreigners.

The geisha world thrived until 1958 when the Anti-Prostitution Act of 1956 (also referred to as Showa 33) was actually put into effect outlawing public solicitation and management of prostitutes. This Act officially ended licensed prostitution and many of the practices associated with prostitution and with the geisha tradition. For example, the Act outlawed mirare, which was the practice of making four or five maiko, or geisha apprentices, appear at the teahouse for the sole purpose of “being seen” by the customer who would then choose one of the four with whom he would have sex. In theory, the geisha had the right to refuse the customer, but in practice the maiko were too naive to say no. Showa 33 also outlawed the practice of “sleeping over.” Customers very much enjoyed sleeping next to several maiko and being surrounded by more than one woman in bed. But the rule in “sleeping over” was no touching. Thus, the practices of mirare and “sleeping over,” which were practiced with the geishas, did not actually involve forced sex but may have led to it. The Anti-Prostitution Act of 1956 also prohibited the deflowerment ceremony (mizuage) and the horrifying practice of


149. Downer, supra note 3, at 208.

150. Dalby, supra note 3, at xiii: “Geisha are embedded in Japanese culture—Japanese regard them as ‘more Japanese’ than almost any other definable group.” “Geisha remain standard-bearers of tradition.” Id. at xviii. “[G]eisha are thought of as the epitome of Japanese Tradition [sic].” Id. at 20.

151. May 24, 1956 is the date the Diet enacted Law No. 118, the Prostitution Prevention Law [the Anti-Prostitution Act or Showa 33] See Morrison, supra note 82, at 471; The Administration of the Anti-Prostitution Law in Japan 3 (1960). See also Anti-Prostitution Law, No. 118 (1956), reprinted in Ministry of Justice Materials, supra note 48, at 32–39.

152. See Downer, supra note 3, at 230–33, for a discussion of the tradition of mirare.

153. Id. at 231.

154. Id. at 231–33, 136.

155. Id. at 232: “[M]en loved sleeping surrounded by beautiful young women.”

156. See Dalby, supra note 3, at 109–11 (describing the formal ceremony of mizuage in which a man must swallow the yolks of eggs and rub the whites between the thighs of the virgin, repeating this act for seven days, as he moves closer and closer to the woman, until she loses her virginity).
debt bondage typically associated with slavery, sex trafficking, and the geisha tradition.

As a result of the serious constraints the Anti-Prostitution Act of 1956 placed on the fundamental practices of the geisha tradition, the geisha numbers slowly started to decline after the 1970s. By 1999, there were just 195 geishas and 55 maiko left, of whom 90 geishas and 22 maiko were in Gion. The geishas who continue the tradition today in Japan have a union to protect them.157

Laws passed in Japan after 1956 did affect the development of the geisha tradition. The fact that geishas were exempted from the Anti-Prostitution Act of 1956 gave them more respectability in Japanese society. Nevertheless, ambivalence towards the geisha remains in Japan to this day.158 After 1956, the practice of child recruitment into prostitution and the life of the geisha still continued. As late as the mid-seventies, children from poor rural villages in Japan were sold by their parents only to end up as maidservants in geisha houses. This practice would change only when Japan started to experience great prosperity.159

History shows that the growth and decline of the geisha tradition in Japan has depended primarily on the state of the country’s finances and secondarily on laws passed to regulate the profession. The laws banning prostitution and emancipating geishas only applied to pimps and were notoriously unenforceable. Under the reign of Emperor Hirohito from 1965–1975, Japan surged into the modern world financially and technologically. In this new age of modernity, the geisha continued to flourish. There were 17,000 geishas in Japan by the mid-1970s. However, the decline of the geisha began in 1973 around the time of the oil crisis. A new world of easy money, teenage prostitution, host clubs, telephone clubs, and private golf clubs replaced the teahouses, and the geishas started to lose importance. When Japan’s bubble economy was deflated in the 1990s, the population of geishas also drastically declined.

To many, the geisha is a very special symbol representing “the epitome of Japanese tradition.”161 Geishas are guardians of old world values that traditional Japanese hold sacred. Geishas remain the bearers of Japanese identity in a changing, integrating world. What is most sacred in the geisha tradition is their code of silence. It is generally accepted that only a low-grade geisha would talk about her experiences and break this code of silence.162 The idiosyncrasies of the geisha world remained secret and impenetrable . . . until Iwasaki, one of the

157. Downer, supra note 3, at 171.
158. Id. at 211.
159. Id. at 211–12.
160. See generally Morrison, supra note 82 (discussing modern telephone clubs and the role they play in the increase in teenage prostitution in Japan).
161. Dalby, supra note 3, at 20.
162. Sayo Masuda, Autobiography of a Geisha (1957) was available in Japan despite the sacred code of silence among the geishas.
most prosperous and well known geishas of the 1960s and 1970s, curiously decided to divulge these precious secrets to Golden who recreated them in his fictional biography.

IV. SUBTEXT

A. Sex Trafficking, Slavery, and the Geisha

Is the recruitment of geishas a variant of sex trafficking and slavery that should be outlawed? In an official CIA Report, the United States links trafficking with slavery, and defines it as “the recruitment, abduction, transport, harboring, transfer, sale, or receipt of persons within national or across international borders, through the use of fraud, coercion, force, or kidnapping, for the purposes of placing persons in situations of slavery-like conditions, forced labor, or services, domestic servitude, bonded sweatshop labor or other debt bondage.” The U.S. Victims of Trafficking and Violence Protection Act of 2000 (TVPA), the sex trafficking laws of many other countries, and international treaties as well as the U.N. Protocol on Trafficking clearly link sex trafficking with slavery.


164. Id.


167. See Tiefenbrun, supra note 111, at Appendix I and II (listing international treaties prohibiting trafficking and linking trafficking with slavery).

168. U.N. Protocol on Trafficking, supra note 165, at Annex II, Art 3(a), defines trafficking as: “[T]he recruitment, transportation, transfer, harbouring [sic]or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud,
The TVPA substantiates the link between sex trafficking and slavery and defines sex trafficking as the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.\footnote{169}

There is no doubt that in the eyes of domestic and international law, sex trafficking is a form of slavery. But is the recruitment of young girls into the life of a geisha also a form of sex trafficking? If it is, then the geishas tradition is similarly linked to slavery. Like Chiyo in Golden’s novel who as a little girl was sold by her parents into a geisha house against her will, the recruitment by force or fraud of a young child to work as a geisha under slave-like conditions, with no right to leave until she pays back an ever-increasing debt that she incurred unwillingly and unknowingly, seems to fit the definitions of sex trafficking quite comfortably. Sex trafficking today is run by international crime organizations, and geisha houses in Japan are similarly protected by the \textit{yakuza}.\footnote{170}

Every year more than two million\footnote{171} women around the world are bought and sold for the purpose of sexual exploitation. Women are trafficked by fraud and deception from relatively poor or war-torn regions of origin to relatively rich destinations. Although there are many different methods of trafficking, the common thread is that a woman is duped into believing she will find prosperity or simply a better life by taking a fraudulent offer from a trafficker in disguise. One of the worst case scenarios is the sale of a young, impoverished, and naive child to traffickers by her own parents for money.\footnote{172} This is precisely what happened to Chiyo in Golden’s novel, which accurately reflects the social reality of Japan in 1930, but also casts a shadow on current practices of child abduction for sexual exploitation.

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of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.” \textit{Id.} at Art. 3(a).
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\footnote{169. TVPA, \textit{supra} note 165, at § 7102(8).}

\footnote{170. See text accompanying note 145 for a discussion of the privatization of geisha houses and their protection by the \textit{yakuza}. \textit{See also} Tiefenbrun on Trafficking, \textit{supra} note 56, at 136–39 (discussing the role of international crime organizations in sex trafficking, and the linkage of other forms of trafficking (i.e., drugs and weapons) to sex trafficking).

\footnote{171. Statistics are difficult to verify because of the secrecy of the activity. \textit{See} Tiefenbrun, \textit{supra} note 56, at 111, 126 (discussing the unreliability of statistics related to trafficking. Some sources have reported as many as four million women being trafficked each year, and these varying numbers appear in official U.S. government reports such as the Annual Trafficking in Persons Reports of 2001, 2002, and 2003). \textit{See} Tiefenbrun, \textit{supra} note 166 (discussing the statistics in these reports). \textit{See also}, Becky Young, \textit{Note}, \textit{Trafficking of Humans across United States Borders: How United States Laws Can be Used to Punish Traffickers and Protect Victims}, 13 \textit{Geo. Immigr. L.J.} 73 (Fall 1998)

in Japan and in other nations of the world. Chiyo and Satsu are victims of slavery, and Golden does not hesitate to use the word *slavery* several times in the novel when describing their plight. Whatever the motive and whatever the outcome, the practice of selling one’s children for exploitation is intolerable and must be eradicated in Japan and elsewhere.

If trafficking is so widespread and if it is a variant of slavery, why have the laws of the nations not eradicated this universal crime? One reason is the difficulty of proving a case for trafficking. The element of *force* and the related concept of *consent* are necessary components to the definition of trafficking.173 If the trafficker can present evidence that the woman consented to, or was not forced into, the act of prostitution or sex work of any kind, the victim may not be successful in proving that a crime of sex trafficking was actually committed. The insistence on proof of force and lack of consent has resulted in the failure to enforce many international conventions174 protecting women against sex trafficking.

The use of force in sex trafficking can refer to either physical or psychological force that occurs when someone is held against her will. In the novel, Chiyo was unmistakably taken against her will to be a slave in a geisha house. She was a victim of both physical and psychological force each time she was beaten, pinched, threatened, humiliated, and disparaged by Mrs. Fidget, Mother, Auntie, Hatsumomo, and many others in the geisha house. There is no possibility for a viable claim that Chiyo actually consented to her sale and forced labor. In addition, Chiyo spends a good part of the novel trying to escape the geisha house. In her desperate attempt to find her sister, Chiyo even manages to fall off a roof and break her arm. She is beaten in the geisha house for this attempted escape.

Domestic laws in the United States and in other countries as well as international laws define sex trafficking as a form of slavery.175 Sex trafficking has been referred to as “white slavery,” and its prohibition resulted in the passage of the Mann Act in 1904 and many international treaties condemning trafficking as slavery.176 Because U.S. law and international law both establish sex trafficking as


174. See Tiefenbrun, Sex Workers, supra note 111, at App. I and App. II, at 187–90 (listing more than twenty international conventions to eradicate sex trafficking and other declarations; treaties; U.N. resolutions; and reports condemning slavery, violence against women, and other elements of trafficking).

