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Milkovich v. Lorain Journal Co. - Demise of the Opinion Privilege in Defamation

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MILKOVICH V. LORAIN JOURNAL CO.—DEMISE OF THE OPINION PRIVILEGE IN DEFAMATION

I. INTRODUCTION

The United States has a strong commitment to freedom of speech, as embodied in the first amendment of the Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[1] At the same time, society has always viewed a person's reputation as worthy of protection from defamatory statements.[2] The law of defamation brings these two values into sharp conflict.[3] The United

1. U.S. CONST. amend. I.

2. Shakespeare emphasized the importance of a person's reputation in *Othello*, where Iago tells Othello:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.

W. SHAKESPEARE, THE TRAGEDY OF OTHELLO, act III, scene 3 (2d ed. 1966).

Approximately 400 years later, Justice Stewart articulated the Supreme Court's recognition of the same concept when he stated: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

3. Defamation consists of the "twin torts" of libel and slander. W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984) [hereinafter PROSSER AND KEETON]. A detailed discussion of the complicated law of defamation is beyond the scope of this Note. The reader may, however, find the following summary of the "black letter law" of defamation as contained in the *Restatement (Second) of Torts* to be a useful background to this Note.

In order for there to be a cause of action for defamation, there must be: (1) "a false and defamatory statement concerning another;" (2) "an unprivileged publication to a third party;" (3) some form of culpability on the part of the publisher; and (4) "either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." RESTATEMENT (SECOND) OF TORTS § 558 (1977) [hereinafter RESTATEMENT (SECOND)]. For a discussion of the falsity requirement, see *infra* note 153. To be defamatory, a communication must "tend[] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND), *supra*, § 559. In determining whether a communication has a defamatory meaning, the court will consider the meaning to be that which the recipient "correctly, or mistakenly but reasonably," believed to have been intended. *Id.* § 563. To ascertain whether the plaintiff was the subject of the communication, a court will also consider the recipient's correct, or mistaken but reasonable, understanding. *Id.* § 564. The element of publication will be satisfied when there has been an intentional or

States Supreme Court has strived to achieve a balance between the two in a series of decisions since 1964 when, in *New York Times Co. v. Sullivan*,[4] the Court employed the first amendment of the United States Constitution to give "freedoms of expression . . . the 'breathing space' that they 'need . . . to survive.' "[5]

The Court's most recent foray into the constitutional balancing required in freedom of speech/defamation cases came in *Milkovich v. Lorain Journal Co.*[6] The issue in *Milkovich* was whether a constitutional privilege existed for those defamatory statements classified as statements of "opinion."[7] Many lower courts had recognized an opinion privilege following the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*,[8] which contained dictum that the lower courts interpreted as mandating such a privilege.[9] The *Milkovich* Court held that lower courts had incorrectly recognized such a privilege,[10] and noted four factors in existing constitutional doctrine which already adequately protected statements based on opinion: (1) in certain situations, the defamatory statement must be provable as false to be actionable; (2) in certain situations, the speaker must be culpable for the defamatory statement to be actionable; (3) statements must appear to state actual facts, unlike rheto-

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negligent communication to someone other than the person defamed, including intentional and unreasonable failure to remove a defamatory communication that one knows is exhibited on his land or chattels. *Id.* § 577.

A defamatory communication will be either libelous or slanderous. *See id.* § 568 comment b. Libel consists essentially of written or printed words or other embodiment in physical form, while slander is composed of spoken words "or any other form of communication other than those stated in [the subsection defining libel]." *Id.* § 568.

4. 376 U.S. 254 (1964). For a full discussion of *New York Times*, see *infra* notes 61-64 and accompanying text.

5. *New York Times*, 376 U.S. at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). The Court held that a state defamation law which allowed recovery for libel against a public official in the absence of proof of injury, falsity, malice or damages violated the first and fourteenth amendments by not providing sufficient protection for freedom of speech. *Id.* at 264. The Court found that such protection would be provided by requiring a finding of "actual malice" as a prerequisite to recovery—a finding that the speaker acted with "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. For a further discussion of *New York Times*, see *infra* notes 61-64 and accompanying text. For a discussion of other major Supreme Court decisions evidencing the constitutionalization of defamation, see *infra* notes 65-83 and accompanying text.

6. 110 S. Ct. 2695 (1990). For a full discussion of *Milkovich*, see *infra* notes 126-86 and accompanying text.

7. *Milkovich*, 110 S. Ct. at 2701.

8. 418 U.S. 323 (1974). For a full discussion of the source and the subsequent development of the opinion privilege, see *infra* notes 89-125 and accompanying text.

9. *Gertz*, 418 U.S. at 339-40. For a discussion of the dictum on which the lower courts relied, see *infra* note 96 and accompanying text.

10. *Milkovich*, 110 S. Ct. at 2706. The Court termed the lower courts' reliance on the *Gertz* dictum to be "mistaken." *Id.*

ric or hyperbole, to be actionable; and (4) independent appellate review of findings of actual malice provides an additional safeguard for freedom of speech.[11] The Court stated that these factors, rather than "an artificial dichotomy between 'opinion' and fact," should guide the lower courts in determining whether a particular statement merits protection.[12]

This Note will examine the impact of the *Milkovich* decision on the law of defamation, first tracing the law of defamation from its ancient roots through to the development of the fair comment privilege, the historical predecessor to the opinion privilege.[13] This Note will further review the Supreme Court's constitutionalization of the law of defamation and examine the opinion privilege that lower courts developed in response to Supreme Court decisions.[14] The impact of *Milkovich* will be discussed with an emphasis on the ramifications of both abolishing the opinion privilege and requiring lower courts to apply *Milkovich*'s broad policy statements rather than the bright-line opinion/fact tests previously in use.[15] This Note will then conclude that if the lower courts attempt to perceive and apply a new bright-line test based on the general *Milkovich* principles, the result may be that statements which the Court intended to be protected will instead be deemed actionable, thus unintentionally contracting the scope of protected communications.[16]

II. BACKGROUND

In order to understand the opinion privilege as it stands today one must trace the development of defamation, particularly in medieval England, and the opinion privilege's first articulation in the fair comment privilege.

A. *History of Defamation*

The roots of defamation may be traced back as far as the days of Moses, and the principle that damage to another's reputation justified sanctions continued into more modern cultures.[17] The Roman code of

11. *Id.* at 2706-07. For a further discussion of the factors articulated by the Court, see *infra* notes 152-64 and accompanying text.

12. *Milkovich*, 110 S. Ct. at 2706.

13. For a discussion of the history of defamation, see *infra* notes 17-46 and accompanying text. For a discussion of the fair comment privilege, see *infra* notes 47-60 and accompanying text.

14. For a discussion of the Supreme Court's constitutionalization of the law of defamation, see *infra* notes 61-88 and accompanying text. For a discussion of the opinion privilege, see *infra* notes 89-125 and accompanying text.

15. For a discussion of the potential impact of *Milkovich*, see *infra* notes 207-09 and accompanying text.

16. For a discussion of the possible outcomes under the *Milkovich* principles, see *infra* notes 199-205 and accompanying text.

17. M. NEWELL, DEFAMATION, LIBEL AND SLANDER ch. 1, § 1, at 2 (1890). Examples of Mosaic laws proscribing defamation are found in the Bible. One of

the Twelve Tables punished defamation, as did the primitive codes of the Teutonic races.[18] Ancient penalties indicate both the seriousness with which these early cultures viewed defamation and the underlying importance of a person's reputation. Penalties ranged from the payment of a set sum[19] to public humiliation[20] or loss of the slanderer's tongue.[21]

The law of defamation as we know it today began to take on its current shape in medieval England. Although libel and slander are known today as the "twin torts" of defamation,[22] they had very different beginnings.[23]

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the Ten Commandments reads: "Thou shalt not bear false witness against thy neighbour." *Exodus* 20:16 (King James). Shortly thereafter, the *Book of Exodus* commands: "Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness." *Exodus* 23:1 (King James).

18. M. NEWELL, *supra* note 17, ch. 1, § 4, at 6 (discussing code of Twelve Tables); Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries—Part 1*, 40 LAW Q. REV. 302, 303-04 (1924) ("The primitive codes of the Anglo-Saxons and other Teutonic races, like the primitive code of the Twelve Tables, punished defamatory words . . . ." (footnotes omitted)).

19. *See* Holdsworth, *supra* note 18, at 303 n.8; Veeder, *The History and Theory of the Law of Defamation—Part 1*, 3 COLUM. L. REV. 546, 548 (1903). Under the *Lex Salica*, the tribal law of the ancient Salian Franks, calling a man "wolf" or "hare" would cost the speaker three shillings; falsely accusing a woman of unchastity carried a much steeper rate of forty-five shillings. Holdsworth, *supra* note 18, at 303 n.8; Veeder, *supra*, at 548; *see also* M. SMITH, THE DEVELOPMENT OF EUROPEAN LAW 124-29 (reprint ed. 1979) (discussing *Lex Salica* and other Germanic tribal laws).

20. Holdsworth, *supra* note 18, at 303 n.8; Veeder, *supra* note 19, at 548. The Norman *Costumal* not only charged the speaker with damages, but required him to publicly confess himself a liar while holding his nose with his fingers. Holdsworth, *supra* note 18, at 303 n.8; Veeder, *supra* note 19, at 548.

21. M. NEWELL, *supra* note 17, ch. 1, § 15, at 19 ("King Alfred commanded that the forger of slander should have his tongue cut out, unless he redeemed it by the price of his head."); Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350 (1975) ("A millenium [sic] ago a slanderer could lose his tongue."); Veeder, *supra* note 19, at 549 (noting that under King Alfred, slanderer would lose his tongue).

22. PROSSER AND KEETON, *supra* note 3, § 111, at 771. Courts and commentators have continuously pointed out the confusing state of the law of defamation. *See* Coleman v. MacLennan, 78 Kan. 711, 740, 98 P. 281, 291 (1908) (referring to law of defamation as "fog of fictions, inferences and presumptions"); Eaton, *supra* note 21, at 1350 (calling defamation "a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities"); Book Review, 6 AM. L. REV. 593, 593 (1872) (reviewing J. TOWNSEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL, AND ON THE REMEDY BY CIVIL ACTION FOR THOSE WRONGS (2d ed. 1872)) (pointing out that law of defamation is "beset with questions of a perplexing character" and without any "general principle for its foundation").

23. For a discussion of the law of defamation and the differences between the current laws of libel and slander, see *supra* note 3.

1. *Slander*

Actions for slander were common in England throughout the thirteenth and fourteenth centuries in local courts such as the seignorial and manorial courts.[24] Although "great men of the realm" such as dukes and barons could bring an action for defamation in the King's courts, this right was initially unavailable to the common people.[25] Commoners could either bring their action in the local courts or in the ecclesiastical courts,[26] where defamation was punished as a sin.[27] The local courts

24. *See* Eaton, *supra* note 21, at 1350 ("actions for slander became common in the English seignorial courts" in thirteenth century); Holdsworth, *supra* note 18, at 304 ("manorial and other local Courts gave remedies" for defamation); Veeder, *supra* note 19, at 549 (defamation actions common during thirteenth and fourteenth centuries in seignorial courts).

25. *See* Carr, *The English Law of Defamation—Part 1*, 18 LAW Q. REV. 255, 260-63 (1902); Book Review, *supra* note 22, at 604-05. In 1275, the first of the Statutes de Scandalis Magnatum was passed, providing civil and criminal remedies in the King's courts for "great men of the realm" who had been defamed. Carr, *supra*, at 260-61. The civil remedy was rarely used by the "great men," *id.* at 262, and the statute afforded no remedy whatsoever to commoners. Book Review, *supra* note 22, at 605.

> For the better among [the King's subjects] it seemed an ignoble thing to approve their worship otherwise than in the duel; while for the mass of the population the King's Courts were very far off, and, moreover, a cheaper, a more familiar, and perhaps a more trusted competing jurisdiction [existed] at their very doors [—the seignorial jurisdiction].

Carr, *supra*, at 263; *see also* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 409-10 (3d ed. rewritten 1923); Veeder, *supra* note 19, at 554; Book Review, *supra* note 22, at 604-05.

26. *See* 3 W. HOLDSWORTH, *supra* note 25, at 410. Holdsworth reported:

> Unless the case fell within the provisions of [the Statutes de Scandalis Magnatum] the courts of common law declined to give any action for defamatory words. . . . For defamation pure and simple the plaintiff was obliged to resort either to the local courts, which . . . freely entertained such cases, or to the ecclesiastical courts.

Id. (footnote omitted).

27. *See* R. SMOLLA, LAW OF DEFAMATION § 1.02[1] (1990). Smolla described the ceremony as follows: "The sinner would be wrapped in a white shroud and required to kneel in public, holding a lighted candle and acknowledging his false witness before the priest and parish wardens, begging the pardon of God and the injured party." *Id.* (citing L. ELDREDGE, THE LAW OF DEFAMATION § 3, at 5 (1978)); *see also* Veeder, *supra* note 19, at 551 ("The usual ecclesiastical penance for the offence was an acknowledgement of the baselessness of the imputation, in the vestry room in the presence of the clergyman and church wardens of the parish, and an apology to the person defamed."); Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 308 (1983) ("Ecclesiastical law remedied defamation by imposing on the defamer the penance of public admission of the baselessness of his or her statements."). Professor Lovell added that after the ceremony the sinner would be absolved. If he remained unrepentant, however, he could then be excommunicated. If he still refused to repent, the ecclesiastical court could order seizure of his worldly goods. Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1055 (1962); *see also* 1 A. HANSON, LIBEL AND RELATED TORTS ch. 1, ¶ 4, at 2 (1969) (in extreme cases, excommunication could be imposed as punishment).

fell into decay in the sixteenth century, and only then did the King's courts begin to entertain commoners' actions for defamation.[28] A battle for jurisdiction over the commoners' actions then developed between the King's courts and the ecclesiastical courts.[29] The King's courts were popular with many people due to the availability of damages, which were unavailable in the ecclesiastical courts.[30] If one wanted an ecclesiastical penalty such as forcing penance on the defamer, however, the defamation action needed to be brought in the ecclesiastical courts.[31]

Over time, a more systematic method developed for determining which court had jurisdiction. If the statement implied a merely spiritual offense, the appropriate forum was the ecclesiastical courts.[32] If the defamatory statement fit into a per se category, such as the imputation of a criminal offense, the defamed person could bring an action in the King's court without alleging special damages.[33] It was also possible to bring a

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The ecclesiastical courts had borrowed their law of defamation from Roman law. *See* Veeder, *supra* note 19, at 550-51. In Roman law, there were two laws used to punish defamation—the relatively mild law of *injuria*, meaning insult, and the more severe law of *libellus famosus*. Carr, *The English Law of Defamation—Part 2*, 18 LAW Q. REV. 388, 393 (1902); Veeder, *supra* note 19, at 563. The ecclesiastical courts adopted the law of *injuria*, while the Star Chamber adopted the law of *libellus famosus* to govern actions for libel. *Id.* at 550, 565. For a discussion of the Star Chamber's application of the law of *libellus famosus* to libel actions, see *infra* note 40. Eventually, the class of "[r]eproachful language which lessened one's good fame . . . grew in ecclesiastical law [from *injuria*] into the distinct title '*diffimation*.' " Veeder, *supra* note 19, at 551; *see also* Book Review, *supra* note 22, at 599.

