William & Mary Bill of Rights Journal

Volume 3 | Issue 2 Article 4

A Matter of Opinion: Milkovich Four Years Later

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A MATTER OF OPINION: *MILKOVICH*[*] FOUR YEARS LATER

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[*] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

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I. INTRODUCTION

> 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. But there is no constitutional value in false statements of fact.[1]

The Supreme Court uttered this dictum in 1974 in *Gertz v. Robert Welch, Inc.*[2] For the next sixteen years, lower courts construed it as articulating a broad, First Amendment immunity for the expression of opinion,[3] and the doctrine became "the fastest growing body of defamation law in the 1980s."[4] Courts employed various analytical approaches to identify the types of language that qualify for immunity as opinion,[5] but the approach adopted by the United States Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans*[6] predominated.[7] Under that approach, the courts have

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[1] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (citation omitted).

[2] 418 U.S. 323, 339-40 (1974).

[3] *E.g.*, Ollman v. Evans, 750 F.2d 970, 974-75 n.6 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

[4] David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 507 (1991).

[5] The United States Court of Appeals for the District of Columbia described several of these approaches:

> Some courts have, in effect, eschewed any effort to construct a theory and simply treated the distinction between fact and opinion as a judgment call. *See, e.g.*, Shiver v. Apalachee Publishing Co., 425 So. 2d 1173 (Fla. Dist. Ct. App. 1983). Other courts have concentrated on a single factor, such as the verifiability *vel non* of the allegedly defamatory statement. *See, e.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied sub. nom.* Hotchner v. Doubleday & Co., 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977). Still others have adopted a multi-factor test, attempting to assess the allegedly defamatory proposition in the totality of the circumstances in which it appeared. *See, e.g.*, Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980).

Ollman, 750 F.2d at 977 (footnote omitted).

In addition, some courts have employed the analysis of the RESTATEMENT (SECOND) OF TORTS § 566 (1977). *See, e.g.*, *Hotchner*, 551 F.2d at 913; Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1358-61 (Colo. 1983) (en banc); Yancey v. Hamilton, 786 S.W.2d 854, 856-57 (Ky. 1989); Kotlikoff v. Community News, 444 A.2d 1086, 1089 (N.J. 1982); *see also* Eileen Finan, Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809, 817-18 (1988). For a description of the *Restatement* approach, see *infra* notes 30-33 and accompanying text.

[6] 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

[7] *See, e.g.*, Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1286-90 (4th Cir. 1987); Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1129-31 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988); McCabe v. Rattiner,

considered four factors to determine whether, in the totality of the circumstances in which the statement was made, the average recipient of the communication would view the statement as fact or opinion.[8] The four factors are (1) "the common usage or meaning of the specific language of the challenged statement itself," (2) "the statement's verifiability—is the statement capable of being objectively characterized as true or false?," (3) "the full context of the statement—the entire article or column, for example," and (4) "the broader context or setting in which the statement appears."[9]

Although the *Ollman* approach gained wide adherence, it failed to produce predictable outcomes.[10] Its major flaw is the absence of a definition of opinion that might guide the courts in weighing the factors.[11] One judge has observed that courts "have come up with buckets full of factors to consider but no useful guidance on what to do when they look in opposite directions, as they always do."[12] Judges have vehemently disagreed on the results of applying the *Ollman* analysis to the facts of particular cases,[13] and some

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814 F.2d 839, 840-42 (1st Cir. 1987); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302-05 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986); Dodson v. Dicker, 812 S.W.2d 97 (Ark. 1991); Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204, 1209 (D.C. 1991); Immuno AG. v. Moor-Jankowski, 549 N.E.2d 129, 132-33 (N.Y. 1989), *recons. denied*, 552 N.E.2d 179 (N.Y.), *vacated*, 497 U.S. 1021 (1990), *adhered to*, 567 N.E.2d 1270 (N.Y.) (employing, under state law, the same standard used in the court's previous opinion), *cert. denied*, 500 U.S. 954 (1991); Scott v. News-Herald, 496 N.E.2d 699, 705-08 (Ohio 1986).

[8] *Ollman*, 750 F.2d at 979.

[9] *Id.*

[10] One analysis of decisions following the *Ollman* approach concluded:

> Two approaches, both relying on *Ollman*, disagree about the relative emphasis that should be granted to the first set of factors (precision and verifiability) or to the second set (literary and social context). Courts stressing precision and verifiability tend to examine the statement for these factors first, and then turn to context as a possible exculpatory factor. Conversely, courts that treat context as formative rarely make an initial finding of factuality. Instead, they emphasize the literary and social setting, and often declare the statement an opinion despite its abstract precision or verifiability.

Rodney W. Ott, Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 FORDHAM L. REV. 761, 781 (1990) (footnotes omitted); *see also* Finan, *supra* note 5, at 826-30 (regarding the patterns of decisions using the *Ollman* approach).

[11] Professor Post has stated that "[s]uch tests fail to specify in any theoretically useful manner exactly what a court should look for in the 'words' or 'medium' employed." Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 650 (1990). Professor Phillips has stated that "the contextual approach appears capable of being manipulated in an infinite number of ways." Jerry J. Phillips, *Opinion and Defamation: The Camel in the Tent*, 57 TENN. L. REV. 647, 661 (1990).

[12] Stevens v. Tillman, 855 F.2d 394, 398 (7th Cir. 1988) (Easterbrook, J.).

[13] *Ollman* itself is a prime example. In that case, heard en banc, three judges who

judges have been caustic in their criticisms of the malleability of the analysis.[14]

Complicating the opinion issue are the related matters of vituperation and rhetoric.[15] Vituperation, or verbal abuse, is not considered defamatory.[16] Rhetorical hyperbole is not actionable when the plaintiff relies on the literal meaning of the language as defamatory, but the language is not reasonably susceptible to a literal construction.[17] Opinion, vituperation, and

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accepted the four-factor analysis disagreed with the court's conclusion that the statement "[Professor] Ollman has no status within the profession" was opinion. *Ollman*, 750 F.2d at 1032 (Wald, J., dissenting in part); *id.* at 1035 (Edwards, J., dissenting in part); *id.* at 1036 (Scalia, J., dissenting in part); *see also Scott*, 496 N.E.2d at 699, a case involving the same newspaper article as that involved in *Milkovich*, in which three justices criticized the majority's adoption of the *Ollman* approach and also disagreed that, under its four-factor test, the statement at issue was opinion; *see id.* at 716 (Celebrezze, J., dissenting in part); *id.* at 718 (Sweeney, J., dissenting in part); *id.* at 721 (Brown, J., dissenting in part).