175. See Tiefenbrun, supra note 56, at 144–55 (discussing the association of sex trafficking and slavery in domestic and international laws). See also Tiefenbrun, supra note 111, at 167 (discussing the definition of sex trafficking as slavery and the role of consent).

176. In the United States, trafficking-in-women cases have traditionally been prosecuted under Title 18 sections such as the Mann Act (§ 2421), involuntary servitude and slavery (§ 1581), and other related sections of the U.S. Criminal Code.
a form of slavery, consent should not be a probative issue in the requisite proof of sex trafficking since a person cannot legally consent to slavery. The recruitment of young women by force into the life of a geisha is a form of slavery, with or without the consent of the woman, especially if the geisha life contains involuntary confinement, violence, debt bondage, and forced labor without pay.

Multilateral treaties and customary international law condemn slavery. Since its inception, the United Nations has always been committed to the abolition or elimination of slavery. Yet despite a multitude of U.N. recommendations, decisions, and other pronouncements, slavery is not dead, and the traffic and sale of human beings for sexual exploitation flourish in a lucrative sex trade industry. On November 14, 2000, the U.N. General Assembly adopted yet another anti-slavery convention, the U.N. Convention Against Transnational Organized Crime and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children [hereinafter “U.N. Protocol on Trafficking”]. In 2003, during his address to the United Nations President Bush asked each nation to join the United States in ratifying the U.N. Protocol on Trafficking and to cooperate with the United States in implementing its own multilateral effort (i.e., the TVPA) to eliminate sex trafficking, which he called “a modern-day form of slavery.”

The U.S. government is committed to the eradication of sex trafficking. In addition to the TVPA, which depends on the willingness of other nations to cooperate with the United States in a global effort to eliminate trafficking, the United States enacted another law, the PROTECT Act, making it a crime for a U.S. citizen (or an alien admitted for permanent residence in the United States) to travel abroad for the purpose of engaging in illicit sexual conduct with another person. Both of these U.S. laws may affect the geisha insofar as her recruitment and engagement in certain activities associated with the geisha tradition arguably constitute a form of sex trafficking. Under the TVPA, any nation failing to pass and make substantial efforts to enforce an adequate anti-trafficking law

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178. Id. at 304.
179. See Tiefenbrun, supra note 56 (discussing the international human rights laws and humanitarian rights laws that have been passed but not enforced with respect to the outlawing of sex trafficking).
183. Id. at Section 105(b).
will be placed on a published list and can be subject to economic sanctions by the United States.

The PROTECT Act has a more direct extraterritorial reach than the TVPA. The PROTECT Act makes it possible to investigate, prosecute, and convict in the United States any person who engages in sex trafficking with a minor abroad (even if sex trafficking is legal in that country) or in the United States, and if convicted, that person may be fined or imprisoned for not more than thirty years (or both). The PROTECT Act was passed to eliminate the abduction and involuntary involvement of children in the thriving sex tourism industry in Asia. If the recruitment of young girls by fraud and by force into the life of a geisha is sex trafficking, and if a U.S. citizen procures the services of a young geisha in Japan, that person is committing a crime under the PROTECT Act and can be brought before a court in the United States.

If what happened to Chio and Satsu in the novel is tantamount to slavery and sex trafficking, why does the international legal system allow the geisha tradition to continue? The answer can be found in the subtle but significant distinction between the geisha as artisan and the geisha as prostitute. If the geisha is viewed as nothing more than an artist who receives a privileged and courtly education in the arts, it is difficult to argue that she is enslaved and trafficked.

### B. Feminist Legal Theory on Sex Trafficking

Feminist legal scholars writing about sex trafficking and forced prostitution typically fall into two distinct categories. One group of feminist scholars (referred to as neoabolitionists) condemns both voluntary and involuntary prostitution on the theory that prostitution is never really entirely consensual and reduces all women to nothing more than pure sex objects. They are against legalizing prostitution because this would justify the sexual exploitation of women. The Coalition Against Trafficking in Women is the organization that supports this position and is vigorously opposed to the legalization of prostitution. However, a second group of feminist scholars accepts the right of women to choose prostitution as a career and condemns sex trafficking only when the career choice is not.

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184. *Id.*

185. Kathleen Barry, *Female Sexual Slavery* (1979) and *The Prostitution of Sexuality* (1995). Barry is the founder of the Coalition Against Trafficking in Women and holds the neoabolitionist belief that all forms of prostitution, both consensual and non-consensual, constitute violence against women and sexual exploitation as well as an institution that victimizes all women. See also Catharine Mackinnon, *Toward a Feminist Theory of the State*, 168 (1991) (“[P]rostitution may be legal or illegal, but so long as women are unequal to men and that inequality is sexualized, women will be bought and sold as prostitutes, and law will do nothing about it.”).

voluntary or when the conditions imposed on the consensual prostitute are inhumane and unanticipated. This group of feminist scholars clearly does not wish to place a value judgment on women who choose prostitution for their livelihood. The Global Alliance Against Trafficking in Women is the primary exponent of this feminist position.

Will legalizing prostitution in Japan aid in the eradication of sex trafficking and the recruitment of little children against their will to work as slaves in a geisha house? The history and development of Japanese laws on prostitution and the geishas do not support the effectiveness of legalizing prostitution, as this would only facilitate the recruitment of children for the geisha houses. When the Anti-Prostitution Act of 1956 was enforced in Japan in 1958, prostitution did decrease appreciably. However, the number of geishas did not decrease immediately after 1958 because the geishas were exempt from this law. In fact, the 1960s and 1970s were a heyday for geishas. The number of geishas started to decline only after Japan's economy started to boom and Japan had an interest in appearing modern to the Western world.

But should the evil practice of child abduction, which is an integral part of the geisha tradition, remain unpunished by law? The recruitment of children into the geisha life against their will and by abduction must be eradicated from this tradition by the force of law. The physical and psychological force used on geisha trainees must also be stopped by law. But that does not mean that the geisha tradition needs to be outlawed entirely; in fact, to do so would be a loss for Japan. Law is a reflection of society, and the aspects of the geisha tradition that involve forced prostitution, slavery, fraud, force and coercion must be condemned by law in order to change the mentality of the Japanese people. But this change in attitude toward the geisha tradition is already happening, but for cultural reasons, not moral or legal. In the past few years, the geisha tradition, including its cultural sophistication, fashionable trendsetting, and promotion of the arts, has seen a dramatic decline in Japan because of changes in the cultural tastes of the people who are affected by globalization and integration.

C. Cultural Relativism and the Geisha Tradition

Why should we as Western people sit in judgment of an age-old tradition that is considered the bastion of Japanese culture and tradition? To do so is a violation

of cultural relativism. Critical race theorists\textsuperscript{188} have focused on the difficult question of determining when cultural relativism can justify egregious violations of human rights, such as stove burning, acid throwing, female genital mutilation, and female infanticide.\textsuperscript{189} Western countries need to respect cultural norms practiced in other countries even if those norms differ from our own. But if sex trafficking and the practice of recruiting children for training as geishas are a variant of the slave trade, we cannot argue persuasively that the geisha is simply a cultural norm accepted in Japan that must be respected as such under the theory of cultural relativism.\textsuperscript{190} Sex trafficking, like the slave trade, is a universal crime prohibited by the principle of \textit{jus cogens} set forth in Articles 53 and 64 of the Vienna Convention on the Law of Treaties.\textsuperscript{191} Recruiting children for labor in geisha houses simply cannot be excused by the argument of cultural relativism because, like female infanticide, it is a universal crime that must be universally condemned. Parents who sell their girl babies for money into the sex work industry—and traffickers like Mr. Tanaka who snare the poverty-stricken girls into a world of forced prostitution—are frowned upon in Japan. Child recruitment for forced sex work should not be viewed as a cultural practice but rather as a universal crime as heinous as the slave trade.

Changes in socioeconomic conditions in Japan have affected the root causes of sex trafficking, forced prostitution, and abduction of children for the geisha life. In the past, and sadly, in the present, young women are lured into sex trafficking and geisha work because they are victims of poverty, of the social practice that marginalizes women in Japan, of the failure to place a value on traditional women’s work, and of the lack of real educational and employment opportunities for women. When Japan passed a law making education for all children compulsory, it put a severe damper on the indecent recruitment of young children into geisha work. The enactment of laws, the influence of foreign governments and practices, and the changes in the economy and infrastructure in Japan caused

\textsuperscript{188} See e.g. Hope Lewis, \textit{Between Irua and “Female Genital Mutilation:” Feminist Human Rights Discourse and the Cultural Divide}, in \textit{Critical Race Feminism} 361 (Adrien Katherine Wing ed., 1997).


\textsuperscript{191} Vienna Convention on the Law of Treaties, \textit{opened for signature}, May 23, 1969, 1155 U.N.T.S. 331, 344, art. 53 (defining \textit{jus cogens} norms as principles “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”). Sex trafficking is slavery and thus meets the \textit{jus cogens} criteria. See Tiefenbrun, \textit{supra} note 56, at 124–26.
the geisha tradition to change significantly since 1850. Some, like Iwasaki, fear it is disappearing entirely.

V. POST-TEXT: THE COMPLAINT IWASAKI V. ARTHUR GOLDEN AND PUBLISHERS

A. Plaintiff’s Claims
On April 22, 2001, Mineko Iwasaki filed a Complaint against Arthur Golden, Random House, Inc., and Alfred A. Knopf, a division of Random House in the U.S. District Court of the Southern District of New York. The Complaint is an action for breach of contract, quantum meruit, and unjust enrichment. Quantum meruit refers to “the reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship.” In addition, the Complaint alludes to viable claims of misappropriation of property (the name and likeness of a person), defamation of character, right to privacy and publicity, and copyright infringement under the laws of the State of New York and of Japan. The plaintiff asks for an accounting under U.S. copyright laws. I shall now discuss the factual and legal basis of these claims and their merit.