28. Holdsworth, *supra* note 18, at 304; Veeder, *supra* note 19, at 547, 549-50, 556. Commentators differ in their estimations as to when in the sixteenth century the common law courts began their frequent involvement with defamation. Estimates range over the span of the century. *See* Holdsworth, *supra* note 18, at 304 ("It was not till the beginning of the sixteenth century that the Common Law Courts began to compete with the Ecclesiastical Courts . . . by allowing an action on the case for defamation."). *But see* R. SMOLLA, *supra* note 27, § 1.02[1] ("By the late sixteenth century the common law courts had begun to assert jurisdiction for defamation."); Veeder, *supra* note 19, at 549-50 ("When, at length, late in the sixteenth century, actions for defamation became common in the king's courts, the manorial courts were in their decay.").

29. Veeder, *supra* note 19, at 551. "[T]he rivalry between the secular and spiritual jurisdictions began" shortly after "a historic ordinance commanding that no bishop or archdeacon should thereafter hold pleas relative to ecclesiastical matters . . . in the county court." *Id.*

30. Holdsworth, *supra* note 18, at 304; *see also* Veeder, *supra* note 19, at 552. Veeder wrote: "[I]t is surprising that injured persons should have been content so long with the very limited satisfaction of seeing their defamers doing penance in a white sheet. Th[is] consideration[] doubtless contributed towards the ultimately successful aggression of the king's courts." *Id.* (footnote omitted).

31. Holdsworth, *supra* note 18, at 304. For a discussion of the various forms of ecclesiastical penalties, see *supra* note 27.

32. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries—Part 2*, 40 LAW Q. REV. 397, 399 (1924). Examples of a spiritual offense would include "call[ing] another 'heretic and one of the new learning,' or adulterer." *Id.*

33. *Id.* at 398-99. There were essentially three per se categories at the time: (1) statements imputing "commission of a criminal offense punishable by impris-

defamation action in the King's court "if it could be proved that temporal loss had been occasioned."[34] Eventually, the King's courts absorbed the jurisdiction of the ecclesiastical courts just as they had absorbed that of the seignorial courts.[35] Therefore, by the end of the seventeenth century, the law of slander was much as we know it today. Certain categories of defamatory statements were actionable even if the plaintiff had not sustained any special damage, while communications outside those categories were only actionable where temporal harm had been shown.[36] The law of libel, on the other hand, was developing along very different lines.

2. *Libel*

While the tort of slander was developing through the local, ecclesiastical and King's courts, actions for libel were developing in the Court of the Star Chamber.[37] The advent of the printing press made possible

onment;" (2) statements imputing "a contagious disease which would exclude a person from society;" and (3) statements imputing unfitness for, or misconduct in, a professional capacity. *Id.* at 398.

Under modern law, there are four classes of slander which are actionable per se, without proof of special harm: (1) a communication which imputes to another a criminal offense; (2) a communication which imputes to another a loathsome disease; (3) a communication which imputes to another a matter incompatible with his business, trade, profession, or office; or (4) a communication which imputes to another serious sexual misconduct. RESTATEMENT (SECOND), *supra* note 3, § 570.

34. Holdsworth, *supra* note 32, at 401. "Although defamation was still heard in ecclesiastic courts, the lay courts would entertain not only a slander suit for general damages if the imputation fit into a per se category, but also suits for any other slanderous imputations if special damages were shown." 1 A. HANSON, *supra* note 27, ch. 1, ¶ 5, at 3. For instance, an accusation of a lady's incontinency would be actionable in the common law court if it could be shown that the accusation had caused her to lose a marriage which was being arranged. Holdsworth, *supra* note 32, at 401.

The requirement of the King's courts that an action for slander which did not fit into a per se category establish special damages is reflected in the modern law of slander as well. RESTATEMENT (SECOND), *supra* note 3, § 575. A slanderous statement that requires proof of special damages is known as slander *per quod*. L. ELDREDGE, THE LAW OF DEFAMATION § 23, at 154 (1978). Historically, pecuniary loss was required to fulfill the "special harm" requirement. RESTATEMENT (SECOND), *supra* note 3, § 575 comment b. Modern courts, however, have "liberalized" the old rule by "find[ing] pecuniary loss when the plaintiff has been deprived of a benefit which has a more or less indirect financial value to him," such as the "society, companionship and association of friends." *Id.* For a discussion of slander per se, see *supra* note 33.

35. *See* Veeder, *supra* note 19, at 547.

36. *See* 1 A. HANSON, *supra* note 27, ch. 1, ¶ 5, at 3. For a discussion of slander per se, see *supra* note 33. For a discussion of slander *per quod*, see *supra* note 34.

37. R. SMOLLA, *supra* note 27, § 1.02[1] ("by the seventeenth century the notorious Court of Star Chamber . . . began to punish the offense of political libel"); Eaton, *supra* note 21, at 1350 (same).

The Star Chamber was an extremely powerful court which had been created

the wide circulation of printed material, followed by the advent of actions for libel at the beginning of the seventeenth century.[38] The Star Chamber had "assumed a strict control over the Press," and concurrently assumed jurisdiction over printed matter coming from the press.[39] The Court of Star Chamber treated printed defamation as a crime.[40] When the defamation concerned a public official, the statement was considered seditious and a threat to the security of the state; when the statement involved a private person, on the other hand, it was considered to risk a breach of the peace.[41] After the Restoration, which abolished the Star Chamber, common law courts continued to develop the concept of libel as a crime.[42] In the latter half of the seventeenth century, the courts began to treat libel as an independent tort for which damages were recoverable,[43] even in the absence of proof of special damages.[44]

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to "do substantial justice" where other methods would be ineffective. Veeder, *supra* note 19, at 562-63. While the Star Chamber initially punished only political statements, its jurisdiction gradually spread to encompass nonpolitical communications. R. SMOLLA, *supra* note 27, § 1.02[1]; Eaton, *supra* note 21, at 1350.

38. Veeder, *supra* note 19, at 562-63. "The new law [of libel] was first set forth in 1609, in the case *De Libellis Famosis* . . . ." *Id.* at 563. Another authority maintained, however, that the law of libel originated much earlier:

> Before the invention of printing, libels upon private persons must have been of rare occurrence, though two instances of such libels in the reign of Edward the Third are mentioned by Coke. In each of these cases the libeller was criminally punished. The art of printing was introduced into England in 1474, nearly two hundred years after the introduction of the action upon the case.

Book Review, *supra* note 22, at 604.

39. Holdsworth, *supra* note 18, at 305.

40. *Id.* The Star Chamber merely adopted a portion of the Roman law of defamation, "without regard to Roman limitations, and with certain additions adapted to the purpose in hand." Veeder, *supra* note 19, at 547. The portion of the Roman law of defamation that the Star Chamber adopted was the law of *libellus famosus*, which was in sharp contrast to the "comparatively mild law" of *injuria* that the ecclesiastical courts had adopted to govern spoken defamation (slander) a number of years before. *See id.* at 550-51, 563. For a discussion of the law of *injuria* as applied by the ecclesiastic courts to slander actions, see *supra* note 27 and accompanying text.

41. Holdsworth, *supra* note 18, at 305.

42. *Id.* "The common law Judges after the Restoration took over the law as developed by the Star Chamber, and further developed it on similar lines." *Id.*; *see also* Veeder, *supra* note 19, at 568 ("Although the Star Chamber was abolished . . . in 1640, the judges [and] the law . . . remained largely the same.").

43. The new civil doctrine of libel was first set forth in King v. Lake, 145 Eng. Rep. 552, 553 (Ex. 1667), in the late seventeenth century. *See* Veeder, *supra* note 19, at 569-70 ("The civil doctrine of libel was first announced . . . in King *v.* Lake in the Exchequer . . . .").

44. The common law courts, starting with *King v. Lake*, eliminated for the civil libel actions the requirement found in the law of slander of showing either that the statement fell under one of the categories of slander per se or that some form of special damages had been sustained. *See* Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries—Part 3*, 41 LAW Q. REV. 13, 16 (1925) (*King v. Lake* was first case to distinguish between written and spoken defamation by

At the close of the medieval period in England, therefore, there were several actions for defamation which required no proof of special damages—the entire law of libel, and communications which were slanderous per se.[45] The law then remained essentially unchanged until the beginning of the nineteenth century, when the English courts originated a defense to defamation actions entitled the "fair comment privilege."[46]

B. *The Fair Comment Privilege*

The fair comment privilege, which "protected the right of every person to fairly express opinions on matters of public interest and gen-

eliminating requirement in written defamation of showing special damages). As the *King v. Lake* court described the new law: "[A]lthough such general words spoken once, without writing or publishing them, would not be actionable; yet here they being writ and published, which contains more malice, than if they had but been once spoken, they are actionable." 145 Eng. Rep. at 553.

Under the new law of libel, damages were presumed to have been sustained, without the necessity of proof, thus eliminating some of the complexities that had plagued the law of slander. *See generally* Holdsworth, *supra*. Holdsworth pointed out that courts hearing civil libel cases were "emancipat[ed]" because they could disregard the "unprofitable rules" which had developed in the law of slander. *Id.* at 18. In addition to simplifying libel law, eliminating the requirement of showing special damages promoted lawsuits, thereby discouraging duelling. *Id.* at 17; Zimmerman, *supra* note 27, at 309.

At common law and under the *Restatement (Second)*, libel is actionable even though no special harm occurred to the plaintiff as a result of the publication. *See* L. ELDREDGE, *supra* note 34, § 23, at 155; RESTATEMENT (SECOND), *supra* note 3, § 569. Although this rule sounds uncomplicated, Professor Eldredge noted that some courts' treatment of the issue introduced confusion into the law of libel, which the early English courts had designed to eliminate the complexities of the law of slander. Professor Eldredge first distinguished between libel which is defamatory on its face and that which is innocent on its face and requires extrinsic facts to show its defamatory nature (libel *per quod*). L. ELDREDGE, *supra* note 34, § 23, at 152-56. He gave the following as an example of libel *per quod*: "The innocent-on-its-face statement was a birth announcement of twins. The extrinsic fact that the parents had at the time been married only one month gave the statement its defamatory sting." *Id.* at 153 n.4. Professor Eldredge explained that the confusion arose when some courts mistakenly used the term "libel per se" (which meant libel actionable in the absence of proof of special damages, as was all libel) to refer to statements that were defamatory on their face. This then led other courts

> to hold that if the communication was not defamatory on its face [and required extrinsic facts to show its defamatory nature, thereby making it libelous *per quod*], it was not "libel per se," and therefore was not actionable without proof of special damages. These courts . . . disregarded the fact that proof of special damages was *never* required in libel cases . . . .

Id. at 156 (emphasis added). Professor Eldredge concluded that, as of 1965, 12 jurisdictions required proof of special damages in some libel cases, and expressed his hope that "courts that have adopted the 'libel per quod' rule . . . will reconsider their actions." *Id.* § 24, at 174, 176.

45. *See* Veeder, *supra* note 19, at 571 (summarizing law of defamation as it existed at end of seventeenth century).

46. For a discussion of the genesis of the fair comment privilege, see *infra* notes 47-53 and accompanying text.

eral concern,"[47] is the source of the opinion privilege at issue in *Milkovich*.[48] The fair comment privilege required courts to distinguish between statements of fact and those of opinion, foreshadowing the distinction courts would be called on to make under the opinion privilege.[49]

The privilege of fair comment is qualified, so that the speaker may lose the protection afforded by the privilege if he acts in bad faith or otherwise abuses the privilege.[50] While the concept of a general qualified privilege arose in 1597,[51] its specific embodiment in the fair com-

47. Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817, 1819 (1984) [hereinafter Note, *Bright-Line Rule*]. Commentators differ as to whether fair comment is a right, a privilege or a defense. *See* Carman, Hutchinson v. Proxmire *and the Neglected Fair Comment Defense: An Alternative to "Actual Malice,"* 30 DE PAUL L. REV. 1, 2 n.5 (1980) (noting dispute as to whether fair comment is privilege or defense; article uses various terms and "does not involve itself in this argument"); Note, *Bright-Line Rule*, *supra*, at 1819 n.14 (noting dispute as to "whether fair comment is a privilege, a right, or a defense"). This Note will refer to fair comment as a privilege, without intending to indicate any theoretically-based preference for this term. For a discussion of the elements necessary to establish the privilege of fair comment, see *infra* note 54 and accompanying text. For general discussions on the fair comment privilege, see Carman, *supra*; Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962); Note, *Fair Comment*, 62 HARV. L. REV. 1207 (1949).

48. 110 S. Ct. 2695 (1990). The fair comment privilege is the source of the opinion privilege in that it was the device first employed by courts to "strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech." *Id.* at 2703. The opinion privilege was later employed to maintain this balance. *See, e.g.*, Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 380-85, 366 N.E.2d 1299, 1306-09, 397 N.Y.S.2d 943, 950-53 (utilizing opinion privilege and noting privilege's role in promoting open discussion), *cert. denied*, 434 U.S. 969 (1977).