[14] *See, e.g.*, Janklow v. Newsweek, Inc., 788 F.2d 1300, 1307 (8th Cir.) (Bowman, J., dissenting) ("Beauty is in the eye of the beholder, and it would appear that the result to be obtained through application of the *Ollman* factors is in the eye of the judge."), *cert. denied*, 479 U.S. 883 (1986); *Scott*, 496 N.E.2d at 716 (Celebrezze, J., dissenting in part) (finding the test "unworkable"); *id.* at 719 (Sweeney, J., dissenting in part) ("[T]he majority's new 'test' is in reality no test at all, because its components can be juxtaposed to forge any interpretation that the user of the 'test' desires. I believe that the majority's 'test' is patently arbitrary, and too unreliable to be given this court's imprimatur.").

[15] For a discussion of such speech, see BRUCE W. SANFORD, LIBEL AND PRIVACY 162-69 (2d ed. 1991).

[16] The *Restatement (Second) of Torts* states:

> There are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse. A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. Thus when, in the course of an altercation, the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not reasonably to be understood as asserting the fact that the plaintiff is of illegitimate birth but only to be abusing him to his face. No action for defamation will lie in this case. The circumstances under which verbal abuse is uttered affect the determination of how it is reasonably to be understood. Words uttered face to face during an altercation may well be understood merely as abuse or insult, while words written after time for thought or published in a newspaper may be taken to express the defamatory charge and to be intended to be taken seriously.

RESTATEMENT (SECOND) OF TORTS § 566 cmt. e (1977).

[17] *See, e.g.*, Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (holding that defendants' use of the word "blackmail" could not support a finding that

rhetoric are not mutually exclusive speech categories;[18] moreover, they all raise issues concerning the reasonable construction of the defendant's charge, and all three may be construed as nonfactual assertions.[19] Accordingly, the *Ollman* multifactor analysis has been used in support of conclusions not only that statements are opinion, but also that they are mere vituperation or rhetoric.[20]

Prior to its 1990 decision in *Milkovich v. Lorain Journal Co.*,[21] the Supreme Court had ruled on the issues of verbal abuse and rhetoric, holding that such speech is protected under the First Amendment when it is nonfactual.[22] Until its decision in *Milkovich*, however, the Supreme Court had said little about the significance of its influential dictum on opinion in *Gertz* and had not defined the scope of constitutional protection for defamatory opinion.[23] In *Milkovich*, the Court addressed those issues. Its decision in *Milkovich*, however, has not provided lower courts with a clear and predictable method of resolving opinion cases, and the decision is subject to more than one interpretation. The major test employed by the Court in *Milkovich*—whether a statement is provable as false on the basis of objective evidence[24]—has produced widely divergent results in its application.[25]

In an opinion narrowly tailored to fit the case at hand, the Court in *Milkovich* rejected the defendants' proposal for the adoption of a multifactor analysis.[26] It held instead that under pre-existing constitutional doctrine, a defamatory opinion on a matter of public concern is not actionable if the opinion does not contain a provably false factual connotation, at least when a media defendant is involved.[27] However, the succinct, twenty-one page

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defendants had charged plaintiff with the crime of blackmail, when the only reasonable construction of the word was that it charged plaintiff with taking an unreasonable bargaining position).

[18] *See, e.g.*, National Ass'n of Gov't Employees v. Central Broadcasting Corp., 396 N.E.2d 996, 1000-02 (Mass. 1979) (holding that charge that union faced an "inroad of communism" was nonactionable because it was pure opinion based on disclosed facts, and because it was "mere pejorative rhetoric"), *cert. denied*, 446 U.S. 935 (1980); *see also* SANFORD, *supra* note 15, at 167-69 (discussing *Central Broadcasting*).

[19] *See* SANFORD, *supra* note 15, at 162-69.

[20] *See* discussion *infra* part IV.A.7.

[21] 497 U.S. 1 (1990).

[22] *See infra* note 83 and accompanying text.

[23] *See Milkovich*, 497 U.S. at 17-19 (reviewing Supreme Court's previous decisions relating to the types of speech that are not actionable).

[24] *Id.* at 19, 21-22.

[25] *See* discussion *infra* part IV.A.

[26] *See Milkovich*, 497 U.S. at 19.

[27] *Id.* at 19-20. This Article does not address the difficulties created by the Court's potential limitation of its holding to matters of public concern and to media defendants. For discussion of the problematic limitation to matters of public concern, see Phillips, *supra* note 11, at 663-66. For cases holding that state common law opinion rules apply

opinion, written by Chief Justice Rehnquist[28] with Justices Brennan and Marshall dissenting,[29] failed to set forth a comprehensive definition of the distinction between fact and opinion, and is subject to at least two reasonable interpretations.

One interpretation is that the Court followed the approach of section 566 of the *Restatement (Second) of Torts*. Under that approach, a "pure" expression of opinion is not actionable.[30] A "pure" opinion has two components: (1) an assertion that reasonably is understood to express the comment of the speaker, rather than an assertion of fact; and (2) a factual basis for the comment that is stated along with the comment, or is known or available to the recipient.[31] Thus, a "pure" statement of opinion does not imply the asser-

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to statements that are not on a matter of public concern, see, e.g., Weissman v. Sri Lanka Curry House, Inc., 469 N.W.2d 471, 473 (Minn. Ct. App. 1991) (holding that state common law principles apply to speech of purely private concern, that state common law "makes no distinction between 'fact' and 'opinion,'" and that defendant's statements were only conditionally privileged under common law rules); Lutz v. Royal Ins. Co. of Am., 586 A.2d 278, 286 (N.J. Super. Ct. App. Div. 1991) (predicting that, if faced with the issue, the New Jersey Supreme Court would not immunize an opinion on a matter of private concern). *But see* Lund v. Chicago and Northwestern Transp. Co., 467 N.W.2d 366 (Minn. Ct. App. 1991).