1. Copyright Infringement and Common Law Copyright
Plaintiff’s claim of copyright infringement is based on the theory that she owns a common law copyright in her own personal account of her life, which Golden taped, transcribed, and allegedly misappropriated as source material for his novel. Plaintiff claims she is the sole owner of the copyrights in and to her personal history and family stories that she set forth in the tapes made by Golden during their interview sessions. According to Iwasaki, Golden wrongfully and without

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192. Quantum meruit is derived from the Latin and means “as much as he has deserved.” See BLACK’S LAW DICTIONARY (Bryan A. Garner, ed., 7th ed. 1999), at 1255 [hereinafter “BLACKS LAW DICTIONARY”].

193. Id. at 1255.

194. U.S. Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2000). Note that the jurisdiction of the New York court in the case against Golden and his publishers is predicated upon the existence of a federal question, the diversity of the parties, and a dispute arising between a U.S. citizen and a citizen of a foreign state, the dollar amount of the claim for damages which is greater than $75,000 and less than $10,000,000, and a copyright jurisdictional claim, as set forth in 28 U.S.C. §§ 1331, 1332(2), 1338 (a) (2000). The defendants reside or transact business in New York and in the Southern District which justifies the venue. The plaintiff, Mineko Iwasaki, resides in Kyoto, Japan and is a citizen and resident of Japan. The defendant, Arthur Golden, resides in Brookline, Massachusetts and transacts business in the Southern District of New York. The other two defendants, Random House, Inc. and Alfred A. Knopf, are New York corporations with their principal place of business in New York.
authorization reproduced Iwasaki’s copyrighted materials in the book. Plaintiff claims she is the coauthor of the novel and should be compensated for her creative contribution. According to this theory, Golden merely put down on paper the actual words she gave him on tape and in transcription, and, therefore, she is the coauthor of the taped conversations that form the basis of the book. Plaintiff further claims that Golden licensed certain rights in the book to Alfred A. Knopf without her approval. As a result of the licensing, the defendants received over $10,000,000 (plaintiff seeks an accounting of the exact sum received by the defendants).

These facts form the basis of a claim for copyright infringement of Iwasaki’s taped conversations presumably under the common law copyright doctrine. Common law copyright is a property right that arises when the work is first created rather than when it is published. Under the U.S. Copyright Act of 1976, which went into effect on January 1, 1978, common law copyright was largely abolished for works created after the statute’s effective date, but it still applies in a few areas, notably in a common law copyright received before January 1, 1978, which is entitled to protection.

Iwasaki will have difficulty proving that she has a common law copyright because she did not create the book. She will also have difficulty proving a legitimate copyright claim in the taped conversations unless she had initially or at some point designated to Golden which part of the total stream of the conversation is her own literary creation, as set forth in Estate of Hemingway vs. Random House, Inc (“Hemingway”) in 1994.

2. Misappropriation of Name and Likeness, Invasion of Privacy, and Publicity Plaintiff contends that she is a well-known and well-respected business person in Japan. Until her retirement in 1980, Iwasaki was one of the most famous geishas of Kyoto, and she worked in Gion, the most prestigious geisha district in Japan. These background facts in the Complaint contain the seeds of Plaintiff’s claim that she is a public figure in Japan and has a property right.

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195. See Black’s Law Dictionary, supra note 192, at 338.
197. Iwasaki admits that she is well-known in Japan. But she is also arguably a “public figure” under U.S. law. A public figure is defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling that gives the public a legitimate interest in his doings, his affairs, and his character, has become a “public personage.” Cason v. Baskin, 30 S.2d 635, 638 (Fla.1947). “Such public figures were held to have lost, to some extent at least, their right of privacy.” William L. Prosser & W. Page Keeton, Law of Torts 823 (1983).
198. Richard A. Posner, Economic Analysis of Law, Section 3.3, 43 (4th ed. 1992). Judge Posner discusses the tort of misappropriation as applied to celebrities. The question is whether there is anything unique about Iwasaki’s name or likeness that creates value for
to her name and likeness. The law grants celebrities a property right to ration the use of their names to maximize their value over time. However, a public figure’s rights to privacy are diminished. The basis of the Plaintiff’s claim is that Golden misappropriated her famous name and likeness when he acknowledged her full name in the beginning of the book and on promotional tours and when he created a likeness of Iwasaki in the character of the narrator Sayuri.

The right of publicity arises out of the right of privacy. The tort of appropriation of a person’s name or likeness for the defendant’s pecuniary benefit or advantage is a form of invasion of privacy and is based on a proprietary right.

In the Second Circuit, an exclusive licensee of this “property” has also what has been called a “right of publicity.” The right of publicity is the right of every person to prevent the unauthorized, commercial use of his identity. The right of publicity serves two primary purposes: to protect all persons from the anguish that may accompany the unwanted use of their identity, and to protect the property interest that persons (especially celebrities) have in their identities.

In New York, as well as in many other states, plaintiffs have successfully recovered under a misappropriation theory when their name or picture or other likeness has been used without their consent for commercial purposes in order to advertise the defendant’s product, to accompany an article being sold, to add luster to the name of a corporation, or for other business purposes. But the unauthorized use by the defendant of the plaintiff’s name and likeness is limited

Golden to appropriate. Her name and likeness may have value in Japan, but certainly not in the United States and Europe, at least when the book first came out in 1997. Golden should win summary judgment on this claim because of free speech and public domain defenses. See Matthews v. Wozencraft, 15 F. 3d 432 (5th Cir. 1994).

Matthews, supra note 198, at 438, n. 2. See also Posner, supra note 198, at 43: “[C] reating a property right in such uses would not lead to any socially worthwhile investment but would simply enrich already wealthy celebrities. However, whatever information value a celebrity’s endorsement has to consumers will be lost if every advertiser can use the celebrity’s name and picture.”


201. Prosser, supra note 197, at 804. See also Restatement (Second) of Torts § 652 C (1977) on right to privacy.


205. Prosser, supra note 197, at 807.


207. Prosser, supra note 197, at 805.
only for advertising purposes or for “purposes of trade,” otherwise referred to as “commercial purposes.”

If the misappropriation of the name or likeness occurs with respect to a public figure, the rights of privacy and publicity of that public person must be balanced with the demands of free speech. The standard set forth in *New York Times v. Sullivan* requires proof that the use of a public figure’s name in reporting is done with actual malice and reckless disregard for the truth. Thus, assuming Iwasaki can prove she is famous in the United States as well as Japan, she would also have to prove that Golden used her famous name and likeness with reckless disregard for the truth and with malice in order to pirate her identity for some advantage of his own (as for example, to add luster to his novel because of the value of Iwasaki’s name). Thus, the mere use of the plaintiff’s name in the novel is not enough to hold the defendant liable unless the defendant also made commercial use of the name and did so with malice.

3. Misappropriation in Fiction: Matthews v. Wozencraft, Random House, Inc. *et al.* William Prosser clearly indicates that a plaintiff will have difficulty in proving misappropriation in a work of fiction. “Nor is there any liability when the plaintiff’s character, occupation, and the general outline of his career, with many real incidents in his life, are used as the basis for a figure in a novel who is still clearly a fictional one.” *Matthews v. Wozencraft.* is the case on point that would work in Golden’s defense against Iwasaki’s claim of misappropriation of her name and likeness and her geisha life story in Golden’s novel.

In *Matthews,* a former undercover narcotics officer filed suit alleging breach of contract, misappropriation, and invasion of privacy against his former wife and the publisher of his wife’s book (which happens to be Random House, the

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208. Id. at 805.
209. *New York Times v. Sullivan,* 376 U.S. 254 (1964). The Court in *Sullivan* announced the rule that a public figure can recover damages from a news organization for harms perpetrated by its reporting only by proving “actual malice,” which requires that the statements were made with a reckless disregard for the truth. *Id.* at 279–80. If *Sullivan,* which refers to news reporting of public figures, also applies to works of fiction, Iwasaki would have to prove that Golden used her name with “actual malice.”
210. See also *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (1997). In the California Court of Appeals, Judge Kosinski held that actor Clint Eastwood could not recover costs because he did not show by clear and convincing evidence that an interview was printed with knowledge, that it was false, and that the newspaper had acted with actual malice.
214. *Id.*
215. *Id.* at 436. Matthew’s former wife, Wozencraft, sold her manuscript and the movie rights to Random House for one million dollars. Similary, Iwasaki decided to sue Golden...
same publisher named as one of the defendants in Iwasaki’s Complaint). Matthews claimed that when his former wife wrote a book about his life story, she was misappropriating his name and likeness and violating his right to privacy. Furthermore, she was cashing in on the goodwill associated with the police officer’s name.

Random House won this case because the Texas court held that a life story is not a “name or likeness” under Texas misappropriation law. The Texas court also held that appropriation does not occur in a fictionalized account of a person’s life under the “false light doctrine.” This holding is applicable to Iwasaki’s case against Golden because the real geisha is claiming that the author misappropriated her information and painted her in a false light when he used her taped words, which she claims are protected by common law copyright.

On appeal from the U.S. District Court for the Eastern District of Texas, the Matthews court held that the author had created a fictionalized account of her husband’s life, and she could not be held liable for misappropriation of a fictionalized biography. The lower court held that the author of a novel falls under First Amendment protection, and is further protected by the fair use of information in the private domain. Moreover, on appeal the Matthews court held that the book and its accompanying publicity had converted the officer (about whose life the book was written) into a “public figure,” and neither the book nor the movie held the officer in a false light or in an embarrassing way so as to constitute “actual malice.”

Like Iwasaki, who claims ownership rights to Golden’s book, the plaintiff in Matthews also claimed that he had ownership rights in his former wife’s fictionalized account of events surrounding his life. Matthews also claimed that he received no compensation for his wife’s use, portrayal, or promotion of his likeness in the book and in the movie. The district court granted summary judgment against Matthews’ appropriation claim because Texas law does not recognize a cause of action for appropriation of a life story, and even if it did,
Texas law grants an exception for biographies and “fictionalized biographies.”

Iwasaki’s case against Golden and Random House also involves a “fictionalized biography,” a claim of misappropriation of a public figure’s name; thus if the case went to trial and the New York court had followed Matthews, the geisha could not succeed on the merits of her appropriation claim.