49. Under the majority view, courts drew a distinction between fact and opinion and limited the privilege of fair comment to statements of opinion. The minority view, on the other hand, extended the privilege to defamatory statements of both opinion and false fact. *See* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 901 (8th ed. 1988); Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 891 (1949); Note, *Fact and Opinion After* Gertz v. Robert Welch, Inc.: *The Evolution of a Privilege*, 34 RUTGERS L. REV. 81, 89 (1981). Twenty-six states favored the majority view, while nine states and most scholars adhered to the minority view. Noel, *supra*, at 891 & n.83, 896 & nn.102-03.

50. R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS § VI.1, at 267 (1980). Compare qualified immunity with absolute immunity, which is granted to a speaker solely on the basis of his position or status and is not defeasible by reason of bad faith. *Id.*

51. *See* Vanspike v. Cleyson, 78 Eng. Rep. 788 (Q.B. 1597). In *Vanspike*, the defendant made a statement to a third party to whom the plaintiff owed money: "You had best call for it; take heed how you trust [the plaintiff]." *Id.* at 788. The court held that the statement did not constitute libel, but was merely "good counsel" to the third party. *Id.* Holdsworth termed *Vanspike* "the germ of the idea which will cover most of the cases of qualified privilege in later law." Holdsworth, *supra* note 44, at 16.

ment privilege appears to have originated in the early 1800s in England for the purpose of promoting discussion on matters of public interest.[52] Subsequently, the American courts adopted the privilege as well.[53]

The elements necessary to establish the modern version of the fair comment privilege include: (1) the allegedly defamatory statement must be one of opinion, and not fact; (2) the opinion must be based on truly stated facts; (3) the opinion must not be an overly personal attack against the plaintiff; (4) the opinion must be related to a matter of public interest; and (5) the opinion must not be stated with malice.[54]

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52. In order to be actionable, a defamatory statement must be false. RESTATEMENT (SECOND), *supra* note 3, § 558; RESTATEMENT OF TORTS § 558 (1938) [hereinafter RESTATEMENT]. The common law took the position, nonetheless, that a defamatory statement of opinion was actionable even though a statement of opinion is inherently incapable of being either true or false. *Milkovich*, 110 S. Ct. at 2702; RESTATEMENT (SECOND), *supra* note 3, § 566 comment a; R. SMOLLA, *supra* note 27, § 6.02[1]. In order to carve out an area of protected speech within the broad scope of the law of defamation, courts developed the fair comment privilege. *See, e.g.*,Tabart v. Tipper, 170 Eng. Rep. 981, 982 (K.B. 1808) ("Liberty of criticism must be allowed . . . . Fair discussion is essentially necessary to the truth of history, and the advancement of science."); *see also Milkovich*, 110 S. Ct. at 2703 ("[D]ue to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of 'fair comment' was incorporated into the common law as an affirmative defense to an action for defamation."); Trager & Chamberlin, *The Dangerous Exception to Protection for Opinion*, COMM. & L., Dec. 1989, at 51, 53 ("[T]o prevent self-censorship based on fear of being sued for libel or slander, the courts granted certain protections. . . . [These protections included] a qualified immunity from defamation actions to allow the expression of opinions regarding subjects of public interest."); Note, *Bright-Line Rule*, *supra* note 47, at 1819 ("[C]ourts believed the social value of freely distributed comment outweighed the potential harm to the individual criticized.").

53. *See* Coleman v. MacLennan, 78 Kan. 711, 723, 98 P. 281, 285 (1908) (recognizing privilege to speak on "matters of public concern, public men, and candidates for office;" privilege qualified in that plaintiff may recover upon a showing of malice); Gott v. Pulsifer, 122 Mass. 235, 238-39 (1877) (recognizing newspaper's right to publish "fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest;" publication privileged unless malice is proved); Eikhoff v. Gilbert, 124 Mich. 353, 359, 83 N.W. 110, 112-13 (1900) (recognizing a right to state opinions on character or conduct of candidate for public office, so long as opinions stem from "honest belief" and are not stated as facts); Triggs v. Sun Printing & Publishing Ass'n, 179 N.Y. 144, 154, 71 N.E. 739, 742 (1904) (recognizing "a right to comment on matters of public interest, so long as one does so fairly, with an honest purpose, and not intemperately and maliciously").

54. Carman, *supra* note 47, at 11 (citing RESTATEMENT (SECOND) OF TORTS § 566 (1977) and RESTATEMENT OF TORTS §§ 606-610 (1938)); *see also* Note, *Bright-Line Rule*, *supra* note 47, at 1819 n.20.

Only the majority view requires that the statement be one of opinion in order to be protected under the fair comment privilege. Likewise, the requirement of truly stated facts would only be applicable to the majority view, since under the minority view, opinions, false statements of fact and presumably opinions based on such false statements of fact are protected. For a discussion of the majority and minority views on fair comment, see *supra* note 49.

While the Supreme Court in *New York Times Co. v. Sullivan*[55] apparently recognized the fair comment privilege,[56] nonetheless, some commentators viewed the Court's later dictum in *Gertz v. Robert Welch, Inc.*[57] as having supplanted fair comment by establishing an opinion privilege.[58] Other commentators, however, viewed fair comment as remaining viable after *Gertz*.[59] It remains to be seen whether the Court's eradication of the opinion privilege in *Milkovich* will breathe new life into the fair comment privilege.[60] After *Milkovich*, which has abolished the

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Some commentators make no mention of the requirement that the statement not constitute an overly personal attack. *See* RESTATEMENT, *supra* note 52, § 606; Note, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1002 (1986) [hereinafter Note, *Statements of Fact*]; Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809, 811 (1988).

55. 376 U.S. 254 (1964).

56. *Id.* at 292 n.30. As the Court stated:

> Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of facts. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

Id. (citation omitted).

57. 418 U.S. 323 (1974). The *Gertz* Court, in dictum, explained: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-40.

58. Prosser and Keeton opined that if all opinions were to be deemed nonactionable, then there would no longer be any purpose for the fair comment privilege and it would thus be eliminated "in favor of a much broader absolute privilege." PROSSER AND KEETON, *supra* note 3, § 113A, at 815. The *Restatement (Second) of Torts* even went so far as to omit Title B of Chapter 25, the title that had previously discussed fair comment. In the words of the American Law Institute: "A statement of opinion that does not imply a defamatory statement of fact is no longer actionable, and no privilege is needed." RESTATEMENT (SECOND), *supra* note 3, §§ 606-610 note on status of title.

59. "Reports of the demise of the fair comment privilege may, like the premature reports of the death of Mark Twain, be greatly exaggerated." R. SMOLLA, *supra* note 27, § 6.02[4][b]. One commentator has suggested that the fair comment privilege may provide a vehicle that would enable courts to avoid restricting freedom of speech in the face of "a constricted category of public figures." Carman, *supra* note 47, at 2-3; *see also* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 875 n.192 (1984) (discussing various ways in which fair comment privilege "may retain a continuing role").

60. Professor Smolla, prior to *Milkovich*, suggested two reasons why the fair comment privilege may remain viable as an alternative to the opinion privilege. R. SMOLLA, *supra* note 27, § 6.02[4][b]. First, since courts are generally predisposed to avoid deciding cases on constitutional grounds where possible, Smolla opined that they may prefer to decide cases using the state law basis of fair comment rather than on the constitutional basis of the opinion privilege. *Id.* Second, Smolla theorized that "courts may feel bolder in experimenting with more

opinion privilege and substituted pre-existing constitutional principles in its place, lower courts may feel more comfortable using non-constitutional grounds like the fair comment privilege to decide cases rather than the constitutional doctrine on which they have not placed sole reliance in the past. Alternatively, if the lower courts perceive that the constitutional doctrine set forth in *Milkovich* will not protect a statement of opinion to the same extent as would the fair comment privilege in a given case, they may wish to employ the fair comment privilege in order to provide maximum protection for the statement. Unfortunately, the full effect of *Milkovich*, the latest decision in a series of Supreme Court opinions constitutionalizing defamation, is still undetermined.

C. *The Constitutionalization of Defamation*

The law of defamation was first subjected to constitutional guidelines in *New York Times Co. v. Sullivan*.[61] The United States Supreme Court Justices agreed that an Alabama rule of law allowing a public official to recover for libel in the absence of legal injury, malice or proof of general damages was "constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct."[62] The Court held that, in order to recover, the public official had to prove that the defendant had acted with actual malice.[63] Actual malice, said the Court, would

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expansive protection for opinion on a common law basis than as a matter of constitutional law." *Id.*

61. 376 U.S. 254 (1964). The *New York Times* had published a full page advertisement which stated that blacks in the South were "being met by an unprecedented wave of terror" in their effort to uphold the guarantees of the Constitution and the Bill of Rights. *Id.* at 256. The ad described certain events constituting this wave of terror. *Id.* at 257. Respondent, who supervised the Police Department of the city of Montgomery, Alabama, contended that certain references to the police and police activities concerned him and were false. *Id.* at 257-59. He sued for libel. *Id.* at 256. The trial court instructed the jury that since the statements were "libelous per se" and no privilege attached, the jury need only find that the statements were "of and concerning" the respondent in order to find the New York Times Company liable. *Id.* at 262. The trial judge instructed the jury that legal injury, falsity, malice and general damages were presumed, although the jury would need to find actual malice in order to award punitive damages. *Id.* The trial judge's sole instruction concerning actual malice was that "mere negligence or carelessness" was not enough. *Id.* The jury awarded respondent $500,000 in damages. *Id.* at 256. On appeal, the Alabama Supreme Court "sustained the trial judge's rulings and instructions in all respects." *Id.* at 263. For a general discussion of *New York Times*, see Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986).

62. *New York Times*, 376 U.S. at 264.

63. *Id.* at 279-80. The Alabama Supreme Court had held that the *Times*' "irresponsibility" was sufficient to constitute malice. *Id.* at 263.

The concept of "actual malice" as used by the Supreme Court differs from common law malice, which is "roughly equivalent to ill will." Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1,

be present when the defendant had acted "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[64]

A few years thereafter, *Curtis Publishing Co. v. Butts*[65] extended the *New York Times* requirement of malice to defamation actions involving public figures.[66] Five Justices agreed that if the *New York Times* standard

48 (1983). The Court later clarified the distinction when it stated that "ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* [actual malice] standard." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n.18 (1971).

64. *New York Times*, 376 U.S. at 279-80. In arriving at the actual malice standard, Justice Brennan, delivering the Court's opinion, first determined that the availability of the defense of truth was inadequate to preserve the free exchange of speech. *Id.* at 279. He noted that the potentially heavy burden of proving the defense of truth was on the defendant. *Id.* This would dissuade "would-be critics of official conduct" from such criticism, even though known to be true, because of a fear that they would be unable to prove their speech was truthful and thus would be liable for defamation. *Id.* The critics would then only make statements they could easily prove true, and statements in the less provable zone would not be disseminated to the general population. *Id.* Thus, according to Justice Brennan, the truth defense did nothing towards assuaging the dampening effect of the Alabama defamation law on criticism of public conduct. *Id.* Noting that a number of state courts had adopted a similar rule, Justice Brennan then set forth the Court's holding regarding actual malice—in the absence of actual malice, statements regarding public officials are protected, even where the statements involve false defamatory assertions of fact. *Id.* at 279-83.

Finally, Justice Brennan analogized the standard set forth for criticism of a public official to the qualified privilege that an official himself enjoys on official matters. *Id.* at 282. Justice Brennan determined that failure to grant the general public a privilege similar to that available to the official would "give public servants an unjustified preference over the public they serve." *Id.* at 282-83.

Justices Black and Goldberg each authored a concurring opinion in which Justice Douglas joined. These three Justices would have gone even further than the majority in protecting criticism of official conduct by declaring such criticism to be unconditionally protected. *See id.* at 293 (Black, J., concurring) (Constitution completely proscribes recovery by public officials in defamation actions, rather than merely delimiting states' authority to allow such recovery); *id.* at 298 (Goldberg, J., concurring in the result) (Constitution gives an "absolute, unconditional privilege to criticize official conduct").

65. 388 U.S. 130 (1967). In *Butts*, the petitioner published an article in the *Saturday Evening Post* which accused respondent, the athletic director and a former coach for the University of Georgia, of trying to fix a football game. *Id.* at 135-36. The trial court awarded Butts $460,000 in damages on his libel claim. *Id.* at 138. Petitioner moved for a new trial on the theory that *New York Times*, which the United States Supreme Court had recently decided, required a finding of actual malice in order for Butts to recover damages. *Id.* The trial court denied the motion on the basis that the *New York Times* requirement of actual malice applied only to public officials, which Butts clearly was not, and furthermore, that the jury could have found that petitioner had in fact acted with actual malice. *Id.* at 138-39. The United States Court of Appeals for the Fifth Circuit affirmed on the ground that, since petitioner was chargeable with knowledge of the proceedings in *New York Times* and nonetheless failed to advance a constitutional claim, it had waived its right to make the claim. *Id.* at 139.

66. *Id.* at 164 (Warren, C.J., concurring in the result). Justice Harlan, writing for the majority, found that Butts constituted a public figure because he

were "[e]venly applied to [defamation] cases involving 'public men'—whether they be 'public officials' or 'public figures'—it [would] afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect."[67]

Rosenbloom v. Metromedia, Inc.[68] appeared to further extend first amendment protection by applying the *New York Times* malice standard to all actions by a private individual against a media concern when the individual had been involved in "an event of public or general concern."[69] The Court seemed to retreat from the broad protection of *Rosenbloom*, however, in *Gertz v. Robert Welch, Inc.*[70] In *Gertz*, the Court held

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"commanded a substantial amount of public interest" due to his "position alone." *Id.* at 154-55. The opinion of the Court stated that the appropriate standard to be applied to public figures was "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. Three other Justices joined in Justice Harlan's opinion. *Id.* at 133. A total of five Justices, however, instead endorsed Chief Justice Warren's concurring opinion that the *New York Times* standard of malice should be adhered to in cases involving public figures, as well as cases involving public officials. *See id.* at 164 (Warren, C.J., concurring in the result); *id.* at 170 (Black, J., concurring and dissenting) (Justice Douglas joined in Justice Black's opinion); *id.* at 172 (Brennan, J., concurring and dissenting) (Justice White joined in Justice Brennan's opinion). Thus, a majority of the Justices adopted the *New York Times* standard.