> We find unpersuasive the dissent's limitation of constitutional opinion protection to statements about public officials or public figures, or regarding matters of public concern . . . . [W]hen the statements, such as those made here during a meeting regarding employee grievances, are clearly opinions, the state's interest fades and the first amendment predominates.

Id. at 369 n.1.

Regarding the tentative limitation of *Milkovich* to cases involving media defendants, suffice it to say that different constitutional protections for media and nonmedia defendants would be untenable. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 780 (1986) (Brennan, J., concurring) ("[S]uch a distinction is 'irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual."'"), *quoted in Milkovich*, 497 U.S. at 23 n.2 (Brennan, J., dissenting).

[28] *Milkovich*, 497 U.S. at 1.

[29] *Id.* at 23 (Brennan, J., joined by Marshall, J., dissenting).

[30] RESTATEMENT (SECOND) OF TORTS § 566 (1977) ("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.").

[31] *See id.* § 566 cmt. b.

> There are two kinds of expression of opinion. The simple expression of opinion, or the pure type, occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character. The statement of facts and the expression of opinion based on them are separate matters in this case, and at common law either or both could be defamatory and the basis for an action for libel

tion of undisclosed or unknown facts as the basis for the opinion.[32] Justice Brennan and others have construed the Court's opinion in *Milkovich* as consistent with the *Restatement* position.[33]

The more plausible interpretation of the Court's opinion is that it adopted the *Restatement* approach only in part, holding that constitutional immunity for the expression of a defamatory opinion on a matter of public concern exists only if (1) the speaker does not imply the existence of undisclosed facts as the basis for the opinion, *and* (2) the opinion itself—that is, the comment on the facts—is not provable as true or false on the basis of objective evidence.[34] Conversely, a speaker is subject to liability for a defamatory charge, even if she couches the charge as her opinion and the factual basis is known or available to the recipients, if (1) the recipient reasonably construes the statement as an assertion of the charge, rather than as mere figurative or pejorative language, and (2) the charge is provable as

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or slander. The opinion may be ostensibly in the form of a factual statement if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated.

The pure type of expression of opinion may also occur when the maker of the comment does not himself express the alleged facts on which he bases the expression of opinion. This happens when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts and does not imply the existence of other facts in order to justify the comment. The assumption of the facts may come about because someone else has stated them or because they were assumed by both parties as a result of their notoriety or otherwise.

The second kind of expression of opinion, or the mixed type, is one which, while an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication. Here the expression of the opinion gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant. To say of a person that he is a thief without explaining why, may, depending upon the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of thievery. To declare, without an indication of the basis for the conclusion, that a person is utterly devoid of moral principles may be found to imply the assertion that he has been guilty of conduct that would justify the reaching of that conclusion.

Id.

[32] *Id.*

[33] *See Milkovich*, 497 U.S. at 24 (Brennan, J., dissenting) ("[T]he Court today . . . determines that a protection for statements of pure opinion is dictated by *existing* First Amendment doctrine."); *see also* Phillips, *supra* note 11, at 673; Nat Stern, *Defamation, Epistemology, and the Erosion (But not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 612 (1990); discussion *infra* part IV.A.2.

[34] *See* discussion *infra* part III.B.

false on the basis of objective evidence.[35]

Stated another way, the Court immunized only pure, *evaluative* opinion. Thus, a pure, *deductive* opinion, which is provable as true or false on the basis of objective evidence, carries no immunity.[36] One asserting such an opinion is subject to liability under the same constitutional protections that apply to all factual assertions.

Beyond these two plausible interpretations of *Milkovich,* some courts have construed it to immunize statements that are not pure opinion.[37] Based on a contextual or multifactor analysis, some courts treat as opinion any statement reasonably understood as the speaker's point of view, even if supporting facts are not stated or available to the recipients.[38] Under this interpretation, an assertion of the speaker's belief or conjecture that certain facts are or may be true, as opposed to an assertion that the facts *are* true, is a statement of opinion.[39] Another form of multifactor analysis immunizes as opinion any statement that cannot be proved true or false by reliable evidence.[40] Yet a third immunizes statements that are imprecise or ambiguous.[41] These interpretations of *Milkovich* seem clearly erroneous.

If my interpretation is correct, the immediate significance of *Milkovich* is to withhold immunity from a defamatory charge reasonably understood as expressing the speaker's opinion that the plaintiff has committed a crime.[42] The broader significance of *Milkovich* is less than clear. One of the difficult questions raised by the decision is how to determine whether a statement is provable as false on the basis of objective evidence. A more basic question is whether the decision strikes the proper balance between the interest in freedom of speech protected by the First Amendment and the interest in reputation protected by the law of defamation.[43] Finally, what balance be-

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[35] *See* discussion *infra* part III.B.

[36] *See* W. Page Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1249-59 (1976) (discussing the difference between deductive and evaluative opinion). Dean Keeton's position is consistent with my interpretation of the Court's position in *Milkovich*; *see* discussion *infra* part III.B.

[37] *See* discussion *infra* part IV.A.3.

[38] *See* discussion *infra* part IV.A.3.

[39] *See* discussion *infra* part IV.A.3.

[40] *See* discussion *infra* part IV.A.4.

[41] *See* discussion *infra* part IV.A.5.

[42] *See* discussion *infra* part III.B.