4. Breach of Contract  Plaintiff claims that when she first met Golden in 1992, she agreed to be interviewed about her geisha life in Gion and her family’s experiences only if Golden agreed to comply with certain express conditions. The first condition was complete anonymity for herself and her family. The second condition was total confidentiality regarding the personal stories and information she related to him about her life and career as well as her family’s experiences. These facts form the basis of Iwasaki’s claim for breach of contract. In May 1992, plaintiff alleges that she and Golden entered into an agreement whereby Golden agreed not to use the personal material supplied to him by plaintiff in her taped interviews and not to mention plaintiff’s name in any publication by Golden. Plaintiff claims defendant breached the express terms of their oral confidentiality agreement by revealing and spotlighting her name in the acknowledgment of the book. This assertion, if true, would be difficult for Golden to defend against as he did place Iwasaki’s name in the acknowledgment of the book and, therefore, could be held liable for breach of an oral agreement (notwithstanding the general difficulty to enforce oral agreements). New York law on the enforceability of oral contracts is quite clear: “It is ordinarily unnecessary to allege whether a contract sued upon was oral or written. However, an oral agreement “reached during negotiations will not be sufficient to defeat an action for breach of contract.” Moreover, the type of oral confidentiality agreement that Iwasaki alleges she and Golden entered into are not covered under the five classes of enforceable oral contracts listed in the U.S. Statute of Frauds.

Plaintiff claims that Golden represented to her that her collaboration in the book was only for the purpose of “fact checking” a certain novel that he had already written. Golden admits that he actually abandoned his earlier drafts and wrote an entirely new novel largely based on Iwasaki’s testimony. This is the basis of plaintiff’s claim that the author breached an alleged oral confidentiality agreement. However, even though there was an exchange of promises between Golden and Iwasaki, Golden could no doubt challenge the existence and enforceability of any

225. Id. at 437.
226. See E. Allan Farnsworth, Contracts 4 (1982) (explaining enforceability of contracts and its relationship to consideration). “[T]he law of contracts is confined to promises that the law will enforce. It is therefore concerned primarily with exchanges because, as will be explained later, courts have generally been unwilling to enforce a promise unless the promisee has given the promisor something in return for it.” Id.
contract between Iwasaki and himself based on there being arguably no consideration,\textsuperscript{229} no writing,\textsuperscript{230} and no meeting of the minds\textsuperscript{231} about conditions precedent\textsuperscript{232} to the publication of the novel.

Pursuant to an alleged express verbal agreement between plaintiff and defendant, Iwasaki claims she permitted Golden to come to her home in Japan and to tape her recollections of Gion life for almost two weeks from May 10, 1992 through May 23, 1992. The interviews she accorded him averaged more than ten hours per day and involved more than one hundred hours of taping. Plaintiff claims unjust enrichment because she was never compensated for the time and work she contributed to the book whereas defendants have enjoyed substantial profits from its sale.

Plaintiff also alleges a claim for quantum meruit against the defendants for failure to compensate her for the fair value of her services to which she is justly entitled. She contends the defendants promoted and exploited the unprecedented access that she afforded Golden to the unknown world of the geisha and to Gion’s history. Quantum meruit is a claim or right of action for the reasonable value of

\textsuperscript{229} See Farnsworth, supra note 226, at 20 (explaining the doctrine of consideration). “The doctrine of consideration took care of the bulk of economically vital commercial agreements, even if it afforded no ground for the enforceability of gratuitous promises, for which nothing was given in exchange . . . [T]he doctrine of consideration has been widely criticized.” Id.

\textsuperscript{230} Id. at 369–70 (“It would be difficult to imagine a question more important to a person expecting to make agreements in an unfamiliar legal system than this: . . . when is a writing required to make an agreement enforceable? . . . [This question] is governed by the “statutes of frauds . . . In contrast to formal contracts, informal contracts might be oral. However, the trial of an action based on an oral contract raised problems.”) (citations omitted).The five classes of enforceable oral contracts listed in the English Statute of Frauds (1677) [Stat.29 Car. 2, c.3] and the U.S. Statute of Frauds do not include the type of oral confidentiality agreement that Iwasaki alleges she and Golden entered into. See id. at 374; Restatement Second of Contracts, Section 110 (1981) (listing the six provisions of the English Statute of Frauds adopted in the United States).

\textsuperscript{231} “Actual assent to the agreement on the part of both parties was necessary; without it there could be no contract. As it was often expressed, there had to be a ‘meeting of the minds.’” Farnsworth, supra note 226, at 113. Farnsworth calls the “meeting of the minds” a “much abused metaphor” and explains its derivation from the Latin aggregatio mentium or a meeting of the minds. See also Farnsworth, “Meaning” in the Law of Contracts, 76 Yale L.J. 939, 943–44 (1967).

\textsuperscript{232} See Farnsworth, supra note 226, at 537–43 on conditions of a contract and conditions precedent: “According to the Restatement Second [Section 224] a condition is ‘an event, not certain to occur, which must occur, unless occurrence is excused, before performance under a contract becomes due’ . . . Almost any event may be a condition . . . [W]hat we have been calling a ‘condition’ has been called a ‘condition precedent’ . . . [T]he plaintiff ha[s] the burden of pleading and proof as to a condition precedent to the defendant’s duty. . . .” (citations omitted).
services rendered. At common law, quantum meruit was a count in an assumpsit action to recover payment for services rendered to another person. It is still used today as an equitable remedy to provide restitution for unjust enrichment. It is often pleaded as an alternative claim in a breach-of-contract case so that the plaintiff can recover even if the contract is voided.

Given the lack of consideration, lack of a writing, and the arguable absence of a meeting of the minds between Golden and Iwasaki, Iwasaki’s claim to the existence of a contract may be void, making her claim to quantum meruit all the more viable.

6. Defamation Plaintiff claims that Defendant breached his express promises to her and disparaged her reputation in the book and in his public promotions of the book. This statement is the basis of Iwasaki’s claim against Golden for defamation. Iwasaki alleges that Golden breached his promises by telling lies about her not only in the book, but in public interviews. For example, Golden stated during public promotions of the book that Iwasaki was sold into the geisha world as a child by her parents and that her virginity was auctioned to the highest bidder when she came out as a geisha. Plaintiff argues that these two statements are untrue and that Golden falsely represented these statements as facts.

Plaintiff further claims that Golden has defamed her and tarnished her reputation by citing her as his primary authority on geisha life and then inaccurately portraying many of the customs, ceremonies, and rituals in the book, thus making her look like an unreliable authority of the geisha tradition. As Iwasaki may have already been planning in 2001 to write two of her own books about the geisha life that were actually published in 2002, her credibility as an authority

234. See id. See also Farnsworth, supra note 226, at 98–99 (distinguishing quantum meruit from restitution). “Since these claims [unjust enrichment for retaining a benefit without paying for it] for the redress of unjust enrichment did not fit comfortably into either the category of contract or that of tort, they came to be described as claims in quasi-contract. Some of them were originally characterized as being in quantum meruit (as much as he deserved), a form of action used for claims to payment for services. This procedural term has persisted and is sometimes used inexacty as a synonym for the more general term quasi-contract, which refers to any money claim for the redress of unjust enrichment. Restitution is a broader term, propagated by American scholars in this century to embrace all remedies having that function. . . .” Id.
235. See Restatement Second of Torts, supra note 201, § 558 for a definition of defamation. See also Prosser, supra note 197, at 739: “Defamation is rather that which tends to injure ‘reputation’ in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.” Id. at 739.
236. Iwasaki, supra note 1; Iwasaki, supra note 2. Both books by Iwasaki were written with the collaboration of Rande Brown and published in 2002, one year after Iwasaki filed her Complaint.
on the geisha tradition was particularly valuable to her. These are the facts that constitute the basis of plaintiff’s claim to the defamation of her character.

To establish a prima facie case for libel or slander (collectively known as defamation), the plaintiff must prove that a false and defamatory statement was made negligently (or, in certain circumstances, with actual malice), of and concerning the plaintiff, which resulted in a special harm of a pecuniary nature or loss of the plaintiff’s reputation.\(^\text{237}\) A defamatory statement must be based on false facts, not opinion. The publication of the defamatory statement must be a communication of that statement to a person other than the plaintiff. If the statement is made in reporting newsworthy events about a public figure, the plaintiff must prove actual malice, but otherwise, only negligence is required. A defamation claim can be actionable even if there is no existence of a “special harm.”\(^\text{238}\) Plaintiff will have difficulty proving defamation under New York law because this is a work of fiction, Iwasaki is arguably a public figure, and the author is protected by freedom of speech unless the plaintiff can prove actual malice. A Texas court refused to uphold a claim for defamation in a fictionalized biography of a person who became a public figure after the book was published and publicized.\(^\text{239}\) Moreover, plaintiff provided Golden with written consent\(^\text{240}\) for publicizing the book, knowing her name was in it. Consent is a bar to a claim of defamation.

Claims for defamation in a work of fiction rather than fact are very difficult to prove. When interviewed, the attorney for the plaintiff and the spokesman for Random House, Inc. could not cite any precedent for such a case,\(^\text{241}\) even though there are several cases clearly on point for defamation in works of fiction.\(^\text{242}\) This is truly an unusual case because normally the author indemnifies the publisher for claims of defamation, but in this case the publishers are “vigorously defending” Golden and his book\(^\text{243}\) based on their firm belief that plaintiff’s claims are baseless.

\(^{237}\) Restatement Second of Torts, supra note 201, at § 558.

\(^{238}\) Id.

\(^{239}\) See supra text accompanying footnotes 213–25 for a discussion of Matthews, supra note 198, and the doctrine of misappropriation of property and invasion of privacy and publicity in a work of fiction.

\(^{240}\) Consent is a complete defense to a claim of defamation. See Prosser, supra note 197, at 784 (“The general social policy of denying recovery for conduct to which the plaintiff has given his consent finds expression in an absolute immunity in cases where consent is given to defamation.” “Where the plaintiff is uncertain as to just what will be said, but consents to publication which he has reason to believe may be defamatory, the defense would seem properly to be one of assumption of risk.”) Cf. Chapman v. Ellesmere, 2 K.B. 431 (1932), cited in Prosser, supra note 197, at n.59.

\(^{241}\) Feeney, supra note 12.

\(^{242}\) Matthews, supra note 198.