67. *Id.* at 165 (Warren, C.J., concurring in the result).

68. 403 U.S. 29 (1971). Respondent's radio station, WIP, had broadcast several news stories relating to petitioner's arrest for possession of obscene literature and his subsequent lawsuit for injunctive relief from publicity and police interference. *Id.* at 33-35. The broadcasts variously referred to "[s]mut [m]erchants," "obscene books" (instead of allegedly obscene), "girlie-book peddlers" and "smut literature racket." *Id.* at 33-34. After a jury acquitted petitioner on the criminal obscenity charges, he sued respondent for libel under Pennsylvania law. *Id.* at 36. The trial judge instructed the jury that in order to find for petitioner they would need to find that WIP either "intended to injure the plaintiff personally or . . . exercised the privilege [of reporting] unreasonably and without reasonable care." *Id.* at 39. The jury awarded petitioner $25,000 in general damages and $725,000 in punitive damages, but the trial court reduced the punitive damages award to $250,000. *Id.* at 40. On appeal, the Third Circuit held the *New York Times* standard to be applicable on this matter of public concern involving a private plaintiff, and found that the standard had not been met. *Id.*

69. *Id.* at 52. The Supreme Court agreed with the court of appeals that the required *New York Times* standard of malice had not been met. *Id.* at 55-56.

70. 418 U.S. 323 (1974). Petitioner Gertz, an attorney, was representing the family of a boy who had been shot by Nuccio (a policeman) in a civil suit against Nuccio. *Id.* at 325. Nuccio was concurrently on trial for the homicide. *Id.* Respondent's magazine published an article entitled *FRAME-UP: Richard Nuccio And The War On Police* which, *inter alia*, falsely labeled Gertz a "Leninist" and a "Communist-fronter." *Id.* at 325-26. Petitioner brought a libel action in the district court, and the court essentially ruled that since petitioner was neither a public official nor a public figure, the *New York Times* standard was inapplicable. *Id.* at 328. The court discounted respondent's argument that the *New York Times* standard was applicable due solely to the presence of a public issue, and submitted the case to the jury under a theory of libel per se in which the sole issue for the jury was that of damages. *Id.* at 328-29. The jury awarded petitioner

that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[71] Nevertheless, the Court retained the requirement that the *New York Times* standard of actual malice be met for recovery of punitive damages.[72]

Bose Corp. v. Consumers Union of United States, Inc.[73] was the next major

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$50,000. *Id.* at 329. The district court then changed its position. Anticipating the impending *Rosenbloom* decision, it granted judgment notwithstanding the verdict on the basis that the presence of a public issue mandated the imposition of the *New York Times* standard, which it found not to have been met. *Id.* at 329-30. The Court of Appeals for the Seventh Circuit affirmed on the basis of the *Rosenbloom* decision, which by that time had been handed down by the United States Supreme Court. *Id.* at 330-32. For general discussions of *Gertz*, see Ashdown, Gertz *and* Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976).

71. *Gertz*, 418 U.S. at 347. In arriving at the majority's conclusion, Justice Powell first discussed the tension inherent in balancing "the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." *Id.* at 342. He then noted that while, as a theoretical matter, the balancing should be performed on a case by case basis, as a practical matter, such an "*ad hoc*" approach would be unworkable and general rules were needed. *Id.* at 343-44. Justice Powell concluded that while the *New York Times* malice standard determined the protection afforded to speech regarding public officials and public persons, the same standard should not be applied to private individuals because "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery" because they have not chosen to subject themselves to public scrutiny as have most public officials and public figures. *Id.* at 342-45. The standard that the Court articulated for private individuals "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." *Id.* at 348.

Although the Court did not expressly limit its decision to media defendants (the factual situation in *Gertz*), some lower courts refused to extend the holding in *Gertz* to nonmedia defendants. For a discussion of the lower court split on the applicability of *Gertz* to nonmedia defendants, see *infra* note 153.

72. *Gertz*, 418 U.S. at 349. In concluding that where a plaintiff does not establish the *New York Times* standard of actual malice he is limited to recovering damages for actual injury suffered, Justice Powell reasoned that "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury." *Id.* Therefore, Justice Powell determined that "state remedies for defamatory falsehood [should] reach no farther than is necessary to protect the legitimate interest involved." *Id.*

Gertz also set forth the famous dictum which gave rise to the opinion privilege. For the text of this dictum and a discussion of how it produced the opinion privilege, see *infra* notes 96-97 and accompanying text.

73. 466 U.S. 485 (1984). The suit stemmed from a negative review of petitioner's loudspeaker system which was published in respondent's magazine, stating that "individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander about the room." *Id.* at 488. Petitioner filed a product disparagement action in the district court, which held that petitioner was a public figure under *Gertz* and that the requisite malice standard

defamation case decided by the Supreme Court. In its holding, the Court established that the "clearly erroneous" standard of appellate review prescribed by Rule 52(a) of the Federal Rules of Civil Procedure is inapplicable to a finding of actual malice under *New York Times*.[74] Rather, an appellate court must "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."[75]

Whereas the Court's major defamation decisions prior to 1985 had involved either public persons or matters of public concern, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[76] the Court was called on to con-

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of *New York Times* had been met. *Id.* at 489-91. On appeal, the United States Court of Appeals for the First Circuit reversed due to its finding that the evidence fell short of establishing the *New York Times* standard. *Id.* at 492. The Supreme Court granted certiorari in order to decide whether the court of appeals was correct in conducting an independent review of "the record to ensure that the district court ha[d] applied properly the governing constitutional law and that the plaintiff ha[d] indeed satisfied its burden of proof," or whether it should instead have applied the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. *Id.* at 492-93 (quoting Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 195 (1st Cir. 1982)).

74. *Id.* at 514. Justice Stevens, writing for the majority, first reiterated the principle that the independent review of the record called for in determining the presence of actual malice is not proscribed by Rule 52(a). *Id.* at 499. Furthermore, as Justice Stevens pointed out, the rule "does not inhibit an appellate court's power to correct errors of law, including . . . mixed findings of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Id.* at 501. With these principles established, Justice Stevens set forth three important characteristics of the *New York Times* malice requirement: first, the requirement of actual malice originated at common law where the judge played a large role in determining the existence of malice; second, the concept of malice is an evolutionary and largely judge-made concept; and third, due to the importance of malice as a constitutional protection, it is "imperative" that the concept be properly applied. *Id.* at 501-02.

75. *Id.* at 514. After an in-depth examination of the characteristics of the *New York Times* standard of actual malice and a review of other first amendment cases in which appellate courts conducted independent review, Justice Stevens concluded that independent review of findings of *New York Times* actual malice was appropriate as well. *Id.* at 502-11.

76. 472 U.S. 749 (1985). Petitioner had provided five of its subscribers with a credit report on respondent indicating that respondent had filed for bankruptcy. *Id.* at 751. In actuality, it was one of respondent's former employees who had filed for bankruptcy. *Id.* at 752. A 17-year-old employee of petitioner had erred in his report, and petitioner had not checked the accuracy of the report prior to distributing it to subscribers. *Id.* Respondent brought a defamation action in Vermont state court, and the jury awarded respondent both presumed damages, which are those awarded in the absence of proof of actual injury, and punitive damages. *Id.* at 752, 760-61. Petitioner moved for a new trial on the grounds that *Gertz* required a finding of actual malice as a precondition to the award of punitive or presumed damages. *Id.* at 752. The trial court granted the motion, and the Vermont Supreme Court reversed on the basis that nonmedia speakers "are not 'the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny.' " *Id.* at 753 (quoting Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 73-74, 461 A.2d 414, 417-18 (1983)) (citation omitted). The Supreme Court affirmed, "although

sider a case which involved a private figure plaintiff, a private figure defendant and a matter not of public concern. The issue before the Court was whether a showing of actual malice was necessary to recover presumed and punitive damages in a case not involving a matter of public concern.[77] The Court, after balancing "the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression," held that allowing such recovery in the absence of malice was not violative of the first amendment.[78]

In *Philadelphia Newspapers, Inc. v. Hepps*,[79] the Court returned to consideration of the scope of defamation law on a matter of public concern.[80] Although the Court in *Dun & Bradstreet* had refused to impose first amendment protections on speech not involving a public person or a public issue, *Hepps* extended the protection which *Gertz* had already afforded to speech concerning private plaintiffs on matters of public concern.[81] While at common law defamatory statements were presumptively false, *Hepps* abolished this presumption in cases involving a media

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for reasons different from those relied on by the Vermont Supreme Court." *Id.* For a discussion of the Supreme Court's rationale and holding in *Dun & Bradstreet*, see *infra* note 78 and accompanying text. For a general discussion of *Dun & Bradstreet*, see Smolla, Dun & Bradstreet, Hepps, *and* Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1535-45 (1987).

77. *Dun & Bradstreet*, 472 U.S. at 751.

78. *Id.* at 757, 763. The analysis which Justice Powell employed in arriving at the holding in *Dun & Bradstreet* was the same as that which he employed in *Gertz*—a balancing of the state's interest in protecting and compensating injuries to reputation against first amendment protections for freedom of speech. *Id.* at 757. Justice Powell found the strength of the state's interest in protecting reputation to be precisely the same as it was in *Gertz*. *Id.* The first amendment interest at issue in this case, protecting speech on matters of private concern, however, was significantly less than the constitutional interest in *Gertz*, protecting speech on matters of public concern. *Id.* at 758. While in *Gertz* the first amendment interest had outweighed the state's interest in awarding presumed and punitive damages without a showing of malice, in this case the first amendment interest was not strong enough to overcome the state's interest in awarding such damages. *Id.* at 760-61.

79. 475 U.S. 767 (1986). In *Hepps*, appellees sued appellant, Philadelphia Newspapers, Inc., for defamation based on a series of articles in the *Philadelphia Inquirer* implying that appellees had "links to organized crime and used some of those links to influence . . . governmental processes." *Id.* at 769. Under Pennsylvania law, defamatory statements were presumptively false. *Id.* at 770. The trial court, however, ruled that this traditional presumption violated the United States Constitution and therefore instructed the jury that plaintiff had the burden of proving falsity. *Id.* The jury found for Philadelphia Newspapers, and appellees appealed directly to the Pennsylvania Supreme Court. *Id.* at 771. The Pennsylvania Supreme Court interpreted *Gertz* as "simply requiring the plaintiff to show *fault* in actions for defamation," rather than requiring "a showing of *falsity*." *Id.* (emphasis added). For a general discussion of *Hepps*, see Smolla, *supra* note 76, at 1525-31.

80. *Hepps*, 475 U.S. at 768-69.

81. *Id.* Justice O'Connor, writing for the Court, limited the holding in

defendant and matters of public concern.[82] The Court stated: "[W]e believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could 'only result in a deterrence of speech which the Constitution makes free.' "[83]

The Court's major decisions constitutionalizing defamation may be summarized as follows. A finding of actual malice is necessary in order for a statement concerning a public official or public figure to be actionable.[84] A finding of malice is also necessary for a private figure to recover punitive damages on a matter of public concern, at least where a media defendant is involved. For a private figure to recover only general damages, however, at least where there is a matter of public concern, the states may set their own standard of fault as long as *some* fault is required.[85] Also applicable to a private plaintiff on a matter of public concern is *Hepps'* requirement that the plaintiff bear the burden of proving falsity, at least in cases involving media defendants.[86] Finally, all findings of actual malice are subject to independent appellate review.[87]

While the lower courts recognized these holdings, they also recognized a principle not contained explicitly in any holding of the Supreme Court—that, pursuant to dictum in *Gertz*, statements of opinion were en-

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Hepps to cases where "a newspaper publishes speech of public concern" and subsequently a "private-figure plaintiff" is attempting to recover damages. *Id.*

82. *Id.* at 776-77. The *Hepps* Court explicitly reserved judgment on whether private plaintiffs on matters of public concern must similarly prove falsity against nonmedia defendants. *Id.* at 779 n.4. Accordingly, lower courts have split on this issue. For a discussion of the lower court split, see *infra* note 153.

83. *Hepps*, 475 U.S. at 777 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)). Justice O'Connor's analysis in the majority opinion began with the proposition that in cases where it is impossible to prove whether the speech at issue is true or false, the burden of proof will be dispositive. *Id.* at 776. No matter whether the plaintiff or the defendant has the burden of proving, respectively, falsity or truth, some cases would result in which the outcome would be "at variance with the outcome that we would desire if all speech were either demonstrably true or demonstrably false." *Id.* Since placing the burden of proving truth on the defendant would have a "chilling" effect on free speech, Justice O'Connor concluded that the burden of proving falsity should instead be placed on the private-figure plaintiff in cases involving a media defendant on a matter of public concern. *Id.* at 776-77.

84. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (public figure); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (public official). For a discussion of *Butts*, see *supra* notes 65-67 and accompanying text. For a discussion of *New York Times*, see *supra* notes 61-64 and accompanying text.

85. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). For a discussion of *Gertz*, see *supra* notes 70-72 and accompanying text. For a discussion of *Dun & Bradstreet*, see *supra* notes 76-78 and accompanying text.

86. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). For a discussion of *Hepps*, see *supra* notes 79-83 and accompanying text.

87. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984). For a discussion of *Bose*, see *supra* notes 73-75 and accompanying text.

titled to their own constitutional privilege.[88] The lower courts then set out to define the scope and nature of this privilege.