[43] The Court's defamation decisions, beginning with New York Times v. Sullivan, 376 U.S. 254 (1964), have not recognized absolute protection for defamatory speech; rather they have balanced the interests of free speech and reputation. *See* discussion *infra* part V.A.2. Professor Post has demonstrated, however, that the interest in reputation is not unitary. Rather, there are "three distinct concepts of reputation that the common law of defamation has at various times in its history attempted to protect: reputation as property, as honor, and as dignity." Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693 (1986).

tween these interests should guide the Supreme Court and lower courts in their further development of the rules regarding defamatory opinion? Although some scholars argue that drawing any distinction between fact and opinion is unsound policy,[44] the better view is that First Amendment principles require the courts to make the distinction.[45]

Commentators also decry the use of a balancing test in First Amendment law.[46] There is considerable justification for this position.[47] Yet, unless one advocates the abolition of defamation law, balancing is unavoidable.[48] Balancing is defensible if the courts give proper priority to free speech interests and, when there is room for error of judgment, provide adequate "breathing

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Contemporary law gives little recognition to reputation as honor. *Id.* at 721-26. The *Gertz* damages rules reflect a recognition of reputation as individual dignity, permitting its rehabilitation. *Id.* at 738.

Demonstrating the difficulty of the balancing issue, at least one state court already has extended broader protection to opinion than it believes *Milkovich* to require. *See* Immuno AG. v. Moor-Jankowski, 549 N.E.2d 129 (N.Y. 1989), *recons. denied*, 552 N.E.2d 179 (N.Y.), *vacated*, 497 U.S. 1021, *adhered to*, 567 N.E.2d 1270 (N.Y. 1990) (employing, under state law, the same standard used in the court's previous opinion), *cert. denied*, 500 U.S. 954 (1991). In its second opinion in *Immuno*, the New York Court of Appeals stated: "[I]t is impossible to state with complete certainty that some of the statements previously considered protected opinion, because of the language and format of the speech, would not now be viewed as implied assertions of fact [under *Milkovich*]." *Immuno*, 567 N.E.2d at 1277 n.3. The court held, however, that under the broader protection for speech of New York law, all of the statements at issue were either statements of fact not shown by the plaintiff to be false, or were statements of opinion. *Id.* at 1280-82.

[44] *E.g.*, Phillips, *supra* note 11, at 648.

[45] *See* discussion *infra* part V.A.2.b.

[46] *See, e.g.*, RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 39-42 (1992).

[47] Professor Smolla, for example, denounces balancing as a process in which

> the weight of the speech interest is balanced against the weight of the competing interest, and the conflict is resolved under a straightforward cost/benefit analysis . . . . [T]he use of the balancing approach tends to result in relatively low protection for speech, because when balancing is employed, speech tends to be devalued as just another social interest to be considered in the mix. The marketplace, self-fulfillment, and self-governance rationales [for freedom of speech] combine to make an overwhelmingly convincing case for treating freedom of speech as a preferred value.

Id. at 39-40 (footnote omitted).

[48] Professor Tribe observes: "[T]he 'balancers' are right in concluding that it is impossible to escape the task of weighing the competing considerations." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 793 (2d ed. 1988). He also notes that "[t]he question is whether the 'balance' should be struck for all cases in the process of framing particular categorical definitions, or whether the 'balance' should be calibrated anew on a case-by-case basis." *Id.* at 793. Professor Tribe finds categorical rules preferable "because they leave less room for the prejudices of the factfinder to insinuate themselves into a decision." *Id.* (footnote omitted).

space" for the protection of First Amendment concerns.[49] In defamation law, moreover, there are nuances in the kind of balancing that may be warranted. Thus, when liability penalizes the content of speech, as it does when it burdens the criticism of governmental officials,[50] the courts must give substantial breathing space for First Amendment values; but when the objective of liability is the compensation of injury to reputation, and does not rest on speech content, then case-by-case balancing is more easily justified.[51] The intransigent problem of differentiating between fact and opinion requires particularly cautious attention to the nature of the balance to be struck

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[49] In his "Model for Freedom of Speech," for example, Professor Smolla recognizes that "modern First Amendment jurisprudence does permit speech to be penalized when it causes harm." SMOLLA, *supra* note 46, at 48. Relational harms are among those that warrant some intrusion on freedom of speech. *Id.* at 40. Professor Smolla also states:

> Communication is often a blend of different types of speech, posing different types of harms and meriting varying levels of constitutional protection. Whenever speech receiving high levels of protection is intertwined with speech receiving lower levels of protection, regulations must utilize "breathing space" devices that are designed to prevent the inadvertent penalizing of the more highly protected speech.

Id. at 51. He further notes that the "breathing space" principle is reflected in the Supreme Court's defamation rulings requiring the proof of fault and falsity. *Id.* at 51-52.

[50] Professor Tribe has observed: "[O]ne teaching of *New York Times Co. v. Sullivan* is that reputational interests are attenuated for persons who become affiliated with government exactly because government itself, unlike individuals, *has* no legitimate reputational interest: government cannot be defamed." TRIBE, *supra* note 48, at 880.

[51] Professor Tribe has stated:

> [W]hy should the plaintiff's vulnerability or deservingness make a difference if the freedoms of speech and press occupy a "preferred position" in the constitutional scheme? One response is to interpret *Gertz* in light of the two ways in which government may abridge speech. Where government aims at the content of speech, the first amendment demands an extraordinary justification. *New York Times Co. v. Sullivan* was clearly a case of this type, and the rule forged in that decision accordingly reflected the primacy of first amendment values. But where government aims at the non-communicative impact of expressive behavior, government may act so long as the flow of information and ideas is not unduly constricted. And, as *Dun & Bradstreet* made clear, the Court is especially reluctant to limit the common law of defamation when the subject matter of the speech is "purely private." Where the law is closely confined to the narrow purpose of compensating private individuals for injury to their reputational interests, the law is aimed at something other than content, at least in the sense that the objective is unrelated to whether government approves or disapproves the content of the message. Defamation law in this sense is ideologically neutral, and therefore is appropriately remitted to a "balancing" test. Because the reputational interest of the individual is significant, and may indeed be of federal constitutional dimension, the crucial question is the degree to which the law of defamation actually constrains the communication of truthful information.