\(^{243}\) Mehren, supra note 63.
7. Defamation-in-Fiction: Claims and Defenses  Defamation-in-fiction is the publication of a false statement of fact, of and concerning the plaintiff, made with actual malice or reckless disregard for the truth for a public figure or with negligence for any person, and which causes injury to the reputation of the plaintiff. It is particularly difficult to prove a defamation claim in a work of fiction because fiction writers are presumably protected by the right of freedom of speech and because the plaintiff has the burden of proving that the statements made in the work of fiction are actually factual and refer specifically to the plaintiff herself. The court’s task in a defamation-in-fiction action entails a search for similarities and dissimilarities so as to determine whether a person who knew the plaintiff and who read the book could reasonably conclude the plaintiff was actually the fictional character.

In a defamation-in-fiction case, the plaintiff must prove that the defamatory publication is of and concerning the plaintiff. In common law, the “of and concerning” element was referred to as the colloquium requirement of defamation. To meet this burden, the plaintiff does not have to establish that everyone all over the world would understand the libelous or defamatory statement refers to the plaintiff; it is sufficient if those who knew the plaintiff can determine that she is the person referred to in the fiction. Iwasaki believes everyone in Japan would identify her as the character in the fiction, and because of the notoriety she received subsequent to the novel’s publication, it is arguable that everyone would recognize her in the fiction. Golden, however, adamantly maintains that Sayuri in the novel and Iwasaki are very different, and it is unlikely that anyone in Japan or elsewhere reading the book would confuse her with Sayuri.

The next big hurdle for the plaintiff in a defamation-in-fiction action is to rebut the presumption that all the material in a fictional work is untrue. In other words, the reader must be convinced the fiction is based on fact. In order for the reader to believe that the content of the novel is based on defamatory false facts, the presumption of invention in a work of fiction must be overcome. Given the accepted fact that writers create their fictional works based on their own

246. Some scholars claim works of fiction are not covered under New York Times v. Sullivan so that writers of fiction are not protected by its high standard of fault. See Schauer, supra note 62, at 240 (“They assume that fiction is outside the paradigm of New York Times and Gertz.”).
248. Schauer, supra note 62, at 236.
experiences, it must be a requirement of an action for defamation in a work of fiction that the reader be totally convinced that the book in all its aspects as far as the plaintiff is concerned is not fiction at all.\footnote{Id. at 9–10.} Golden’s presence in the book, his master craftsmanship, and his artistic rearrangement of plaintiff’s statements into a work of poetic prose will make it difficult if not impossible for Iwasaki to prove this novel is fact and not fiction.

Defamation-in-fiction actions are difficult to win because they do not fit comfortably into defamation law. In a defamation-in-fiction case, the plaintiff must overcome the dichotomy between opinion and fact in a work of fiction. “[D]efamation law is predicated on two polar premises: first, opinion is protected under the first amendment [sic] because ‘there is no such thing as a false idea;’ but second, ‘there is no constitutional value in false statements of fact.’”\footnote{Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974).} A work of fiction is not easily categorized either as opinion or as containing false statements of fact. Fiction contains many factual details, but by its very nature, works of fiction are not based solely on “statements of fact.”\footnote{Id. at 340.} False statements of fact are unprotected. However, given the hybrid nature of works of fiction that are often based on truth but fashioned in fiction, a novel such as Golden’s Memoirs of a Geisha does not fit easily into the requirement of proof of “falsity” in a defamation case.

Defamation law was first constitutionalized by the U.S. Supreme Court in New York Times Co. v. Sullivan.\footnote{New York Times v. Sullivan, supra note 209, at 254.} This decision embodies “the central meaning of the First Amendment” and is “the best and most important [opinion] the Court has ever produced in the realm of freedom of speech.”\footnote{See Harry Kalven, The New York Times Case: A Note on “The Central Meaning of the First Amendment, 1964 Sup.Ct.Rev. 191, 194”.} If New York Times v. Sullivan is applicable to a work of fiction about a public figure, then Iwasaki’s claim of defamation in fiction flies in the face of the writer’s freedom of speech. Thus, if this case went to Court and Golden were found guilty of defamation in fiction, this would add to the small but significant increase in successful defamation-in-fiction litigation suits\footnote{Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, cert denied, 444 U.S. 984 (1979); Pring v. Penthouse Int’l, Ltd., 616 F.2d 438 (10th Cir. 1982) (reversing a $26.5 million jury verdict in “Miss Wyoming” defamation action against Penthouse magazine), cert. denied, 103 S. Ct. 3112 (1983); Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980) (finding that plaintiff’s complaint, alleging libel and violations of privacy rights arising from publication of a novel about a transsexual tennis player, stated a valid cause of action).} and would have a chilling effect on the freedom
of speech of writers. If Iwasaki succeeded in her defamation action, this could have seriously reduced the publication of traditional fiction, particularly the roman à clef, as well as newer forms of fiction such as the docudrama that are largely based on fact but placed within a framework of artistic fiction.\textsuperscript{258}

The law continues to wrestle with the need to balance the writer’s right to freedom of speech and the right of individuals allegedly harmed by fictional portrayals to protect themselves under defamation theory or alternative tort theories such as misappropriation. Modern libel and defamation law seeks to avoid self-censorship by writers and journalists fearing to be held strictly liable for factual errors. To protect against self-censorship, the U.S. Supreme Court requires that false statements by media defendants are actionable only if the statements are the product of actual malice (intentional or reckless disregard for the truth)\textsuperscript{259} when the plaintiff is a “public official”\textsuperscript{260} or “public figure”\textsuperscript{261} or if the statements are the product of negligence when the plaintiff is a private individual.\textsuperscript{262} Proof of actual malice is the safeguard of freedom of speech. However, in 1979 when the Supreme Court in \textit{Bindrim v. Mitchell}\textsuperscript{263} declined to review the judgment in favor of the plaintiff in a defamation-in-fiction litigation based on a nonfactual publication and an intentional or reckless disregard for the truth, a serious danger to literary freedom was established.\textsuperscript{264}

If Iwasaki is deemed a “public figure,” she would have to prove that Golden engaged in actual malice to harm her reputation and that he knew or should have known that what he published was false. Given the nature of the friendship between Golden and Iwasaki before the post-publication scandal developed, it seems unlikely that Iwasaki could prove either Golden’s actual malice towards her or even his reckless disregard for the truth, especially in the light of Golden’s family background and experience in newspaper publication. Moreover, the requirement of proof of actual malice for a public figure in a work of fiction would result in an absurdity because Golden is a writer of fiction who clearly knew that what he was publishing was fictional and therefore partially “false” in a literary but not entirely legal sense. Fiction involves the interplay of truth and falsity, reality and fantasy, and the application of the rules for actual malice to a fictional work may be problematical.

\textsuperscript{258} David A. Anderson, \textit{Avoiding Defamation Problems in Fiction}, 51 Brook. L. Rev. 383, 393 nn. 56–57 (1985) (defining literary genres such as the roman à clef and the docudrama).

\textsuperscript{259} \textit{Bindrim}, supr\textit{a note 257}, at 984. Note that Justices Brennan, Stewart, and Marshall dissented and voted to grant certiorari.


\textsuperscript{262} \textit{Gertz}, supr\textit{a note 252}, at 347, n.10.

\textsuperscript{263} \textit{Bindrim}, supr\textit{a note 257}.

\textsuperscript{264} See Gora, supr\textit{a note 254}, at 226.
8. Defamation-in-Fiction: Contradictions and Conundrums Defending a defamation-in-fiction action requires a plaintiff to contradict herself by asserting that the fictional character resembles her but is not like her at all. Thus, Iwasaki would have to prove that the fictional character, Sayuri, is both similar to, and different from herself. The plaintiff must assert simultaneously that the story or novel is “about” her based on similarities between Iwasaki and the fictional character. However, the plaintiff must also assert that the novel could not “be about” her because, in real life, she would never do the scandalous things ascribed to the fictional character. Moreover, to prove she experienced harm to her reputation, she would have to prove that she is very different from the fictional character. Iwasaki would no doubt argue that she is a geisha artisan, not a courtesan or a prostitute like Sayuri. Thus, the plaintiff would have to prove similarities and differences and contradict herself in order to win her case.

Similarly, Golden would have to assert the absurd defense that he is a writer of fiction and did not knowingly, recklessly, or negligently make untruthful statements. This assertion is unthinkable for a writer of fiction. Therefore, bringing and defending such a defamation-in-fiction action requires “a kind of mutual doublethink.”

9. Damages As for damages, plaintiff makes an excessive and unreasonable request. She wants defendants to surrender all profits as a result of their infringing activities including the sale of all goods or services incorporating plaintiff’s copyrighted materials.

265. Pring v. Penthouse Int’l, Inc., 695 F. 2d 438, 442-443 (10th Cir. 1982), cert denied, 103 S. Ct. 3112 (1983). In an earlier New York case, Geisler v. Petrocelli, 616 F. 2d 636 (2d Cir. 1980), the U.S. Court of Appeals for the Second Circuit held that a young woman, whose name was identical to the female transsexual heroine of a novel, could sue the book’s author for defamation. The New York court in Geisler followed an earlier California defamation-in-fiction case, Bindrim, supra note 257, brought by a psychologist who conducted a nude group therapy session and successfully sued an author because the author had attended the session and thereafter wrote a novel that described a similar nude encounter session in an unflattering way. In Pring, the plaintiff obtained a $26,500,000 jury verdict in a defamation action against Penthouse magazine that portrayed her as a supposedly fictional baton-twirling Miss Wyoming engaging in fantastic sexual exploits during a pageant that was televised coast-to-coast. (Pring, 695 F.2d at 439). As a result of the outcome of the trial in Pring and the earlier holdings in Geisler and Bindrim, a “full blown first amendment problem” has emerged and authors’ literary freedom is being infringed. However, the appellate court in Pring overturned the judgment by a narrow two-to-one vote on the ground that the story was too fantastic to have reasonably been taken as “true”, 695 F.2d at 443). See Schauer, supra note 62, at 235–41; Gora, supra note 254, at 225–26.

266. See Gora, supra note 254, at 228.
B. Defendant’s Response
The defendants never filed a Reply to the Complaint, which the plaintiff ultimately voluntarily dismissed on February 11, 2003. If Golden had filed a Reply, he would probably have argued the absence of a contract; the right to fair comment and free speech; the limitation of plaintiff’s rights to privacy and publicity in a work of fiction; plaintiff’s consent as a bar to her claims of right to privacy and publicity, as well as her claim of defamation; absence of a common law copyright claim based on the holding of Hemingway; and the absence of a claim for quantum meruit or unjust enrichment.