D. *Development of the Opinion Privilege*

Traditionally, statements of opinion regarding matters of public interest had been protected by the fair comment privilege.[89] Following the *Gertz* decision, many state courts and lower federal courts determined that the first amendment mandated a blanket privilege for all opinions, even those unprotected under the traditional fair comment privilege by reason of their being outside the realm of public interest.[90]

The courts based their determinations that the Supreme Court had mandated an opinion privilege on three cases: *Gertz*,[91] *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*[92] and *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*.[93] *Bresler* held that a word used as "no more than rhetorical hyperbole, a vigorous epithet" was not actionable,[94] while the Court held in *Letter Carriers* that words

88. *See, e.g.*, Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.) ("[o]pinion is absolutely protected under the First Amendment" (citing *Gertz*, 418 U.S. at 339)), *cert. denied*, 479 U.S. 883 (1986); Lauderback v. American Broadcasting Cos., 741 F.2d 193, 195 (8th Cir. 1984) ("right of free speech provides absolute protection to statements which are purely opinions" (citing *Gertz*, 418 U.S. at 339-40)), *cert. denied*, 469 U.S. 1190 (1985); Mashburn v. Collin, 355 So. 2d 879, 884 (La. 1977) (*Gertz* "strongly indicated . . . that mere comment or opinion on public matters, even though defamatory, enjoys the unqualified protection of the First Amendment"); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 380, 366 N.E.2d 1299, 1306, 397 N.Y.S.2d 943, 950 ("[o]pinions . . . are constitutionally protected and may not be the subject of private damage actions"), *cert. denied*, 434 U.S. 969 (1977); Braig v. Field Communications, 310 Pa. Super. 569, 580-81, 456 A.2d 1366, 1372-73 (1983) (adopting RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977) and "recogniz[ing] that [a] 'pure' expression of opinion is absolutely privileged as a result of *Gertz*"), *cert. denied*, 466 U.S. 970 (1984).

89. For a discussion of the fair comment privilege and the elements thereof, see *supra* notes 47-60 and accompanying text.

90. For a discussion of the viability of the fair comment privilege, see *supra* notes 57-60 and accompanying text.

91. For a discussion of *Gertz*, see *supra* notes 70-72 and accompanying text.

92. 418 U.S. 264 (1974).

93. 398 U.S. 6 (1970).

94. *Id.* at 14. The petitioner had printed two articles which stated that respondent's negotiations with the city had been characterized by some people as "blackmail." *Id.* at 7. Respondent contended that the use of the word "blackmail" imputed that crime to him, and since he had not committed such an offense, the statements were false and therefore libelous. *Id.* at 13. The Court held that because any reader would conclude that the word "blackmail" was being used as hyperbole and not as an imputation of a criminal offense, the statement was protected under the Constitution. *Id.* at 14-15. *The Oxford English Dictionary* defines hyperbole as "[a] figure of speech consisting in exaggerated or extravagant statement, used to express strong feeling or produce a strong impression, and not intended to be understood literally." 7 THE OXFORD ENGLISH DICTIONARY 559 (2d ed. 1989).

used "in a loose, figurative sense to demonstrate . . . strong disagreement with the views [of another]" were similarly inactionable.[95]

In *Gertz*, the Court had commented in dictum that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[96] The lower courts read *Gertz* in conjunction with the holdings in *Bresler* and *Letter Carriers* and concluded that they must recognize a privilege for statements of opinion.[97]

Accordingly, the lower courts developed a variety of tests to determine whether a statement was one of fact, and therefore potentially actionable, or one of opinion for which no action would lie. Three primary categories of tests emerged: The *Restatement (Second) of Torts* test,[98] the verifiability test,[99] and various multi-factor tests.[100]

1. *The* Restatement (Second) *Test*

Section 566 of the *Restatement (Second) of Torts* states: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[101]

95. *Letter Carriers*, 418 U.S. at 284. The action in *Letter Carriers* was based on newsletter articles in which respondents' names appeared in a "List of Scabs" and a subsequent article which purported to define a "scab," because they had not joined the union. *Id.* at 267-68. The definition referred to the scabs' "rotten principles," lack of character, and tendency to be traitors. *Id.* at 268. The Court reasoned that since the language was used in a "loose, figurative sense," a reader could not reasonably believe that the article was charging the non-union members with, for example, actually committing the crime of treason. *Id.* at 284-85. Therefore, because the language was "merely rhetorical hyperbole, a lusty and imaginative expression of . . . contempt," it was a form of opinion and protected under the labor laws. *Id.* at 286.

96. *Gertz*, 418 U.S. at 339-40. The Court later quoted this dictum with approval in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (quoting for proposition that there is "no such thing as a 'false' idea"), Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504 (1984) (quoting full dictum) and *Letter Carriers*, 418 U.S. at 284 (same).

97. *See* Ollman v. Evans, 750 F.2d 970, 974-75 n.6 (D.C. Cir. 1984) (en banc) (collecting federal cases recognizing *Gertz* dictum as controlling law), *cert. denied*, 471 U.S. 1127 (1985). For a further discussion of the recognition of a privilege for opinions, see *infra* notes 101-24 and accompanying text.

98. For a discussion of the *Restatement (Second)* test, see *infra* notes 101-08 and accompanying text.

99. For a discussion of the verifiability test, see *infra* notes 109-15 and accompanying text.

100. For a discussion of the multi-factor tests, see *infra* notes 116-24 and accompanying text.

101. RESTATEMENT (SECOND), *supra* note 3, § 566. For discussions, analyses and criticisms of the methodology and results of the *Restatement (Second)* test, see Christie, *Defamatory Opinions and the* Restatement (Second) of Torts, 75 MICH. L. REV. 1621 (1977) (focusing on whether statements of opinion, including ridicule, are actionable); Hill, *Defamation and Privacy Under the First Amendment*, 76

Comment b elaborates on this concept by dividing opinions into two types, pure and mixed.[102] Pure opinions are those in which the speaker either (1) states the facts upon which the opinion is based, or (2) does not state such facts, but their existence is known to him and to his audience and the existence of additional facts is not implied.[103] A mixed opinion, on the other hand, is one in which "the comment is reasonably understood as implying the assertion of the existence of undisclosed facts about the plaintiff that must be defamatory in character in order to justify the opinion."[104] According to the *Restatement (Second)*, pure opinions are not actionable, while an action may lie for mixed opinions.[105] The *Restatement (Second)* bases its protection for pure statements of opinion on the *Gertz* dictum,[106] and sets forth two possible bases for its conclusion that mixed statements of opinion may be actionable. The first possible basis is that, with a mixed opinion, there has been a publication of the defamatory facts whose existence was implied. A second basis for the *Restatement (Second)*'s conclusion is simply a black letter rule that "an expression of a mixed opinion can itself be a defamatory communication."[107] The concept set forth by the *Restatement (Second)* was the method most widely used by the courts prior to *Milkovich* for determining when a statement was actionable.[108]

COLUM. L. REV. 1205, 1239-45 (1976) (criticizing treatment of opinions under *Restatement (Second)* for resting on slight foundation of *Gertz*, being unnecessarily disruptive, and failing to eliminate liability for unreasonable opinions).

102. RESTATEMENT (SECOND), *supra* note 3, § 566 comment b.

103. *Id.* The *Restatement (Second)* gives the following illustration of a statement of pure opinion:

> A writes to B about his neighbor C: "He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard about 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic."

Id. comment c, illustration 4. The *Restatement (Second)* explains that "[t]he statement indicates the facts on which the expression of opinion was based and does not imply others. These facts are not defamatory and A is not liable for defamation." *Id.*

104. *Id.* comment c. The *Restatement (Second)* gives the following as an example of a mixed opinion: "A writes to B about his neighbor C: 'I think he must be an alcoholic.' " *Id.* illustration 3. The *Restatement (Second)* indicates that this statement could be found to imply the existence of undisclosed defamatory facts on which the statement is based. *Id.*

105. *Id.* comment c.

106. *Id.* The *Restatement (Second)* notes that while prior to *Gertz* statements of pure opinion had been actionable, such actions were rendered unconstitutional by *Gertz*. *Id.*

107. *Id.*

108. Note, *Statements of Fact*, *supra* note 54, at 1012 ("The *Second Restatement* view . . . is the predominant view in the lower courts. . . ."); *see also id.* at 1012 n.70 (collecting cases utilizing the *Restatement (Second)* analysis). *Contra* Brief for Respondent at LEXIS *26, Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990) (No. 89-645) (LEXIS, Genfed library, Briefs file) ("most courts have not

2. *The Verifiability Test*

Other courts which did not adopt the *Restatement (Second)* instead devised a test based on the verifiability of the defamatory statement. Under this test, if a statement is verifiable, it is factual and thus actionable.[109] If the statement is not capable of being verified, then it is not actionable.[110] The formulations of this test vary. In *Buckley v. Littell*,[111] the court found that the term "fascist" was imprecise and the "content is so debatable . . . that [it is] insusceptible to proof of truth or falsity" and thus not actionable.[112] The court in *Hotchner v. Castillo-Puche*[113] stated simply: "An assertion that cannot be proved false cannot be held libellous."[114] The verifiability test, while sometimes used alone, was also used as one prong of the various multi-factor tests adopted by several courts.[115]

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limited themselves to the mechanical and often artificial methodology of the Second Restatement").

109. Note, *Statements of Fact*, *supra* note 54, at 1017-18.

110. *Id.*

111. 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). The basis for the action was a book written by Littell that labeled Buckley a "fellow traveler of fascism." *Id.* at 890.

112. *Id.* at 894. The court determined that the terms "fascist" and "fellow traveler" were so imprecise that the court was forced to speculate on the meaning of the statements. *Id.* at 892-93. The moment that it had to engage in such speculation, the court considered itself "in the area of opinion as opposed to factual assertion" and the statements were thus protected as ones of opinion. *Id.* at 892.

113. 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977). The court summarized the allegedly defamatory statements, contained in a book that Castillo-Puche wrote, as follows:

> Castillo-Puche describes Hotchner as a manipulator, a "toady," a "hypocrite" who exhibited "two-faced behavior" toward Hemingway's true friends and "put up a very good front as [Hemingway's] mild-mannered, obedient servant," an "exploiter of [Hemingway's] reputation" who was "never open and above board." The sixth passage is one in which Hemingway, referring to Hotchner, tells Castillo-Puche: "I don't really trust him, though."

Id. at 912.

114. *Id.* at 913. The court determined that Castillo-Puche's characterizations of Hotchner, "viewed in isolation," were statements of opinion protected under *Gertz* because they could not be proven false. *Id.* Curiously, the court went on to apply an apparent variation of the *Restatement (Second)* test. It stated that "[i]f an author represents that he has private, first-hand knowledge which substantiates the opinions he expresses," then statements of opinion may be actionable if the defendant knew the underlying facts were false or probably false. *Id.* In this case, the court found that the defendant (the publisher) had no reason to believe that any underlying facts were false, as it believed Castillo-Puche had based his opinions on personal observations. *Id.* at 913-14. Hence, the publisher was not liable for defamation. *Id.* at 914.

115. For an example showing the use of the verifiability test as one part of a multi-factor test, see *infra* notes 119, 123 and accompanying text.

3. *Multi-Factor Tests*

Different courts devised different multi-factor tests to use in determining whether a statement was one of fact or one of opinion.[116] The primary multi-factor test was that formulated by the Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans*.[117] In that case, the defendants wrote a column in which they labeled Ollman as being, among other things, "widely viewed in his profession [political science professor] as a political activist" and "an outspoken proponent of 'political Marxism.' "[118] On appeal, the circuit court held that courts should evaluate the totality of the circumstances surrounding a defamatory statement, and established four factors which courts should examine in performing such an evaluation: (1) the common usage or meaning of the language used in the statement, including the presence of a precise core of meaning; (2) the verifiability of the statement; (3) the full context of the statement and the use of cautionary language; and (4) the broader context or setting in which the statement appears.[119]

The *Ollman* court first examined the broad context in which the specific statements appeared (on the op-ed page of a newspaper) and concluded that readers expect a column on that page merely to express the writer's opinion.[120] The court then examined the context of the article

116. *See* Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987) (establishing two-step test, with second step containing three factors, based on Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985)); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.) (en banc) (establishing four-part test based on plurality opinion and concurring opinion in *Ollman*), *cert. denied*, 479 U.S. 883 (1986); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980) (establishing three-part test); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982) (establishing three-part test).

117. 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). The following discussion of *Ollman* is intended to illustrate the application of only one of the many multi-factor tests that the courts utilized in determining whether a statement was one of fact or opinion.

For general discussions of the *Ollman* decision and the court's methodology, see R. SMOLLA, *supra* note 27, § 6.08[3]-[4] (performing a "case study" of *Ollman*); Heidig, Ollman v. Evans: *Skinning the Membrane of Fact Versus Opinion*, 23 TORT & INS. L.J. 232 (1987) (in-depth analysis of the majority and dissenting opinions); Note, *Bright-Line Rule*, *supra* note 47, at 1839-45 (performing a case study).

118. *Ollman*, 750 F.2d at 972 (emphasis omitted). The defendants further contended that Ollman's "candid writings avow his desire to use the classroom as an instrument for preparing what he calls 'the revolution.' " *Id.* (emphasis omitted). The article also quoted a political scientist who called Ollman a "pure and simple activist" with "no status within the profession." *Id.* at 973 (emphasis omitted).

119. *Id.* at 979.

120. *Id.* at 986-87. The basis for the court's conclusion was that readers were aware that the defendants' columns on the op-ed page were not " 'hard' news" and may have contained statements "that would hardly be considered balanced or fair elsewhere in the newspaper." *Id.* at 986 (citing National Rifle Ass'n v. Dayton Newspaper, Inc., 555 F. Supp. 1299, 1309 (S.D. Ohio 1983)).

itself, and characterized it as designed only to raise certain questions regarding Ollman and "not purporting to set forth definitive criteria."[121] These factors pointed to the article as being a statement of opinion, although the court did not expressly so state. The court then turned to an analysis of the specific statements at issue, and concluded that all of the statements were protected as opinion.[122] In its analysis, the court found several considerations which supported a finding of opinion—specifically, the lack of precise definitions for the labels that the authors had applied to Ollman, and the extent to which the authors had revealed the facts on which they based their opinion.[123] Given these factors, the court found that the defendants were not liable for their statements. Other courts apparently agreed with this analysis, as the *Ollman* test was widely accepted.[124]

Accordingly, until very recently, courts used a test from one of the three categories detailed above to determine whether a statement was an actionable one of fact, or a nonactionable one of opinion. Although

121. *Id.* at 987. Furthermore, the article stated its purpose as being to "spark a . . . debate" concerning Ollman and contained a section which literally posed questions raised by Ollman's appointment. According to the court, this constituted cautionary language. *Id.*

122. *Id.* at 987-92.