Id. at 878 (footnotes omitted).

between the competing interests, as First Amendment values lie on both sides of the equation.[52] This Article explores these and related problems.

Part II of this Article presents the factual background of the *Milkovich* case. Part III discusses the opinion of the Court, comparing it with the analytical approaches of the *Restatement (Second) of Torts*, Judge Friendly's opinion in *Cianci v. New Times Publishing Co.*,[53] and Justice Brennan's dissent in *Milkovich*.[54] Based upon these comparisons, this Article construes the Court's decision as recognizing a constitutional immunity for "pure" evaluative opinion, but not for deductive opinion. Part IV presents the widely divergent approaches to opinion cases that lower courts have employed since *Milkovich*.

Part V analyzes some of the major issues generated by the *Milkovich* decision. Section A confronts the perplexing problem of how to distinguish between fact and opinion. Section B addresses the question whether immunity for evaluative but not deductive opinion strikes the proper balance between the interests in free speech and reputation, and concludes that it does. Section C evaluates the decisions that immunize point-of-view assertions. Section D deals with the problem of ambiguity, which presents conflicting dangers to First Amendment interests. On the one hand, some courts have immunized ambiguity by treating it as opinion; this approach may immunize the clever defamer without advancing First Amendment interests. On the other hand, the language of persuasion often is passionate, and there is danger to First Amendment interests in allowing juries to construe ambiguous language as factual. Section D maintains that use of a stringent fault requirement regarding the meaning of language would help to protect against both of these dangers. Section D further maintains that the Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*[55] is authority for the sound proposition that in opinion cases, the plaintiff must prove not only falsity and fault regarding falsity, but also fault regarding the factual connotation of the defendant's assertion.[56]

Part VI, the concluding section, discusses the precarious accommodations between speech and reputational interests that the Supreme Court's defamation decisions have made. This portion of the Article identifies two shortcomings in current rules. The first is that the Court has created minimum, but not maximum, protections for defamatory speech. Because excessive protection for defamatory speech impairs public discourse, lower courts

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[52] *See* discussion *infra* part V.A.2.b.

[53] 639 F.2d 54 (2d Cir. 1980).

[54] *Milkovich*, 497 U.S. at 23 (Brennan, J., dissenting).

[55] 466 U.S. 485 (1984).

[56] *See* Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 834-51 (1984) (arguing in addition that the plaintiff in a defamation case should be required to prove that the defendant was at fault concerning the defamatory meaning of his words).

that extend protection beyond the minimum that the Court requires provide inadequate protection to First Amendment interests. The second shortcoming is the lack of a forum for the vindication of reputation by a determination of truth or falsity. Current proposals for the reform of defamation law address this problem, but they will not provide an adequate solution if judges interpret too broadly what qualifies as "opinion." In conclusion, I join others in deploring the complexity of the law of defamation, acknowledging, however, the reality that defamation law confronts conflicting interests of vital importance in our society. Defamation law will remain complex as the courts strive to make the right accommodations.

II. THE *MILKOVICH* CASE HISTORY

The facts giving rise to *Milkovich* began with a fight at a high-school wrestling match in Maple Heights, Ohio.[57] The state high school athletic association imposed penalties on the Maple Heights wrestling team following a hearing on the incident. Subsequently, some Maple Heights parents and students obtained a restraining order against the association penalties on due process grounds. Michael Milkovich, the coach of the Maple Heights team, and H. Don Scott, the Superintendent of the Maple Heights Public School System, testified during both the association proceedings and the court hearing.[58] Following the court's decision, J. Theodore Diadiun, a sports writer for the *News-Herald*, a local newspaper, published a column sharply criticizing the testimony of Milkovich and Scott at the court hearing. The headline over the column stated, "Maple beat the law with the 'big lie,'"[59] and the headline on a carryover page stated, "Diadiun says Maple told a lie."[60] Diadiun's photograph appeared below the main headline, along with the caption, "TD Says."[61] The column asserted that the lesson the Maple Heights students had learned from the court hearing was, "If you get in a jam, lie your way out."[62] It also asserted that "[a]nyone who attended the meet, whether he [was] from Maple Heights, Mentor, or [an] impartial observer, [knew] in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."[63]

Milkovich brought a libel action against Diadiun and the newspaper, alleging that the headline of the article and the passages quoted above defamed him in that they "accused plaintiff of committing the crime of perju-

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[57] *Milkovich*, 497 U.S. at 4 (citing Milkovich v. The News-Herald, 545 N.E.2d 1320, 1321-22 (Ohio Ct. App. 1989)).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 5.

ry, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation of coach and teacher, and constituted libel per se."[64] The litigation followed a circuitous route through the Ohio courts over a period of fifteen years.[65] Finally, an Ohio Court of Appeals granted summary judgment to the defendants[66] on the basis of a 1986 decision of the Ohio Supreme Court in a related case, *Scott v. News-Herald*,[67] which held that the Diadiun column was constitutionally protected as opinion. In reaching that conclusion, the court in *Scott* determined that the proper analysis for distinguishing between fact and opinion was the four-factor, totality-of-the-circumstances test adopted by the United States Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans*.[68]

Applying the four-factor test, the court found that the first two factors indicated that the article constituted a verifiable charge that the plaintiff had committed perjury; however, the last two factors indicated that the average reader would regard the article as opinion.[69] With regard to the first factor, the court stated: "[T]he clear impact in some nine sentences and a caption is that appellant 'lied at the hearing after . . . having given his solemn oath to tell the truth.'"[70] With regard to the second factor, the court stated: "Whether or not [the plaintiff] did indeed perjure himself is certainly verifiable . . . ."[71] As to the third factor, the court found that, viewing the article as a whole—including the caption, "TD Says," the second heading, "Diadiun says Maple told a lie," and Diadiun's apparent view that any position taken by Scott and Milkovich that was less than a full admission of culpability was a lie—"the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury."[72] As to the fourth factor, the broader context of the article, the court found that the appearance of the article on the sports page was significant; the court described the sports page as "a traditional haven for cajoling, invective, and hyperbole."[73] The court stated that "[o]n balance, . . . a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that 'legal conclusions' in such a context would probably be con-

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[64] *Id.* at 7 (footnote omitted) (citation omitted).