1. Absence of a Contract
In public interviews, Golden repeatedly and adamantly denies the existence of any agreement not to disclose Iwasaki’s identity or to observe total confidentiality about her personal stories and her family’s experiences. “There was no such agreement,” he said. Why would Golden have spent all those hours taping if he had agreed not to use the material in his book? Why would he, a man very familiar with the publishing world, so boldly place his source’s real name in the acknowledgments of his own book if he had actually entered into a confidentiality agreement with her not to reveal it? The facts seem to support the contention that there is no written or verbal confidentiality agreement between Iwasaki and Golden.

The enforceability in the State of New York of an alleged oral confidentiality agreement by a plaintiff who (four years after the book was actually published), seeks astronomical amounts of compensation for services performed is, at best, questionable. Moreover, Iwasaki filed her Complaint on the eve of a Steven Spielberg movie of Memoirs of a Geisha and in anticipation of the publication of Iwasaki’s own two novels about the geisha life. The timing of her Complaint undermines the legitimacy of her claims and the credibility of her testimony. The only explanation for the filing of this belated Complaint is that either she or Golden is lying about the existence of a confidentiality agreement. More probably there was a misunderstanding about what each party meant by confidentiality and trust. Given the disparity in the cultural backgrounds of the plaintiff and defendant, such a misunderstanding seems quite plausible. In any case, if there were an oral agreement not to divulge the plaintiff’s identity, Golden is in breach of it.

Iwasaki claims that she began considering legal action in 1999 when the book was first translated into Japanese and after she read it for the first time. Apparently, Iwasaki believed she would be able to settle her differences with Golden without lawyers. This explanation is reasonable given the cultural pattern of the Japanese people to shy away from lawyers and courtrooms and to prefer mediation or conciliation as a form of dispute resolution. Other explanations for her delay are

possible. Iwasaki probably had ulterior motives and second thoughts about the merits of suing Golden for breach of contract. Her ulterior motives could be based not only on greed and the desire for just compensation for her services, but also self-interest and the plan to bring publicity to her own forthcoming books via a lawsuit that would no doubt reach the press.

However, the most important reason for suing was her need to save face, which also is a culturally specific motivation. Many of Iwasaki's sister geishas in Japan were up in arms for breaking the geisha code of silence. Iwasaki must have reasoned that she could achieve her goal of saving face by attacking the book and its author publicly through a lawsuit. Her own legal claims of a breach of contract would reveal to the world that she had, indeed, respected the code of silence by insisting on confidentiality and anonymity. It was not she but the author who violated that code by breaching their agreement. This argument will probably fail because her own claim to coauthorship of the book militates against her need to distance herself from the assertions in the book.

2. Limited Rights to Privacy and Publicity in a Work of Fiction: Fair Comment and Free Speech

Golden's main defense against Iwasaki's claims of a right to privacy and publicity would have been that he wrote a work of fiction, specifically a fictionalized biography, in which the main character is a literary creation. The book and its publicity (created largely by Iwasaki's filing of the Complaint) converted Iwasaki into a public figure. In the eyes of the law, a public figure's right to privacy is significantly reduced.

269. “The right to privacy and publicity are related. The right to privacy has been defined as the right of a person to be free from unwarranted publicity or the right to be protected against the commercial exploitation of one's personality without his written consent. The doctrine of privacy rests upon the proposition that an individual, as a private person, should be protected from unsought publicity.’’ Rosenwasser v. Ogoglia (1916) 172 AD 107, 158 NYS 56; Joseph E. Conley et al., Right of Privacy Defined, New York Jurisprudence §274; 44 N.Y. Jur. 2d (Defamation and Privacy Section) (2nd ed. 1994).

270. See Matthews, supra note 198, at 440 on the denial of a claim of a right to privacy in a fictionalized biography. See also Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, supra note 200, at 214–15 (“To whatever degree and whatever connection a man's life ceases to be private before the publication under consideration has been made, to that extent the protection is withdrawn. . .”).


272. See Matthews, supra note 198, at 440–41, citing Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1139 (7th Cir. 1985) (“Because all of the events were a part of the public domain, defendants were entitled to their fair use, including their narration in fictionalized form.”).
filed suit immediately after the publication of the novel and before she became a public figure in the United States, she might have had a chance to win her invasion of privacy claim.

Golden would probably have argued that Iwasaki is not Sayuri. On many occasions, Golden has explained that he tried to make the novel look like it was the narrator’s creation. “I was working very hard to make it look like I didn't really write this book, that it was just dictated by a geisha and that I wrote it down. And many people write me letters and say, ‘Where–how can I get in touch with Sayuri?’ The truth is, she doesn’t exist. This character is entirely invented, and the woman that I interviewed wouldn't recognize herself, or really anything about herself, in this book.”

How wrong and yet how right Golden was when he said Iwasaki would not recognize herself in the character of Sayuri. Iwasaki does vigorously deny being like the person Golden wrote about in the book, even though in order to win her claim for defamation, Iwasaki must prove the book is about her. “Everything is wrong.” she said. “In the book, a geisha was beaten with a hanger and crippled. There is a very strict rule that ‘maiko’ (apprentice geisha) and geisha should never be beaten.” Every time Golden paints a picture of the geisha that is not in accordance with Iwasaki’s glorified perception of herself as a geisha/artist, she cannot help being offended. Iwasaki’s flaw is her refusal to understand that the protagonist in this novel is an invented character drawn up by an author hiding in the background. “The book is fiction,” Golden insists, and confesses that he made a lot of it up. “It’s not about her,” and Sayuri is not Iwasaki.

If Iwasaki is not the character in the book, there can be no basis for her claim to a violation of her right to privacy because the statements in the novel are not about Iwasaki or her own life story. Iwasaki’s claim is something like the real person’s reaction when she suspects she is the character in a roman à clef. But this person has no basis for a claim of privacy or publicity because the character is fictional, not real, and the author is protected by his First Amendment right to freedom of speech.

Moreover, a qualified privilege has been developed at common law to cover what has been called fair comment on matters of public concern.

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274. Tegler, supra note 9.
275. Id.
276. Feeney, supra note 12 (“[T]he novel’s protagonist, Nitta Sayuri, was not based on Iwasaki.”).
277. See Matthews, supra note 198, at 432.
278. A roman à clef is a novel written with purportedly fictional characters but who are actually real people with fictional names. The public enjoyed trying to figure out who the actual people in the novel were in real life.
279. See Prosser, supra note 197, at 786.
Supreme Court has made this privilege a constitutional one under the First Amendment. It applies to invasions of the right of privacy as well defamation claims. Prior to 1964, cases dealing with both defamation and privacy made mention of the guarantee of freedom of speech contained in the First Amendment to the U.S. Constitution.

3. Plaintiff’s Consent is a Bar to Invasion of Privacy and Publicity Iwasaki’s claim to a violation of her right to privacy and publicity would probably have failed because of her own written consent to publicity. Golden has stated publicly that he has a fax from her proving that she actually asked him to set up a U.S. publicity tour for her. Her desire to be recognized publicly and her claim to require a condition precedent of anonymity in the novel are contradictions of terms. Consent to publicity by the plaintiff in a claim of invasion of her right to privacy and publicity would result in the denial of her claims under New York law.

4. Plaintiff’s Consent is a Bar to Defamation: Viability of Claim of Slander in New York Court Plaintiff’s consent to publicity is a complete bar to a claim of defamation. Iwasaki’s vaguely alleged claim to defamation of her reputation based on Golden’s references to the sexual activity of Sayuri would probably fail because of Iwasaki’s own written consent to the novel being publicized. Golden would have easily won against Iwasaki’s claim of defamation in fiction because she consented to the publicity and converted herself into a public figure as a result of the self-imposed publicity. She also could not easily prove that the novel is “of and concerning” Iwasaki herself. In addition, Golden is protected by the most powerful of all constitutional rights, the right to free speech.

Notwithstanding the weakness of her defamation claim, Iwasaki could have alleged a viable claim of slander based on Golden’s portrayal of the geisha, Sayuri, engaging in the sex act both in the novel and in his discussions during promotional tours of the book. The basis of Iwasaki’s claim of slander would

280. Id. at 819.

281. “The right of publicity generally is defined as the right of every person to prevent the unauthorized commercial use of his or her identity. The right of publicity arose from the right of privacy and serves two primary purposes: (1) to protect all persons from the anguish that may accompany the unwanted use of their identity; and (2) to protect the property interest that persons, especially celebrities, have in their identities.” See Keller, supra note 206, at 161.


283. “In an action for defamation, the plaintiff’s consent to the publication of the defamation confers an absolute immunity or an absolute privilege upon the defendant. Stated differently, the plaintiff’s consent constitutes a complete defense to a defamation action.” 43A N.Y. Jurisprudence § 105, supra note 269.

284. See Ellison & Watts, supra note 282.
be unchastity. As far as Golden’s statements during the promotion of the novel are concerned, most courts would not look favorably at the actionability of an oral imputation of unchastity to a woman without proof of damage. However, New York, by virtue of a specific statutory provision, permits an action of slander to be maintained for unchastity without the necessity of alleging or proving special damages. In New York, any words are slanderous per se that impute unchastity to a woman. Iwasaki could have argued that Golden falsely associated sexual activity and prostitution to her when he wrote about sex acts performed by Sayuri as a geisha in the novel. If Iwasaki could prove these sex acts are “of and concerning” her, she could then have argued that Golden indirectly accused her of sexual activity, which would then constitute an actionable and possibly viable claim of slander under New York law.

5. Common-Law Copyright Infringement In *Hemingway*, the New York Court of Appeals spoke out quite clearly against the merits of a claim of common-law copyright for taped conversations where the speaker has not marked off the copyrightable utterance in question from the ordinary stream of speech. Unless the speaker can indicate that she actually intended to mark off certain parts of the taped speech as her own literary creation, the whole taped conversation would not pass muster under copyright law, as set forth in *Hemingway* (discussed below).