123. *Id.* The court first found the term "political Marxism" to be "loosely definable [and] variously interpretable," as well as unverifiable, and thus to be opinion. *Id.* at 987 (citing Buckley v. Littell, 539 F.2d 882, 895 (2d Cir.), *cert. denied*, 429 U.S. 1062 (1977)). The court next looked at the statement labeling Ollman a "political activist," and found that term to be "imprecise" as well. *Id.* The court noted the impossibility of defining how much political activity qualifies a person as an "activist." *Id.* The court also factored into its analysis the defendants' inclusion in the article of the facts on which the label "political activist" was based, finding this inclusion to support the conclusion that the statement was one of opinion. *Id.* at 987-88.

The court then analyzed the defendants' statement regarding Ollman's desire to use the classroom to prepare for the "revolution," and found it to be opinion. *Id.* at 988-89. The court found that the context of the statement, which followed a discussion of Ollman's writings, made it clear that the defendants were expressing their interpretation of those writings. *Id.* at 989. Additionally, the statement was not clearly definable or susceptible to proof, further indicating that it was an opinion. *Id.*

The court finally discussed the statement that described Ollman as having "no status within the profession," and found this statement to be opinion as well. *Id.* at 989-92. The court based this decision on multiple factors, such as the article's inclusion of factual statements ascribing some status to Ollman, and a general concern for not abridging freedom of speech. *Id.* at 990-92.

124. *See* Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 226 (2d Cir. 1985); Konrath v. Williquette, 732 F. Supp. 973, 976 (W.D. Wis. 1990); Henderson v. Times Mirror Co., 669 F. Supp. 356, 359 (D. Colo. 1987); Stevens v. Tillman, 661 F. Supp. 702, 708 (N.D. Ill. 1986); Ramada Inns, Inc. v. Dow Jones & Co., 543 A.2d 313, 327 (Del. 1987); Yovino v. Fish, 27 Mass. App. Ct. 442, 447-48, 539 N.E.2d 548, 552 (1989); Steinhilber v. Alphonse, 68 N.Y.2d 283, 292, 501 N.E.2d 550, 554, 508 N.Y.S.2d 901, 905 (1986); Scott v. News-Herald, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 706 (1986); El Paso Times, Inc. v. Kerr, 706 S.W.2d 797, 798 (Tex. Ct. App. 1986).

the use of such disparate tests by the lower courts may have resulted in inconsistent decisions among the states and the federal circuits in the past, the abolishment of the opinion privilege and its replacement with existing constitutional doctrine by *Milkovich* has imposed uniform standards for courts to follow in determining the actionability of a statement.[125]

III. DISCUSSION

The saga that became *Milkovich* began in 1974 when Michael Milkovich was the wrestling coach at Maple Heights High School in Ohio. During a wrestling match with another school, an altercation erupted in which several people were injured.[126] Milkovich and H. Don Scott (the school superintendent) gave their account of events at the match during a hearing on the incident held by the Ohio High School Athletic Association (OHSAA).[127] Following the hearing, OHSAA sanctioned the Maple Heights team.[128] When parents and wrestlers sought a restraining order against the sanctions in state court, Milkovich and Scott testified once again as to the occurrences at the match.[129] The court overturned the sanctions on due process grounds.[130]

The next day, an article concerning the court hearing appeared in a local newspaper owned by Lorain Journal Company. The article, authored by J. Theodore Diadiun, was headed "Maple beat the law with the 'big lie' " and contained the caption "TD Says."[131] It stated that the testimony which Scott and Milkovich presented at the OHSAA hearing did not resemble the actual events at the wrestling match, and that Scott and Milkovich altered their testimony to an even greater degree for the court hearing.[132] The relevant passages of the article read as follows:

. . . a lesson was learned (or relearned) yesterday by the student

125. For a discussion of the abolishment of the opinion privilege by *Milkovich* and the standards that supplanted the privilege, see *infra* notes 146-64 and accompanying text.

126. *Milkovich*, 110 S. Ct. at 2698.

127. *Id.*

128. *Id.* The sanctions included probation and ineligibility for the state wrestling tournament. *Id.*

129. *Id.*

130. *Id.* The trial court held that the wrestling team's right to enter the state competition constituted a property right, entitling it to due process prior to deprivation of that right. Milkovich v. Lorain Journal Co., 65 Ohio App. 2d 143, 145, 416 N.E.2d 662, 664 (1979). Since OHSAA had failed to "safeguard" the team's due process rights in effecting the disqualification, the trial court reinstated the team's eligibility for the state competition. *Id.*

131. *Milkovich*, 110 S. Ct. at 2698.

132. *Id.* at 2699 n.2. Diadiun's article stated: "Any resemblance between [the events at the match and the testimony at the OHSAA hearing] is purely coincidental." *Id.* (quoting newspaper article). An OHSAA commissioner further commented that Milkovich's and Scott's testimony in court "certainly sounded different from what they told us." *Id.* (quoting newspaper article).

> body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.
>
> A lesson which, sadly, in view of the events of the past year, is well they learned early.
>
> It is simply this: If you get in a jam, lie your way out.
>
> If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> The teachers responsible were mainly Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott.
>
> . . . .
>
> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
>
> But they got away with it.
>
> Is that the kind of lesson we want our young people learning from their high school administrators and coaches?
>
> I think not.[133]

Milkovich's complaint contended that the article "accused [him] of committing the crime of perjury . . . and damaged [him] directly in his life-time occupation of coach and teacher and constituted libel per se."[134]

The case went up on appeal twice to the Ohio Supreme Court and certiorari was denied twice by the United States Supreme Court.[135] The

133. *Id.* at 2698 (quoting Milkovich v. News-Herald, 46 Ohio App. 3d 20, 21, 545 N.E.2d 1320, 1321-22 (1989)).

134. *Id.* at 2699-700.

135. *Id.* at 2700. When the action first appeared before the trial court, the court found that Milkovich had not established actual malice and therefore granted a directed verdict to Lorain Journal. *Id.* On appeal, the Ohio Court of Appeals held that there was a jury issue as to actual malice, and it reversed and remanded the case. *Id.* The Ohio Supreme Court then dismissed the appeal because there was no "substantial constitutional question," and subsequently the United States Supreme Court denied certiorari. *Id.*

When the case came before the trial court the second time, it was dismissed by summary judgment in favor of Lorain Journal. *Id.* The trial court gave alternative bases for its grant of summary judgment. The first basis was that the article was constitutionally protected opinion under *Gertz*, and the second was that Milkovich had not proved the requisite prima facie case of actual malice. *Id.* While the Ohio Court of Appeals affirmed the trial court's determinations, the Ohio Supreme Court reversed and remanded. *Id.* The Ohio high court disagreed with both of the trial court's findings. It held first that Milkovich was neither a public figure nor a public official, and thus the actual malice standard was inapplicable. *Id.* It then held that Diadiun's article consisted of factual assertions, and was therefore not protected as opinion. *Id.* Once again, the United States Supreme Court denied certiorari. *Id.*

Ohio Court of Appeals, however, eventually affirmed the trial court's grant of Lorain Journal's motion for summary judgment.[136] The appeals court considered itself bound by the Ohio Supreme Court's decision, in a parallel action brought by superintendent Scott, that Diadiun's article was constitutionally protected opinion.[137] When the Ohio Supreme Court dismissed Milkovich's appeal, the United States Supreme Court finally granted certiorari.[138]

While Milkovich contended that Diadiun's article was libelous per se in that it accused him of perjury and damaged him in his occupation, Lorain Journal argued that the article was opinion, and as such, was entitled to "First Amendment-based protection."[139] Lorain Journal urged that in all defamation actions, "the First Amendment mandates an inquiry into whether a statement is 'opinion' or 'fact,' and that only the latter statements may be actionable."[140]

In a seven to two decision, the Court rejected Lorain Journal's argument. The majority opinion (written by Chief Justice Rehnquist and in

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On remand, the trial court once again granted summary judgment in favor of Lorain Journal. For a discussion of the procedural history after the trial court's action at this stage, see *infra* notes 136-38 and accompanying text.

136. *Milkovich*, 110 S. Ct. at 2701.

137. *Id.* In analyzing the statements at issue from the Diadiun article, the Ohio Supreme Court adopted the four-factor test developed in Ollman v. Evans, 750 F.2d 970 (1984), *cert. denied*, 471 U.S. 1127 (1985). *See* Scott v. News-Herald, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 706 (1986). For the text of the statements at issue in Diadiun's article, see *supra* text accompanying note 133. For a discussion of the *Ollman* test, see *supra* notes 117-24 and accompanying text.

The *Scott* court first looked at the common meaning of the language in the article, and found that although there was no express statement that Scott had perjured himself, the clear implication of the language as it would commonly be understood was that Scott had committed perjury. 25 Ohio St. 3d at 250-51, 496 N.E.2d at 706-07. The court next analyzed whether the statements were verifiable, and concluded that a perjury action would provide a means for either verifying or disproving Diadiun's statements. *Id.* at 251-52, 496 N.E.2d at 707. The court then looked at the context of the article. It found the caption "TD Says" and Diadiun's obvious "bias" against Milkovich and Scott to cause "the average reader viewing the words in their internal context [to] be hard pressed to accept Diadiun's statements as an impartial reporting of perjury." *Id.* at 252-53, 496 N.E.2d at 707-08. Finally, the court concerned itself with the broader context in which the article appeared—in a column on the sports page, "a traditional haven for cajoling, invective, and hyperbole" where a reader would not expect an author to "be particularly knowledgeable about . . . perjury." *Id.* at 253-54, 496 N.E.2d at 708. Thus, although the first two factors that the court examined indicated that the statements were factual and actionable, the second two factors caused the court to reach the opposite conclusion—that the article was "constitutionally protected opinion." *Id.* at 254, 496 N.E.2d at 709. The court therefore affirmed the trial court's grant of summary judgment in favor of the newspaper. *Id.*

138. Milkovich v. Lorain Journal Co., 110 S. Ct. 863 (1990) (granting certiorari).

139. *Milkovich*, 110 S. Ct. at 2699-700, 2705.

140. *Id.* at 2706.

which Justices White, Blackmun, Stevens, O'Connor, Scalia and Kennedy joined) held that since existing constitutional doctrine adequately protected statements of opinion, no separate opinion privilege was necessary.[141] It then went on to find the statements at issue in *Milkovich* to be actionable.[142]

Justice Brennan's dissent, in which Justice Marshall joined, agreed with the majority's statement of the law, but disagreed with its application to the facts of the case. Justices Brennan and Marshall instead found the statements to be protected under the constitutional doctrines outlined by the majority.[143]

Chief Justice Rehnquist began his analysis with a brief overview of the history of defamation at common law, including the development of the fair comment privilege,[144] and he then traced the series of decisions subjecting the law of defamation to first amendment restrictions.[145] Chief Justice Rehnquist next addressed the issue before the Court—the existence of, "in addition to the established safeguards discussed above, still another First Amendment-based protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact.' "[146]

He first noted that the concept of a privilege for opinions stemmed primarily from the dictum in *Gertz* that "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction . . . on the competition of other ideas."[147] He found the "fair meaning of the passage [to be] equat[ing] the word 'opinion' in the second sentence with the word 'idea' in the first sentence."[148] Moreover, "[u]nder this view, the language was merely a reiteration of Justice Holmes' classic 'marketplace of ideas' concept,"[149] and was not "in-

141. *Id.* at 2707. For a discussion of the majority's analysis in *Milkovich*, see *infra* notes 144-64 and accompanying text.

142. *Milkovich*, 110 S. Ct. at 2707. For a discussion of the majority's application of the law to the facts of the case, see *infra* notes 165-69 and accompanying text.

143. *Milkovich*, 110 S. Ct. at 2709 (Brennan, J., dissenting). For a discussion of the dissent's application of the law to the facts of the case, see *infra* notes 180-84 and accompanying text.

144. *Milkovich*, 110 S. Ct. at 2702-03. Chief Justice Rehnquist noted that defamation was developed to redress injuries to reputation, and for that reason, at common law, a defamatory statement was actionable whether it was one of fact or one of opinion. *Id.* Chief Justice Rehnquist then explained that since the common law was "unduly burdensome" and "could stifle valuable public debate," the fair comment privilege originated to protect most statements on matters of public concern. *Id.* at 2703.

145. *Id.* at 2703-05.

146. *Id.* at 2705.

147. *Id.* (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974)).

148. *Id.*

149. *Id.* The "marketplace of ideas" concept derives from Justice Holmes' statement that "the ultimate good desired is better reached by free trade in ideas—the best test of truth is the power of the thought to get itself accepted in

tended to create a wholesale defamation exemption for anything that might be labeled 'opinion.' "[150] Furthermore, Chief Justice Rehnquist found the creation of such a "wholesale exemption" to be unnecessary, because under extant case law statements of opinion were already adequately protected in four ways.[151]

At this point in his analysis, Chief Justice Rehnquist set forth the four protections offered by prior decisions of the Court. He first cited *Philadelphia Newspapers, Inc. v. Hepps*[152] as "stand[ing] for the proposition that a statement on matters of public concern must be *provable* as false before there can be liability . . . at least . . . where a media defendant is involved," thus "ensur[ing] that a statement of opinion relating to matters of public concern which does not contain a *provably* false factual connotation will receive full constitutional protection."[153] Second, Chief

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the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For an analysis of the marketplace of ideas theory, see Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967-81 (1978) (rejecting classic marketplace of ideas concept due to implausible assumptions on which concept is based).

150. *Milkovich*, 110 S. Ct. at 2705. The Court went on to state that "[n]ot only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Id.*

151. *Id.* at 2706.

152. 475 U.S. 767 (1986). For a full discussion of *Hepps*, see *supra* notes 79-83 and accompanying text.