[65] *See id.* at 7-10.

[66] *Milkovich*, 545 N.E.2d at 1320.

[67] 496 N.E.2d 699 (Ohio 1986).

[68] 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *see Scott*, 496 N.E.2d at 706.

[69] *Scott*, 496 N.E.2d at 707.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 708.

[73] *Id.*

strued as the writer's opinion."[74]

III. THE SUPREME COURT'S OPINION

A. *The Court's Decision—An Expansion of Constitutional Doctrine*

The Supreme Court granted certiorari "to consider the important questions raised by the Ohio courts' recognition of a constitutionally required 'opinion' exception to the application of its defamation laws."[75] Specifically, it considered the defendants' arguments that only statements of fact are actionable and that the *Ollman* four-factor test should be employed in distinguishing between fact and opinion.[76] The Court rejected the defendants' invitation to adopt a multiple factor test, holding that opinions on matters of public concern receive sufficient protection under existing constitutional doctrine.[77] The Court determined that "the 'breathing space' which 'freedoms of expression require in order to survive,' . . . is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact."[78]

The Court identified four existing constitutional rules that secure adequate protection for the expression of opinions on matters of public concern.[79] The first was the rule adopted in *Philadelphia Newspapers, Inc. v. Hepps*,[80] requiring the plaintiff to prove the falsity of a defamatory statement on a matter of public concern.[81] The Court in *Milkovich* stated:

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[74] *Id.*

[75] Milkovich v. Lorain Journal Co., 497 U.S. 1, 10 (1990).

[76] *Id.* at 9.

[77] *Id.* at 19.

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

[79] *Id.* at 1.

[80] 475 U.S. 767 (1986).

[81] In *Hepps*, the Court held that "a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation." *Id.* at 775 (citing Garrison v. Louisiana, 379 U.S. 64, 74 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)). *Hepps* further held that a private figure plaintiff must prove the falsity of a defamatory newspaper article on a matter of public concern. *Id.* at 776. In *Hepps*, the defendant had published a series of newspaper articles asserting that the plaintiffs had links to organized crime and that the plaintiffs had used those ties to influence the state's governmental processes. *Id.* at 769. The Pennsylvania Supreme Court followed the common law presumption of falsity, holding that the defendant had the burden of proving truth. Hepps v. Philadelphia Newspapers, Inc., 485 A.2d 374, 387 (Pa. 1984). The United States Supreme Court held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Hepps*, 475 U.S. at 777.

> Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved . . . . *Hepps* ensures 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.[82]

The second rule identified by the Court was that of "the *Bresler-Letter Carriers-Falwell* line of cases," which protects statements that cannot reasonably be understood as asserting defamatory facts about the plaintiff.[83] The third rule involved the "*New York Times-Butts-Gertz* culpability requirements," under which the plaintiff must prove fault with regard to falsity, the level of fault depending upon the status of the plaintiff as public official, public figure, or private figure.[84] The fourth was the appellate review standard established in *New York Times Co. v. Sullivan*[85] and reaffirmed in *Bose Corp. v. Consumers Union of United States, Inc.*,[86] under which an

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[82] *Milkovich*, 497 U.S. at 19-20 (footnotes omitted). Prior to *Hepps*, Franklin and Bussel had interpreted *New York Times* and *Gertz* to require that plaintiffs prove falsity. Franklin & Bussel, *supra* note 56, at 855-58. They concluded that the falsity requirement meant that "the courts [could] discard permanently the spurious distinction between fact and opinion." *Id.* at 869.

[83] *Milkovich*, 497 U.S. at 20; *see* Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (holding that the defendants' use of the word "blackmail" could not support a finding that defendants had charged the plaintiff with the crime of blackmail, when the only reasonable construction of the word was that it charged the plaintiff with taking an unreasonable bargaining position); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974) (holding that the defendant's use of the word "traitor" in a literary definition of a "scab" could not form the basis of a recovery for libel under federal labor law because the word could not be construed as a representation of fact); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (holding that the First Amendment precluded recovery for intentional infliction of emotional distress by a public figure for an advertisement parody that could not reasonably be interpreted as stating actual facts about the plaintiff).

[84] *Milkovich*, 497 U.S. at 20; *see* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that a public official plaintiff must prove knowledge of falsity or reckless disregard of the truth to recover a libel judgment against a media defendant); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (holding that a public figure plaintiff also must prove knowledge of falsity or reckless disregard of the truth to recover in a libel action against a media defendant); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that a private figure plaintiff must prove negligence regarding falsity to recover in a libel action against a media defendant).

[85] 376 U.S. 254 (1964).

[86] 466 U.S. 485 (1984).

appellate court must make an independent review of the record to ensure that clear and convincing evidence supports a finding of actual malice when that standard is required by the First Amendment.[87]

Although the Court asserted that existing constitutional doctrine secures adequate protection for defamatory opinion, the *Milkovich* decision in fact expanded constitutional doctrine in two significant respects. First, the Court broke new ground in interpreting existing rules to prohibit liability for defamatory opinion, on a matter of public concern, that does not contain a provably false factual connotation. None of the cases referred to by the Court squarely presented issues regarding defamatory opinion. *Hepps, New York Times, Butts,* and *Gertz* developed their requirements regarding the proof of falsity and fault in cases involving defamatory fact.[88] *Bresler* and *Letter Carriers* raised the question of the reasonable construction of the allegedly defamatory language at issue.[89] In both cases, the Court held that the language used was rhetorical hyperbole not capable of the literal meaning that the plaintiffs alleged to be defamatory.[90] Similarly in *Falwell,* the jury had found for the defendants on the plaintiff's libel claim because the ad parody at issue could not reasonably be construed in a literal sense.[91] The Court held that a public figure may not recover for intentional infliction of emotional distress without showing that the publication contained a false statement of fact made with knowledge of falsity or reckless disregard for the truth.[92] Although *Letter Carriers* and *Falwell* contained language recognizing First Amendment protection of defamatory opinion,[93] those cases

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[87] *Milkovich*, 497 U.S. at 21.