285. See *Prosser, supra* note 197, at 759 (“An accusation of unchastity was at first regarded as purely a “spiritual matter”—that is, a sin—and so was not actionable without proof of “temporal” damage, such as the loss of a particular marriage. This remained the law of England until 1891, when it was remedied as to the female sex by the Slander of Women Act of 1891 (54 and 55 Vict. Ch 51). Similar statutory changes of the common law rule have been made in a number of American states, and several courts have accomplished much the same result by holding that an imputation of unchastity to either sex is equivalent to a charge of the crime of adultery or fornication, which involves an infamous punishment or moral turpitude.”).

286. *Id.* at 760.

287. CLS Civ. R. Law §77.


289. *Hemingway, supra* note 267, at 256 (“Assuming, without deciding, that in a proper case a common law copyright in certain limited kinds of spoken dialogue might be recognized, it would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement, and that he wished to exercise control over its publication.”).
a. Estate of Ernest Hemingway v. Random House, Inc. The facts of Hemingway are strikingly similar to Iwasaki’s case against Golden. The defendant in both cases is Random House, and both cases involve a claim to copyright infringement of taped conversations that develop into a fictionalized biography called memoirs. In the Hemingway case, Ernest Hemingway’s widow sued the publisher (Random House), and the author (Hotchner) who wrote a biography of the writer entitled Papa Hemingway. She sued for damages and injunctive relief on the grounds that the biography consisted largely of Hemingway’s taped and confidential conversations with Hotchner. The court was called upon to decide whether conversations of a highly regarded writer may become the subject of common-law copyright even though the speaker himself did not reduce his words to a writing.

Hotchner was an intimate friend of Hemingway who had frequently recorded their personal conversations. Hotchner even published several articles about Hemingway based on these conversations. In the past, Hemingway had consented to the publication of these articles. After Hemingway’s death, Hotchner wrote Papa Hemingway based upon his notes and his recollections of conversations he had with Hemingway. The book, which is subtitled A Personal Memoir, contains lengthy quotations from these conversations.

Hemingway’s wife objected vigorously to the last two chapters of the book about Hemingway’s suicide and mental illness. She sued Hotchner claiming four causes of action, which are strikingly similar to those in Iwasaki’s case: (1) that the biography consists of literary matter composed by Hemingway and in which he had a common-law copyright (an author’s proprietary interest in his literary or artistic creations before they have been made generally available to the public, also referred to as the right of first publication); (2) that publication would constitute an unauthorized appropriation of Hemingway’s work and would compete unfairly with his other literary creations; (3) that Hotchner wrongfully used material imparted to him in the course of a confidential and fiduciary relationship with Hemingway, and (4) that the book invades the right to privacy to which Mary Hemingway herself was entitled under § 51 of the New York Civil Rights Law.

The Hemingway court held that in order to claim a common-law copyright in a taped conversation, the plaintiff must indicate that Hemingway intended to mark off the utterance in question from the ordinary stream of speech, that he

290. Id. at 253 (“Subtitled ‘a personal memoir,’ it is a serious and revealing biographical portrait of the world-renowned writer.”).
291. Id. at 253.
292. Id.
293. Id.
294. Id.
295. Id. at 254.
meant to adopt it as a unique statement, and that he wished to exercise control over its publication. Golden could similarly assert the defense that Iwasaki never marked off portions of her taped conversation from the ordinary stream of her speech, that she did not intend to adopt portions of it as unique, and that she did not express to Golden any wish to control the publication of the taped conversations. Thus, the merits of Iwasaki’s claim are weakened by the holding of *Hemingway*, and she is unlikely to have had any success in her claim of common-law copyright infringement. This is no doubt one of the primary reasons she ultimately voluntarily dismissed her Complaint even before Golden responded to it.

6. Quantum Meruit and Unjust Enrichment Defendant has a moral obligation, if not a legal one, to compensate Iwasaki for her hours spent in providing him with valuable information about the geisha life. But, if there were no oral or written agreement about compensation, there is no legal justification for her claim to quantum meruit. However, by the equity of business practice, Golden should compensate her for her services.

Golden should not have to compensate her for the profits he earned from the writing of his own book, which Iwasaki claims is unjust enrichment. If a New York court accepted the holding of the Texas court in *Matthews*, New York law would not recognize her as coauthor of this book, and therefore Iwasaki would not likely succeed on her claim of unjust enrichment.

C. What is the Likelihood That Iwasaki Would Have Succeeded on the Merits?
Iwasaki makes similar claims to those of Mary Hemingway in the *Hemingway* case. Iwasaki argues that she owns a common-law copyright to the taped conversations she had with Golden in her home. Like Mary Hemingway, Iwasaki claims Golden is unjustly enriched due to the misappropriation of her personal property. Iwasaki also similarly claims she was not remunerated for her services. As in *Hemingway*, Iwasaki bases most of her claim on the breach of an oral confidentiality agreement between Golden and herself. Iwasaki also alleges that there was a serious, confidential relationship between her and Golden that he breached. Iwasaki further claims he breached her right to privacy when he portrayed her as Sayuri and thereby misappropriated her name and likeness in the novel.

Judging from the holding of the court in *Hemingway* and the similarity of both cases, Iwasaki does not have much hope of winning. However, *Hemingway* was an easier case because the Hemingway biography containing information that Hotchner allegedly misappropriated is one of an uncontested public figure. Iwasaki is a public figure only in Japan, but she was arguably unknown to the Western world when the book first came out. However, Iwasaki became a public figure because of the publicity she created about the book. Iwasaki might have
prevailed if she claimed she is not a public figure in the United States and, therefore, has a right to privacy. However, if she claimed she is not a public figure, she could not easily win on the claim of misappropriation of her name and likeness (which has more value if she is a celebrity). Iwasaki might have prevailed if she could have persuaded the court that there was an agreement of confidentiality and anonymity between her and Golden and that Golden breached that agreement by placing her name boldly in the acknowledgment of the book. However, Golden has continued to deny the existence of any such agreement.

Iwasaki’s claims for misappropriation, right of privacy, breach of common-law copyright and coauthorship, and breach of contract are unlikely to succeed in view of the holdings in *Matthews* and *Hemingway*. Specifically, the New York Court of Appeals rejected Hemingway’s similar claims for misappropriation and copyright infringement.

Iwasaki’s claim for defamation-in-fiction will also probably fail because she consented to the publication and publicizing of the book, and consent is a complete bar to a claim of defamation.

**VI. PRETEXT**

**A. Why Did Iwasaki Really File a Complaint against Golden?**

Iwasaki may have been interested in just compensation, but she appears to have been less motivated by greed than by a personal mission to save herself and to save the geisha tradition. In interviews with newspaper reporters, Iwasaki revealed her personal, hidden motives for filing a Complaint against Arthur Golden, her former friend. She claims Golden told lies about her and about the geisha tradition. Since the publication of Golden’s book, Iwasaki has been on a mission to defend both her own reputation and the reputation of the geisha tradition, which she sees as the bastion of Japanese culture. Like an advocate for the rights of the geisha, Iwasaki was offended by Golden’s misguided association of the geisha with the prostitute, an unfortunate link that casts a long shadow of immorality over the reputation of the geishas in general and of Iwasaki in particular. Iwasaki believes that geishas are worthy of respect, not opprobrium. “Golden has mixed up the well-respected and highly educated geisha with the common prostitute in order to spice up the story for Western audiences . . . In so doing, Golden has insulted all true geishas.”

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297. See discussion supra notes 212–13 on the claim by plaintiff of coauthorship to a fictionalized biography, which was rejected by the *Matthews* court.

298. See supra text accompanying notes 290–96 for a discussion of the *Hemingway* case on the claim of coauthorship which was rejected by the court.

299. Norton, supra note 13 (“The book is lies, all lies.”).

some geisha quarters did engage in prostitution, most did not, and the perception that all geisha sleep with their clients is absolutely false,” she insisted.301 Iwasaki is defending the whole geisha tradition that she considers a vestige of old world Japanese culture and the key to the Japanese soul.302 She has set it as her personal goal to correct the misguided images of the geisha. “We [geisha] are precious goods and the livelihood of the geisha houses depends on us.”303 Iwasaki sounds like an advocate for women’s human rights when she claims that geishas are “proud, accomplished women who have absolute rights over [their] own bodies.”304

Iwasaki must also protect her own image. Having retired from the geisha life and now living in Japan as a married woman and the proud mother of two children, Iwasaki must defend her own reputation as a woman for the benefit of her family, friends, and former geisha sisters who are maligned by any association of the geisha with the prostitute. Despite much evidence to the contrary, Iwasaki insists the geishas did not perform sex for money. “The geisha world is not a place where you sell your body.”305 In short, Iwasaki does what she can to save face.

Iwasaki filed a Complaint against Golden because he offended her honor, and any slight to her personal honor is also a blow to the honor of the whole geisha profession. Golden’s painting of a less-than-clear picture about the morality of the geisha is viewed by Iwasaki as a direct attack on her honor. Given Golden’s duality and ambivalence about the geisha tradition (which he communicates in his novel), Iwasaki’s irritation with him and the resulting legal suit were inevitable. Her Complaint is more about honor than about money. That is why initially she sought only a public apology from Golden,306 not $10,000,000 in compensation. She also only “want[ed] her name removed from all future reprints of the book.”307 Her own lawyer stated that in Japan Iwasaki withdrew an official Complaint when the publisher there agreed to remove her name from the book’s acknowledgments.308 This response does not sound like a plaintiff motivated entirely by greed.

Iwasaki sued Golden because she felt betrayed by someone she considered a good friend. Arguably, this betrayal is a reenactment of the betrayal she felt towards her own father who sold her to a geisha house presumably to give her a

301. Tegler, supra note 9.
302. Hoh, supra note 35, at 46 (“[T]he geisha have retained a peculiar iconic status; some outsiders still see them as a key to unlocking the Japanese soul.”).
303. Id.
304. Id.
306. Id.
307. Id.
308. Mehren, supra note 63.
better life and to save the family’s honor. There must have been some misunderstanding about how Golden would use her material because she repeatedly refers to Golden’s betrayal of her confidence and trust. “He has betrayed me and my family,” she said. 309 “I am angry about the way he has abused my confidence and trust. He could not have written the book without my help. This is not just a personal injury law suit. I am not just doing this for myself. His book is an insult. He has shown a total lack of respect for me, my privacy and that of all geishas.” 310 This lack of respect and privacy are based on her misunderstanding that the fictional geisha is not the real geisha. She is embarrassed because Golden writes in the book that “as a young girl [the protagonist’s] virginity was ‘auctioned to the highest bidder,’ which Iwasaki falsely assumes must refer to her own life. The selling of her virginity, that rite of passage, did not happen,” said Iwasaki’s lawyer. 311

Iwasaki felt compelled to defend her own reputation as an authority on the geisha tradition because she herself (with the assistance of Rande Brown) was writing two books about her own life as a geisha and the whole geisha tradition when she filed the Complaint. Both these books were published in 2002, 312 and all the publicity surrounding Golden’s book must have helped sales of Iwasaki’s books.