153. *Milkovich*, 110 S. Ct. at 2706 (emphasis added). The falsity requirement articulated in *Hepps* and reiterated in *Milkovich* does not change the established requirement of the law of defamation that a statement must *be* false in order to be actionable. *See* L. ELDREDGE, *supra* note 34, § 2, at 3 (listing falsity as an element of defamation); RESTATEMENT, *supra* note 52, § 558 (same). It does change, however, the common law rules that dictate which party has the burden of *pleading and proving* truth or falsity. At common law, the plaintiff had the burden of pleading, but not of proving, falsity. L. ELDREDGE, *supra* note 34, § 5, at 25-26. Falsity was presumed, and truth was an affirmative defense that the defendant bore the burden of pleading and proving. *Id.* at 26; *id.* § 63, at 323; Franklin & Bussel, *supra* note 59, at 871. The common law began to change with the introduction of the constitutional culpability requirements. In cases involving a public official, a public figure, or a matter of public concern in which the plaintiff seeks punitive damages, the plaintiff must establish that the defendant acted with actual malice—knowledge of falsity or reckless disregard of truth or falsity. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (public official); Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result) (public figure); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (private figure and matter of public concern). The actual malice requirement has therefore necessitated that a plaintiff who must establish actual malice must also, as a practical matter, establish the falsity of the statement at issue, thus effectively transferring the burden of proving falsity to the plaintiff. *Milkovich*, 110 S. Ct. at 2706 n.6 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986)); L. ELDREDGE, *supra* note 34, § 63, at 323-24 (quoting RESTATEMENT (SECOND) OF TORTS § 613 comment j (1977)); Franklin & Bussel, *supra* note 59, at 855-56.

In cases where actual malice is not an element of an action for defamation, however, it is less clear which party has the burden of proving truth or falsity.

Justice Rehnquist cited *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*,[154] *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*[155] and *Hustler Magazine, Inc. v. Falwell*[156] as cases providing

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Gertz required a showing of *some* level of culpability, definable by each state, in cases involving a private figure plaintiff where punitive or presumed damages are not at issue, at least on matters of public concern. *Gertz*, 418 U.S. at 347. *Hepps* made it clear that in such cases, at least where a media defendant is involved, the plaintiff has the burden of proving falsity. *Hepps*, 475 U.S. at 768-69. In cases that do not involve a media defendant, however, lower courts have split on the issue of whether *Gertz* imposes a culpability requirement, and whether *Hepps* requires the plaintiff to prove falsity. *See* Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91, 100 n.57 (1987) (noting lower court split as to whether *Gertz* applies to cases with nonmedia defendants); Franklin & Bussel, *supra* note 59, at 858 (arguing that "placing the burden of proof [of truth] on the defendant would permit the imposition of liability without fault," in contravention of *Gertz*). *Compare* Connolly v. Labowitz, 519 A.2d 138, 140 (Del. Super. Ct. 1986) (Supreme Court limited *Hepps* to media defendants, and "will be followed here") *with* Cunningham v. United Nat'l Bank of Wash., 710 F. Supp. 861, 863 (D.D.C. 1989) (recognizing that jurisdiction has extended *Hepps* to nonmedia defendants).

It appears, therefore, that there are two primary categories of cases in which the Supreme Court has not *mandated*, through constitutional requirements concerning culpability or proof of falsity, a change in the common law rule placing the burden of proving truth on the defendant: cases involving a private figure plaintiff on a matter of public concern with a nonmedia defendant, and cases involving a private figure plaintiff on a matter not of public concern. In such cases, states "will be free to apply their own rules, and they may or may not continue to apply the traditional common law rule" placing the burden of pleading and proving truth on the defendant. L. ELDREDGE, *supra* note 34, § 63, at 324 (quoting RESTATEMENT (SECOND) OF TORTS § 613 comment j (1977)). The common law rule presuming falsity does not, of course, offer as much protection to speech as does any rule that requires the plaintiff, directly or indirectly, to prove falsity.

Any requirement that the plaintiff bear the burden of proving that the defamatory statement is false essentially espouses the verifiability test used by some lower courts to adjudicate defamation cases. For a discussion of the verifiability test, see *supra* notes 109-15.

154. 398 U.S. 6 (1970). For a discussion of *Bresler*, see *supra* note 94 and accompanying text.

155. 418 U.S. 264 (1974). For a discussion of *Letter Carriers*, see *supra* note 95 and accompanying text.

156. 485 U.S. 46 (1988). In *Falwell*, *Hustler* magazine had published a parody advertisement allegedly portraying respondent Jerry Falwell "and his mother as drunk and immoral, and suggest[ing] that respondent is a hypocrite who preaches only when he is drunk." *Id.* at 48. At trial, the court granted a directed verdict in favor of *Hustler* on Falwell's invasion of privacy claim. *Id.* at 49. The jury found in favor of *Hustler* on Falwell's libel claim, on the basis that "the ad parody could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.' " *Id.* (quoting Appendix to Petition for Certiorari). The jury did find in favor of Falwell on his intentional infliction of emotional distress claim, awarding him both compensatory and punitive damages. *Id.* On appeal, the circuit court affirmed. *Id.* It held that the actual malice standard of *New York Times* need not be met in an intentional infliction of emotional distress claim, and, furthermore, that the jury's decision that the parody was an "opinion" and therefore protected by the first

protection for statements of "imaginative expression" and "rhetorical hyperbole" and other statements which cannot " 'reasonably be interpreted as stating actual facts' about an individual."[157] Next, Chief Justice Rehnquist cited *New York Times*,[158] *Butts*[159] and *Gertz*[160] as cases espousing the requirement in defamation cases of some level of culpability, whether it be actual malice or some other level of fault established by a state.[161] These cases, according to the majority, "further ensure that debate on public issues remains 'uninhibited, robust and wide-open.' "[162] Finally, Chief Justice Rehnquist found "assurance that the foregoing determinations will be made in a manner so as not to 'constitute a forbidden intrusion [into] the field of free expression' " in *Bose Corp. v. Consumers Union of United States, Inc.*'s[163] requirement of independent appellate review of findings of actual malice.[164]

In applying two of the above standards to the facts of the case at bar, the Court first found that the statements at issue were sufficiently factual to be actionable.[165] Chief Justice Rehnquist cited the language

amendment was "irrelevant," since the issue concerned only "whether the [parody] was sufficiently outrageous to constitute intentional infliction of emotional distress." *Id.* at 49-50 (quoting Falwell v. Flynt, 797 F.2d 1270, 1276 (4th Cir. 1986)). The Supreme Court rejected Falwell's contention that mere outrageousness would sustain a finding of intentional infliction of emotional distress, holding instead that public figures and public officials may not recover without establishing that a parody "contains a false statement of fact which was made with 'actual malice.' " *Id.* at 56. The Court accepted the finding of the court of appeals that the parody "was not reasonably believable," and thus held that the parody did not meet the Court's requirement that both falsity and malice be shown. *Id.* at 57 (quoting *Flynt*, 797 F.2d at 1278). In the course of its decision, the Court defined the nature of a parody as inherently "distorted" and "exaggerat[ed]." *Id.* at 53 (quoting WEBSTER'S NEW UNABRIDGED TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 275 (2d ed. 1979)).

157. *Milkovich*, 110 S. Ct. at 2706.

158. 376 U.S. 254 (1964). For a full discussion of *New York Times*, see *supra* notes 61-64 and accompanying text.

159. 388 U.S. 130 (1967). For a full discussion of *Butts*, see *supra* notes 65-67 and accompanying text.

160. 418 U.S. 323 (1974). For a full discussion of *Gertz*, see *supra* notes 70-72 and accompanying text.

161. *Milkovich*, 110 S. Ct. at 2706-07.

162. *Id.* (quoting *New York Times*, 376 U.S. at 270). Chief Justice Rehnquist, in a footnote accompanying his consideration of the *Hepps* proof of falsity requirement, emphasized that in cases involving a showing of the *New York Times* actual malice standard, the plaintiff will necessarily bear the burden of showing falsity. *Id.* at 2706 n.6. It is therefore logical to assume that when he later in the opinion referred to the culpability requirements as a third protection for speech, he was addressing the purpose they serve in dictating a finding of *fault*, since he had already discussed their role in compelling the plaintiff to prove *falsity*. For a discussion of the effect of the culpability requirements on the burden of proving falsity, see *supra* note 153.

163. 466 U.S. 485 (1984). For a full discussion of *Bose*, see *supra* notes 73-75 and accompanying text.

164. *Milkovich*, 110 S. Ct. at 2707 (quoting *Bose*, 466 U.S. at 499).

165. *Id.* Chief Justice Rehnquist posed the question of "whether or not a

in the column that Milkovich "lied at the hearing after . . . having given his solemn oath to tell the truth," and found this not to be the "sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury."[166]

The second standard applied by Chief Justice Rehnquist in the majority opinion tested the verifiability of Diadiun's statement that Milkovich lied. The Chief Justice found that "a core of objective evidence" existed from which it could be determined, through a perjury action, whether or not Milkovich lied.[167] Specifically, Milkovich's testimony before OHSAA could be compared to his testimony before the trial court in order to verify the truth or falsity of his statements.[168] Thus, Lorain Journal would be adequately protected if this comparison proved the truth of its article.[169]

Justice Brennan, who was joined in his dissent by Justice Marshall, agreed with the majority that a separate privilege for statements of opinion was not necessary.[170] Justice Brennan "part[ed] company with the Court," nevertheless, in its application of the law to the facts of the case.[171] Justice Brennan maintained that the statements at issue were eligible for "full constitutional protection" because they could not "reasonably be interpreted as either stating or implying defamatory facts about [Milkovich]."[172]

In the first part of his dissent, Justice Brennan implicitly criticized the majority for not giving the lower courts more guidance in distinguishing between a statement that implies the existence of facts and a statement that is based solely on the speaker's opinion.[173] In the second part, Justice Brennan explained how he arrived at the conclusion that the challenged statements in *Milkovich* did not imply a factual asser-

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reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding," and concluded that a reasonable factfinder could so conclude. *Id.*

166. *Id.* (quoting Scott v. News-Herald, 25 Ohio St. 3d 243, 251, 496 N.E.2d 699, 707 (1986)).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 2709 (Brennan, J., dissenting) ("With all of the above, I am essentially in agreement.").

171. *Id.* (Brennan, J., dissenting).

172. *Id.* (Brennan, J., dissenting); *see also id.* at 2711 (Brennan, J., dissenting) ("Diadiun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing.").

173. *Id.* at 2709-10 (Brennan, J., dissenting). Justice Brennan remarked that "[t]he majority provides some general guidance for identifying when statements of opinion imply assertions of fact. But it is a matter worthy of further attention . . . ." *Id.* at 2709 (Brennan, J., dissenting).

tion.[174] He first dissected Diadiun's article.[175] According to Justice Brennan, the article began with factual statements made by Diadiun based on his first-hand observations at the wrestling match and the OHSAA hearing.[176] Then, Diadiun began to "surmise" and draw conclusions based on his stated observations.[177] Justice Brennan pointed to the language of apparency that Diadiun used—words like "seemed," "probably" and "apparently"—which indicated that Diadiun was drawing conclusions based on his own interpretation of facts.[178] Justice Brennan further stated that Diadiun "fail[ed] to claim any firsthand knowledge" in describing events at the court hearing in his article.[179]

Justice Brennan concluded that the overall effect of the article would not lead any reasonable reader to believe either that Milkovich had actually perjured himself or that "Diadiun had further information about Milkovich's court testimony on which his belief was based."[180] Justice Brennan specified three findings upon which he based his conclusion. First, he stated that the column made it obvious that Diadiun did not attend the court hearing, nor did he have "detailed secondhand information" about Milkovich's testimony in court.[181] Second, Justice Brennan pointed to the fact that Diadiun's statement that Milkovich perjured himself was "preceded by the cautionary term 'apparently.' "[182] He cited several cases to support the view that a statement which follows cautionary language is less likely to be taken as fact by the reader, and is thus less likely to be actionable.[183] He finally concluded that the "tone and format" of the article would not lead readers to expect it to be factual, thus also indicating that the statement would be nonactionable.[184]

In the third part of his dissent, Justice Brennan extolled the value to

174. *Id.* at 2710-13 (Brennan, J., dissenting).

175. *Id.* at 2711-13 (Brennan, J., dissenting).

176. *Id.* at 2711 (Brennan, J., dissenting). For the text of the statements at issue in Diadiun's article, see *supra* text accompanying note 133.

177. *Milkovich*, 110 S. Ct. at 2711 (Brennan, J., dissenting).

178. *Id.* (Brennan, J., dissenting).

179. *Id.* (Brennan, J., dissenting).

180. *Id.* (Brennan, J., dissenting).

181. *Id.* at 2711-12 (Brennan, J., dissenting) ("It is plain from the column that Diadiun did not attend the court hearing.").

182. *Id.* at 2712 (Brennan, J., dissenting) ("an unmistakable sign that Diadiun did not know what Milkovich had actually said in court").

183. *Id.* (Brennan, J., dissenting). Justice Brennan first cited *Ollman* for the proposition that "when the reasonable reader encounters cautionary language, he tends to 'discount that which follows.' " *Id.* (Brennan, J., dissenting) (quoting Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984)). He then cited other cases, along with parenthetical explanations of their significance. *Id.* (Brennan, J., dissenting).

184. *Id.* at 2712-13 (Brennan, J., dissenting). Justice Brennan summarized the tone of Diadiun's article as "pointed, exaggerated and heavily laden with emotional rhetoric and moral outrage," making the article "obvious hyperbole." *Id.* (Brennan, J., dissenting). He described the format of the article as a "signed editorial column" in which "even the headline . . . reminds readers that they are

society of "conjecture," and concluded that "[p]unishing such conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate."[185]

The majority opinion did not respond to the dissent's characterization of the challenged statements as protected conjecture, but merely found the statements to imply a factual assertion and thus to be actionable.[186] While the majority and dissent agreed that the existing constitutional protections delineated by the majority were adequate to enable a court to distinguish actionable statements from those that are nonactionable, the different conclusions to which the majority and dissent came foreshadow the difficulties that lower courts will likely face in applying the stated constitutional protections to the multitude of fact patterns before them.

IV. ANALYSIS

In *Milkovich*, the Supreme Court abolished the "artificial dichotomy between 'opinion' and fact,"[187] while retaining the idea that a statement is only actionable if it contains a certain undefined amount of factual content.[188] Rather than developing a test, per se, to be used in deciding whether the requisite amount of factual content is present, the Court held that freedom of expression "is adequately secured by existing constitutional doctrine."[189] While the Court eliminated the strict categorization into terminology ("fact" or "opinion") that the lower courts had previously used in determining whether a statement was an actionable one ("fact") or an inactionable one ("opinion"),[190] it retained many of the concepts which the lower courts had used in making their determi-

reading one man's commentary." *Id.* at 2713 (Brennan, J., dissenting). For a definition of hyperbole, see *supra* note 94.