[88] *Hepps*, 475 U.S. at 769; *New York Times*, 376 U.S. at 257; *Butts*, 388 U.S. at 135; *Gertz*, 418 U.S. at 326.

[89] *Bresler*, 398 U.S. at 14; *Letter Carriers*, 418 U.S. at 286.

[90] *See supra* note 83.

[91] *Falwell*, 485 U.S. at 49.

[92] *Id.* at 56.

[93] *See Falwell*, 485 U.S. at 46.

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." . . . We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea.

Id. at 50-51; *see also Letter Carriers*, 418 U.S. at 264.

> Such words [as traitor and treason] were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law. Here, too, "there is no such thing as a false idea. However pernicious an opinion may seem, we depend

involved the kind of insulting or pejorative "name calling" that traditionally has not been regarded as defamatory.[94] Thus, the application of these decisions to preclude liability for defamatory opinion extends their reach.

Second, the Court delineated, to a degree, the line between fact and opinion.[95] *Milkovich* did not draw a very bright line; however, it is clear enough to indicate that the Court's standard for holding that a statement is protected opinion, as a matter of law, is narrower than that of *Ollman v. Evans*.[96] The relevant portion of the Court's opinion began with the much-quoted dictum in *Gertz*.[97] The Court rejected the notion that this language was intended to create a broad immunity for opinion.[98] Adopting Judge Friendly's interpretation of this dictum in *Cianci v. New Times Publishing Co.*,[99] the Court stated that the language was merely an expression of Justice Holmes's "market place of ideas" theory.[100] This origin of the passage, Judge Friendly said, "points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion."[101] The Court stated:

> Thus, we do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion" . . . . Not 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.[102]

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for its correction not on the conscience of judges and juries but on the competition of other ideas."

Id. at 284.

[94] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 776 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 566 cmt. e (1977).

[95] *Milkovich*, 497 U.S. at 19.

[96] Of course, state courts are free to immunize statements they regard as opinion under state constitutional or common law rules, even if the statements would not be protected opinion under *Milkovich*. *See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983) ("The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on 'the limitations of our own jurisdiction.'"). In *Milkovich*, the Court rejected the defendants' argument "that certain statements made by the court evidenced an intent to independently rest the decision on state law grounds . . . ." *Milkovich*, 497 U.S. at 11 n.5. The Court noted "that the Ohio Supreme Court remains free, of course, to address all of the foregoing [state law] issues on remand." *Id.* at 12.

[97] *Milkovich*, 497 U.S. at 17-18; *see supra* text accompanying note 1.

[98] *Milkovich*, 497 U.S. at 18.

[99] 639 F.2d 54, 61-62 (2d Cir. 1980).

[100] *Milkovich*, 497 U.S. at 18.

[101] *Cianci*, 639 F.2d at 62 n.10, *quoted in Milkovich*, 497 U.S. at 18.

[102] *Milkovich*, 497 U.S. at 18.

In what may be its most important passage on the fact-opinion distinction, the Court next addressed what language, couched as opinion, may involve an assertion of fact:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" . . . . It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion."[103]

The Court compared the statement, "In my opinion Jones is a liar," with a statement that would be protected as opinion:

> [U]nlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures 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.[104]

Turning to the facts of *Milkovich*, the Court employed a two-step analysis. First the Court stated: "The dispositive question in the present case . . . [is] whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding."[105] The Court resolved this issue in the plaintiff's favor, relying on the Ohio Supreme Court's finding that "the clear

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[103] *Id.* at 18-19 (footnotes omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. a).

[104] *Id.* at 20.

[105] *Id.* at 21.

impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.'"[106] The Court added that "[t]his is not 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. Nor does the general tenor of the article negate this impression."[107]

The second question the Court addressed was whether "the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false."[108] Again, the Court resolved the issue in the plaintiff's favor:

> A determination of whether petitioner lied in this instance can be made on a core of objective evidence by comparing, *inter alia*, petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court. As the *Scott* court noted regarding the plaintiff in that case: "[W]hether or not H. Don Scott did indeed perjure himself is certainly verifiable in a perjury action with evidence adduced from the transcripts and witnesses present at the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." So too with petitioner Milkovich.[109]

The Court did not expound on the justifications for its holding. It merely noted that its decisions have recognized both "the [First] Amendment's vital guarantee of free and uninhibited discussion of public issues" and the "'important social values which underlie the law of defamation,' [recognizing] that '[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation.'"[110] The Court determined that its "decision in

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[106] *Id.* (quoting Scott v. News-Herald, 496 N.E.2d 699, 707 (Ohio 1986)).

[107] *Id.* at 21.

[108] *Id.*

[109] *Id.* at 21-22 (quoting *Scott*, 496 N.E.2d at 707).

[110] *Id.* at 22 (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966)). The Court continued:

> 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 . . . . The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Id. at 22-23 (quoting *Rosenblatt*, 383 U.S. at 92-93 (Stewart, J., concurring)).

the present case holds the balance true."[111]

The Court reversed and remanded the case "for further proceedings not inconsistent with this opinion."[112] On remand, the Court of Appeals of Ohio remanded the case for trial, holding that "the Ohio Constitution does not afford greater protection to 'opinion' than the [F]ederal Constitution."[113]

B. *The Meaning of the Fact/Opinion Distinction in* Milkovich

The Court's demarcation between fact and opinion in *Milkovich* may raise as many questions as it answers. Three sources, however, help to clarify the Court's general statements about the fact/opinion dichotomy and its application of those generalities to the facts of *Milkovich*. First, section 566 of the *Restatement (Second) of Torts*, cited by the Court,[114] is useful because in one respect the Court's analysis resembles that of the *Restatement*; in other respects, however, it differs. Second, Judge Friendly's decision in *Cianci v. New Times Publishing Co.*,[115] cited several times in *Milkovich*,[116] dealt with the fact/opinion distinction in a case somewhat similar to *Milkovich*. The key to understanding the fact/opinion distinction adopted by the Court in *Milkovich* appears to lie in Judge Friendly's analysis in *Cianci*. Third, Justice Brennan's dissent in *Milkovich* is instructive because his analysis contrasts with that of the majority. Justice Brennan stated that he agreed with the Court on the rules that should be applied in the case, but disagreed on how those rules applied to the facts.[117] More likely, however, the real disagreement was over the rules; Justice Brennan followed the analytical scheme of the *Restatement*, while the majority followed that of Judge Friendly in *Cianci*.