For example, in defense of her own reputation as an author and authority on the geisha tradition, Iwasaki denies that geisha ever had to undergo the indignity of a deflowerment ceremony. “There was no money put on virginity in my circles.” 313 Iwasaki’s statement is true about the geisha who lived in the 1960s and 1970s, in precisely the time that Iwasaki was practicing as a geisha. But Golden’s fictional geisha lived in the 1930s and 1940s when the deflowerment ceremony was a ritual that each young geisha typically endured. 314 The real geisha assumes wrongly that she is the same person as the fictional geisha, and her identification with the fictional character is the source of her anger, which is manifested in the filing of a Complaint. Iwasaki’s statement denying deflowerment of the geisha as a ritual casts doubt on her being an authority about the history of geisha. Her denial of the deflowerment ceremony shows her lack of understanding of the evolution of the geisha tradition. In a different interview, Iwasaki is quoted as saying that “the system under which geisha operate was established in 1873 and has not changed since then.” Nothing could be farther

309. Id.
310. Id.
311. Barret, supra note 77.
312. See IWASAKI, supra note 1; IWASAKI, supra note 2.
313. Id.
314. DALBY, supra note 3, at 109–10 (“Older geisha automatically say how wonderful it is that their daughters do not have to submit to mizu-age.”).
from the truth, and studies have been done to trace the evolution of the geisha from the seventeenth century to today.

Iwasaki filed a Complaint against Golden because of a culture clash. She is Japanese, defending the old-world tradition of the geisha that she knew in 1960 and 1970; and Golden is an American writing in 1997 in the voice of a female geisha of the 1930s. This is no doubt a tour de force for a writer, but there may be moments when Golden’s assumed Japanese voice does not ring true to the Japanese reader. Iwasaki—and apparently many of the Japanese readers—do not like the book because some of the details simply do not reflect their own image of themselves as they see Japan and as they remember one of their most valued traditions, the geisha. “The vulgar details it contains about unsavoury lavatories and thigh tattoos are not to Japanese taste.”

Iwasaki also filed a Complaint against Golden because she needed to defend herself from attacks by her geisha friends who were bound, with a seriousness of purpose, to a code of silence that she clearly breached by speaking out to Golden. The reaction of her geisha friends was so violent that she thought the only way to deflect their anger was to sue the author and place the blame on him and his breach of confidentiality. The merits of this claim are dubious.

VII. CONCLUSION

Memoirs of a Geisha by Arthur Golden deserves entry into the law and literature canon. The author writes with authenticity and engaging lyricism in the many different voices of an evolving female narrator who represents the geisha in the 1930s and 1940s. With stylistic ingenuity and an elaborate array of poetic and exotic similes, Golden paints vivid portraits of characters who populate the geisha world. His poetry in prose captures the peculiarities of Japan’s geisha tradition. This book belongs in the law and literature canon because for the first time an author’s narrative technique, based on voyeurism and duality, constitutes the primary motive for a lawsuit. It is not only what Golden says about the geisha, but how he says it that provokes the real geisha to sue the author and his publisher for common-law copyright infringement, breach of contract, quantum meruit and unjust enrichment, misappropriation, right to privacy, and defamation in a work of fiction.

Iwasaki’s defamation-in-fiction claim against the author and publisher is difficult and fraught with contradictions flowing from her need to present evidence of both similarities and differences between herself and the main character of Golden’s fictional biography. In a defamation-in-fiction case, the evidentiary simultaneity of similarity and difference puts the judge and jury in a disconcerting

doublethink as they endeavor to balance the real needs of the plaintiff with the precious freedom of speech of the literary artist.

In Japan, the geisha is both revered as an artist and symbol of old-world Japanese tradition and reviled as a sex slave. Golden paints a realistic picture of the geisha and illustrates both the ugly and the beautiful aspects of the geisha tradition. For example, the recruitment of geishas by force, fraud, and deception, and the practice of selling one’s own children into a life of slavery is a heinous aspect of the geisha tradition likening it to the international crime of sex trafficking. Recruitment of children for the purposes of sexual exploitation and slave labor cannot be justified by the argument of cultural relativism. Slavery is a universal crime that is universally condemned; the recruitment of children into the geisha world is a variant of sex slavery and must be eradicated. That does not mean, however, that the geisha tradition should be outlawed entirely. As Golden points out, the geisha is the bastion of Japanese culture, the symbol of the apogee of a nation, and the representation of Japan’s most respected values: love of beauty and the arts. To ban the geisha entirely would be to violate the soul of Japan.

Iwasaki’s own perception of the geisha does not always coincide with Golden’s. Iwasaki resents Golden’s dualistic portrait of the geisha, and she herself paints only a one-dimensional picture of the geisha in her own two novels published five years after Golden’s. As an advocate for the geisha, Iwasaki’s agenda is to preserve the sanctity of the tradition and to establish a positive image of the geisha in the mind of society. Golden has a different goal, which is to provide a historically accurate slice of the geisha life. Golden's dualist image of the geisha is realistic; Iwasaki’s monolithic image of the geisha is romantic. She also shies away from the stereotype of the geisha as a courtesan, preferring to view the geisha as an artisan.

Iwasaki would have had a hard time defending her claims in court. To win the defamation-in-fiction claim, she would have had to contradict herself and prove that she both is and is not like Sayuri. Iwasaki would have had to assert that she is like Sayuri if she wanted to prove that Golden’s allegedly defamatory statements are “of and concerning” herself. However, Iwasaki would also have had to assert that she is not like Sayuri if she wanted to prove the statements made in the novel are untrue.

She would also have had a difficult time making a case for both misappropriation of her name and likeness in Golden’s work of fiction. For example, to be successful in her claim of misappropriation, Iwasaki would have had to assert that she is a public figure in Japan and in the United States because only a public figure has a property right to ration the use of her name and likeness in public. Iwasaki is caught in a conundrum because she also would have to assert that she is not a public figure to win her claim for defamation. In addition, even if she were found to be a public figure, her claim for defamation might fall afoul of New York Times v. Sullivan. That landmark case protects a writer’s freedom of
speech when reporting facts about public figures by requiring a show of actual malice. Moreover, it is not at all clear that New York Times v. Sullivan applies to works of fiction.

Iwasaki’s claim for quantum meruit has equitable, if not legal, merit because she was never paid for her more than one hundred hours of taped sessions with Golden. On the other hand, her claim to unjust enrichment, which is based on a veiled claim for misappropriation of her copyrighted tapes, has no basis under New York law. She sought to receive a large percentage of the profits of the novel based on her contention that she is the coauthor. However, Matthews does not recognize a claim of coauthorship by an information provider of a fictionalized biography. Plaintiff’s claim to the ownership of a common-law copyright in the taped conversations also has no merit based on the Hemingway holding.

Golden’s main defense against Iwasaki’s claims based on right to privacy and publicity as well as defamation is that he wrote a work of fiction whose main character is a literary creation. As a writer of fiction, he has First Amendment protections of free speech to write about information held in the public domain. This novel is not about Iwasaki, who was a geishas in the 1960s and 1970s—it is about Sayuri, who is a symbol of all geishas in the 1930s and 1940s.

Iwasaki’s consent to publicity is a bar to her claims of misappropriation of her name and likeness and her right to privacy and publicity as well as her claim to defamation of her character. Defendant also has a full-proof defense against her common-law copyright claim based on Hemingway, which requires the claimant to distinguish any literary statements from the main stream of conversations (which Iwasaki failed to do).

The real geisha has many hidden motives for suing that go beyond mere pecuniary satisfaction. Something more than money would have to justify a famous geisha from breaking the sacred code of silence and incurring the wrath of her sister geishas in Japan. Arguably, Iwasaki’s confessions to Golden were her way of expiating a deep sense of guilt about her life as a geisha. She spoke out against Golden because she is an advocate of the geisha tradition as she sees it, and she wants the rest of the world to see the geisha in that special light. After the publication of Golden’s novel, Iwasaki went on a mission to defend both her own reputation and that of the geisha tradition that she continues to see as the bastion of Japanese culture. She is offended by Golden’s association of the geisha with the prostitute, an unfortunate historically based link that casts a long shadow of immorality over the reputation of the geisha in general and of Iwasaki in particular. Moreover, Iwasaki needed to defend her reputation as an authority on the geisha tradition because she, herself, was writing two books on this same subject that she hoped would sell. Iwasaki also defended her reputation for moral reasons for the benefit of her family and children. She also sued Golden because he offended her honor and showed disrespect toward her by painting a less-than-totally positive image of the geisha in the novel. Any slight to Iwasaki’s personal honor is a blow to the honor of the whole geisha profession. Iwasaki felt betrayed,
as she once was by her father who sold her into the geisha life. Now she was betrayed by Golden, a friend whom she mistakenly assumed would be loyal enough to keep her thoughts confidential.

In addition, Iwasaki sued Golden because of a misunderstanding between them based on a culture clash. Golden is an American male writing in 1997 in the voice of a female geisha of the 1930s. To accomplish this literary feat, the author must cut through time, generations, gender, and nationality. Golden is very successful at the manipulation of these voices, especially for American reading audiences. But the Japanese readers did not appreciate some of the details he included that do not reflect the image of themselves as they see Japan. Iwasaki is offended by these cultural and perceptual differences.

Finally, Iwasaki sued Golden because she had to defend herself from attacks by her own geisha friends. To the geishas of Japan, Iwasaki’s breach of the code of silence was a serious breach of trust. Frightened and ashamed, Iwasaki tried to deflect their anger and her own humiliation by focusing her energies on a lawsuit against the author. This type of frivolous suit is not uncommon in the American courts. This novel (and the lawsuit it engenders) is of interest to the law and literature canon because it revives the defamation-in-fiction conundrum that begs the serious question of the writer’s freedom of speech, and it illustrates the limits of a common-law copyright infringement action.