185. *Milkovich*, 110 S. Ct. at 2715 (Brennan, J., dissenting).

186. *Id.* at 2707.

187. *Id.* at 2706; *see also id.* at 2707 ("We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment.").

188. *See id.* at 2706. The Court summarized this idea in several ways: "[A] statement of opinion . . . which does not contain a provably false factual connotation will receive full constitutional protection," *id.*; and "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual" will be protected. *Id.* (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).

189. *Id.*

190. For a discussion of *Milkovich*'s abolishment of the opinion privilege, see *supra* notes 146-51 and accompanying text.

nations[191] and grouped them into a four-part analysis.[192] It is apparent that the Supreme Court did not intend the constitutional doctrine which it set forth to be used as a bright-line checklist for lower courts to follow, but rather intended it as a more general statement of policy considerations. The Court expected lower courts to use the four protections disjunctively—so that if a statement is shielded by any one of the protections, it will not be actionable. Nonetheless, since the lower courts are accustomed to using bright-line checklists of a more conjunctive nature in determining the actionability of defamatory statements, they may attempt to utilize the constitutional doctrine articulated in *Milkovich* as such a checklist. Therefore, the "existing constitutional doctrine" which the Court attempted to simplify into four protections may be a dangerous tool in the hands of lower courts that venture to use *Milkovich* as a checklist rather than reading the opinion thoughtfully.

In essence, it is the first two *Milkovich* protections (requiring a statement to be provable as false and capable of interpretation as stating facts) that determine whether or not a particular statement has enough factual content to be actionable. While a showing of the third protection (requiring some form of culpability) will be necessary in limited situations, such a showing does nothing towards deciding the threshold issue of whether the statement is sufficiently factual to be actionable.[193] The fourth protection (requiring independent appellate review of findings of actual malice) would also be wholly inapplicable in determining actionability based on factual content. Thus, the first two protections alone determine the initial actionability of the statement.

Exclusive reliance on these first two protections poses a serious

191. For example, the first existing constitutional protection cited by the Court (that the statement must be provable as false in order for an action to lie) is merely a rearticulation of the verifiability test that the lower courts had previously used. For a discussion of the verifiability test, see *supra* notes 109-15 and accompanying text. Additionally, the second doctrine which the Court set forth (that the statement must be able to be reasonably interpreted as stating facts) is akin to the test used in Cianci v. New York Times Publishing Co., 639 F.2d 54, 63 (2d Cir. 1980), of whether the statement is so "laden with factual content" as to be actionable.

192. For a discussion of the four constitutional protections enumerated in *Milkovich*, see *supra* notes 152-64 and accompanying text.

193. The *Milkovich* Court did not even address the issue of culpability (here, actual malice) in its factual examination of the case. The culpability requirements will have an indirect effect on the first protection (requiring the plaintiff to bear the burden of proving falsity), as the Court noted. *Milkovich*, 110 S. Ct. at 2706 n.6. The reference to culpability in the third protection, however, goes to the effect of the culpability requirements on fault, not falsity. For a discussion of the effect of the culpability requirements on the burden of proof of falsity, see *supra* note 153. For a discussion of the third protection's focus on fault rather than on falsity, see *supra* note 162. For a discussion of the cases that the *Milkovich* Court cited as embodying culpability requirements, see *supra* notes 158-60 and accompanying text. For a summary of the culpability requirements, see *supra* notes 84-85 and accompanying text.

problem, however, in that they involve fluid, subjective concepts, making them difficult to apply. The fact that the majority and dissent in *Milkovich* agreed on the law, but disagreed on the application of the law to the facts, illustrates graphically the potential problems which lower courts will face in applying the concepts from *Milkovich*.[194]

The second protection, in particular, could be problematic. The difficulty arises because, in a literal reading of the language used by the Court, the second protection appears to contain two separate classes of protected statements: (1) "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual,"[195] and (2) statements of "imaginative expression" or "rhetorical hyperbole."[196] Although the Court ostensibly was *not* suggesting that these be treated as separate classes, both of which a statement would need to fulfill in order to satisfy the second protection, a court that implements a checklist approach to *Milkovich* could readily so interpret the Court's language. The two classes will often overlap, such as they did in the *Bresler-Letter Carriers-Falwell* line of cases cited by the *Milkovich* Court.[197] In *Letter Carriers*, for example, the use of the word "traitor" in an article defining "scabs," or people who refused to join a union, was not interpreted as stating actual facts about the individual, and the word was easily labeled hyperbole rather than a literal use of language.[198] Thus, both factors in the second protection were consistent in indicating the statement to be nonactionable.

It is possible, however, that a case could arise in which the statement at issue does not state actual facts about an individual, yet is *not* hyperbole. In such a case, a court reading *Milkovich* literally and employing a checklist approach would find that the two factors of the second protection conflict in that they each counsel a different outcome. For instance, consider under the *second* protection an example given by the *Milkovich* Court to demonstrate a statement that would not be provable as false under the *first* protection (relating to verifiability) and thus not actionable: "In my opinion Mayor Jones shows his abysmal igno-

194. For Justice Brennan's statement in dissent that he agrees with the majority's articulation of the law, see *supra* note 170. For a discussion of the majority's views of the *Milkovich* facts, see *supra* notes 165-69 and accompanying text. For a discussion of the dissenting views on the *Milkovich* facts, see *supra* notes 180-84 and accompanying text.

195. *Milkovich*, 110 S. Ct. at 2706 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).

196. *Id.* (citing Hustler Magazine, Inc., v. Falwell, 485 U.S. 46, 53-55 (1988)). The *Milkovich* Court later used the phrase "loose, figurative or hyperbolic language." *Id.* at 2707. For a definition of hyperbole, see *supra* note 94.

197. *Milkovich*, 110 S. Ct. at 2706. For a discussion of *Bresler*, see *supra* note 94 and accompanying text. For a discussion of *Letter Carriers*, see *supra* note 95 and accompanying text. For a discussion of *Falwell*, see *supra* note 156.

198. Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974). For a discussion of *Letter Carriers*, see *supra* note 95 and accompanying text.

rance by accepting the teachings of Marx and Lenin . . . ."[199] A court might justifiably find that although the statement that Mayor Jones displays "abysmal ignorance" does not state an actual fact, neither is the language in the same "loose, figurative" sense as calling someone a traitor or a blackmailer. Thus, each factor in the second protection would result in a different outcome on the question of actionability. A court, when faced with a situation in which the two factors of the second protection conflict, might then require further analysis in order to make a determination as to whether or not the statement is sufficiently factual to be actionable. Application of the first *Milkovich* protection could then provide the weight necessary to tip the balance toward a finding of actionability or nonactionability.

In order to understand the potential effect of the first *Milkovich* protection on the second *Milkovich* protection, it is necessary to begin by examining the first protection in isolation. In relation to the first protection, the *Milkovich* Court cited *Philadelphia Newspapers, Inc. v. Hepps* as "stand[ing] for the proposition that a statement on matters of public concern must be provable as false before there can be liability . . . [for] defamation . . . where a media defendant is involved."[200] The Court further stated that the statement at issue must also be provable as false in cases where the plaintiff is a public official or a public figure.[201] This is essentially a restatement of the verifiability test, requiring that a statement be provable as false in order to be actionable, which lower courts had used in the past.[202] The Court in *Milkovich*, however, clearly and deliberately limited this protection's applicability to cases involving a public official or public figure plaintiff, or a matter of public concern and a media defendant.[203]

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199. *Milkovich*, 110 S. Ct. at 2706. In this example, it is implicit that Mayor Jones does in fact follow the teachings of Marx and Lenin. The part of the statement referring to this as fact would thus not give rise to an action for defamation. Rather, at issue is the defamatory nature of the statement that he displays "abysmal ignorance" due to his beliefs.

200. *Id.* (emphasis added) (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986)).

201. *Id.* at 2706 n.6. Statements in such cases would need to be provable as false due to the requirement of actual malice, which necessitates that the plaintiff establish falsity. For a discussion of the effect of the culpability requirements on the burden of proving falsity, see *supra* note 153.

202. For a discussion of the verifiability test, see *supra* notes 109-15 and accompanying text.

203. *Milkovich*, 110 S. Ct. at 2706 n.6. The *Milkovich* Court noted that "[i]n *Hepps* the Court reserved judgment on cases involving nonmedia defendants, and accordingly we do the same." *Id.* (citation omitted). Lower courts have split on the issue of whether cases in which there is a private figure plaintiff, a matter of public concern and a defendant who is not a member of the media are governed by *Hepps* and *Gertz*. For a discussion of the lower court split, see *supra* note 153. Until such time as the Supreme Court explicitly rules on the applicability of *Hepps* to cases involving nonmedia defendants, courts may arguably choose not to apply the first protection of *Milkovich* to such cases. Various commentators

The first protection would come into play in the "Mayor Jones" hypothetical posited above, as the mayor would be a public official. While it is arguable that his ignorance per se could be proved or disproved by a test on current events or the like, this would have no effect on the hypothetical. Under the first protection, the Mayor's "abysmal ignorance" would *not* be provable as false, because a showing of verifiability would need to show *not* that Mayor Jones is ignorant, but rather that it is his acceptance of the teachings of Marx and Lenin which renders him ignorant. Since there would necessarily be no way to prove this to be false, the application of the first protection of *Milkovich* would result in this statement being inactionable.

When the second protection is brought back into the analysis and applied to the hypothetical in conjunction with the first protection, the results are mixed. Under the first factor of the second protection (which concerns the statement of actual facts) the statement would be judged one which is not sufficiently factual to be actionable. Under the second factor of the second protection, on the other hand, the language used is not that of rhetoric or hyperbole, indicating factual content and hence actionability. The weight of the combined first and second protections, therefore, would be in favor of declaring the statement to be not actionable due to lack of factual content. In other words, the perceived conflict between the two factors of the second protection would be resolved in favor of inactionability by the introduction of the first protection into the analysis.

A different outcome is seen if the hypothetical situation is slightly varied so that instead of referring to "Mayor Jones," the hypothetical involves a person writing to his friend, "In my opinion my neighbor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin." This slight variation arguably renders the first protection inapplicable, as it does not involve a public official or a public figure, or a matter of public concern and a media defendant.[204] The second protection, therefore, becomes the sole determinative factor in ascertaining initial actionability, and the situation described above in which the two factors of the second protection conflict remains problematic for lower courts that treat *Milkovich* as a bright-line checklist.[205]

Not only will the uncertainty that courts face in applying the principles articulated in *Milkovich* pose difficulties for the courts and for liti-

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have urged, however, the rejection of any media/nonmedia distinction. *See, e.g.*, Langvardt, *supra* note 153, at 117-23 (proposing reasons for eliminating media/nonmedia distinction).

204. For a discussion of the *Milkovich* Court's limitation of the first protection to cases involving public officials, public figures or matters of public concern and media defendants, see *supra* note 203 and accompanying text.

205. For a discussion of the reasons why the third and fourth protections are not applicable in determining whether a statement contains sufficient factual content to be actionable, see *supra* note 193 and accompanying text.

gants, but it will also have an impact on journalists. Prior to *Milkovich*, one pair of commentators lamented the difficulties that journalists faced: "Unfortunately, even the protection for rhetorical hyperbole leaves editors in a quandry. . . . [E]ditors cannot be sure when the word 'liar,' without supporting facts, will be protected as rhetorical hyperbole or unprotected for implying undisclosed false defamatory facts."[206] Because, as discussed above, such a determination remains a part of the law of defamation even after *Milkovich* (which also involved a journalist), journalists and editors still face the same problems in making publication decisions based on estimates of potential liability as they did in the pre-*Milkovich* years. Thus, it appears that due to the inherent uncertainties in the *Milkovich* holding, the law of defamation will remain difficult to apply and predict.

V. CONCLUSION

Prior to *Milkovich*, the lower courts were accustomed to determining the actionability of a statement through a variety of specific tests. Although it remains uncertain how the courts will incorporate *Milkovich* into their existing jurisprudence, it is possible that they will attempt to break the constitutional doctrines down into a more easily applied bright-line test. The attendant difficulties in such an approach, as discussed, may be avoided if lower courts make a conscious effort to apply the spirit of the *Milkovich* decision rather than to apply the letter of the decision by reducing it to its components. The Court's purpose in all of its defamation cases since *New York Times* has been to effectuate a "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[207] The *Milkovich* decision is intended to carry out that policy without creating an "artificial dichotomy between 'opinion' and fact."[208] In attempting to provide a method by which lower courts may distinguish between cases that are actionable and those that are not, the Supreme Court has devised an analysis which inherently generates a great deal of uncertainty rather than easily obtained answers. The lower courts, in order to effectuate the Supreme Court's stated policy of establishing a broad scope of protected speech, should resolve these uncertainties in favor of protecting the speech at

206. Trager & Chamberlin, *supra* note 52, at 62. The authors suggested that the uncertainties which journalists faced at that time could be alleviated if the courts would simply merge two existing concepts in the law of defamation: the concept of verifiability and the constitutional doctrine in *Hepps* that the plaintiff has the burden of proving falsity in a defamation action. *Id.* at 63. They believed that under this formulation "a statement would be actionable if a plaintiff could establish . . . that it was based on false fact-laden assertions." *Id.* The authors' assertion that such an approach would alleviate the existing difficulties is unconvincing, however, in light of the fact that they did not offer any proof or substantiation for their conclusions.

207. *New York Times*, 376 U.S. at 270.

208. *Milkovich*, 110 S. Ct. at 2706.

issue. Lower courts should be cautious not to allow their uncertainty to lead to findings that the speech is factual and thus actionable in cases where a finding of nonactionability is not *clearly* mandated by *Milkovich* due to the absence of a bright-line directive. If increased findings of actionability are indeed the outcome in the wake of *Milkovich*, the Court may find a need to promulgate a different test which would result in clearer outcomes and provide the " 'breathing space' which 'freedoms of expression require in order to survive.' "[209]

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209. *Id.* (quoting Philadelphia Newspapers, Inc. v. Hepps, 475 U.S 767, 772 (1986)).