1. *The Court's Analysis Compared with that of the* Restatement

Under section 566 of the *Restatement (Second) of Torts*, opinion is actionable "only if it implies the allegation of undisclosed defamatory facts as

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[111] *Id.* at 23.

[112] *Id.*

[113] Milkovich v. News-Herald, 591 N.E.2d 394, 396 (Ohio Ct. App. 1990).

[114] *Milkovich*, 497 U.S. at 19.

[115] 639 F.2d 54 (2d Cir. 1980).

[116] *See Milkovich*, 497 U.S. at 18-19.

[117] *Id.* at 23-25 (Brennan, J., dissenting).

the basis for the opinion."[118] The drafters of this section assumed that the *Gertz* dictum established First Amendment immunity for defamatory opinion.[119] Although *Milkovich* took a narrow view of that dictum, the *Restatement* provision is instructive, given the holding in *Milkovich* that opinion is actionable if it "contain[s] a provably false factual connotation."[120] The *Restatement* provision is useful, too, because it reflects a long-standing common law concept that is a part of traditional fair-comment doctrine.[121] Thus, in 1933 Professor Fowler Harper noted that "[e]ven opinion is susceptible of being stated in such a manner as to directly imply a factual basis and if it is so stated, the defense of fair comment is not applicable."[122]

The protection of defamatory opinion stated with its factual predicate derives from cogent policy considerations:

> If the actual facts are accurately stated, an opinion based thereon will be understood as such and taken for what it is worth. In such a case the writer may, by expressing his opinion, "libel himself rather than the subject of his remarks." But if the facts are misstated, the subject of his remarks is at the writer's mercy, and a defamatory opinion, unless properly labeled, may have the effect of a statement of fact.
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> As a corollary to the foregoing rule, it follows that to

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[118] Entitled "Expressions of Opinion," section 566 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." RESTATEMENT (SECOND) OF TORTS § 566 (1977).

[119] *See id.* § 566 cmt. c.

[120] *Milkovich*, 497 U.S. at 20.

[121] There are two views on the common law requirement for a disclosed factual predicate. Under one view, the requirement constitutes the "fairness" element of the privilege of fair comment. Whether there is a sufficient relation between the facts and the inference stated is tested by asking the factfinder whether "a fair minded man in good faith [could] have held the opinion expressed having regard to such of the facts referred to in [the defendant's statement] as proved." *See* Broadway Approvals, Ltd. v. Odhams Press, Ltd., 1 W.L.R. 805, 811 (Court of Appeal, 1965); *see also* Coleman v. Newark Morning Ledger Co., 149 A.2d 193, 206 (N.J. 1959) ("[T]he relevant questions [are] whether (a) the subject matter was indicated with sufficient clarity to justify comment being made, and (b) the comment actually made was such as an honest, though prejudiced, man might make."). The *Restatement* approach, however, reflects the view of Professor Fowler Harper, the Associate Reporter for the defamation portion of the *Restatement*, that, unless the speaker states the factual predicate for the viewpoint expressed, the speaker's statement is not comment or opinion at all. *See infra* note 123. However the requirement for a factual predicate is characterized, it is a long-standing requirement of the fair comment privilege.

[122] FOWLER HARPER, A TREATISE ON THE LAW OF TORTS 543 (1933) (footnote omitted).

> constitute genuine comment, criticism or expression of opinion must give the facts upon which it is based. Otherwise, the opinion would directly imply facts to reasonably and fairly support it and thus amount to a false statement of fact. To determine whether a writer is libeling himself or someone else by his expression of opinion, it is obviously necessary to know the facts upon which his comment or opinion is based.[123]

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[123] *Id.* at 543-44 (quoting Popham v. Pickburn (1862), 7 H. & N. 891, 158 Eng. Rep. 730, 733, per Wilde, B.). Harper elaborates on this point in the following passages:

> And the facts must not be so confused and mixed with opinion and comment that the reader can not distinguish them. "The justice of this rule is obvious," said Fletcher Moulton, L.J., in an English case, "if the facts are stated separately and the comment appears as an inference drawn from these facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavorable inference is based. But if the fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fairminded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses."
>
> Again, there must be a satisfactory relation between the facts, truly and accurately stated, and the inference or comment made thereon. This requirement is a bit vague and has been formulated in various ways by the judges. Cockburn, C.J., in a leading case, said that the comment must be such that "a jury shall say that the criticism was not only honest, but also well founded." Kennedy, J., said that the criticism must be "warranted" by the facts. A "reasonable inference" from those facts is the formula laid down by Lord Atkinson. According to Buckley, L.J., the test is whether the comment was, in the opinion of the jury, "beyond that which a fair man, however extreme might be his views in the matter, might make honestly and without malice, and was not without foundation."
>
> It seems clear that the jury is not to substitute its judgment on the matter in controversy for that of the defendant, and exclude from the immunity of "fair" comment all criticism with which it disagrees. The only requirement that seems necessary is that the inference or criticism be susceptible, as a matter of logic and experience in the view of the jurors, of being drawn from the facts stated. "That is to say, it must not introduce new and independent defamatory matter, or draw inferences or conclusions wholly irrelevant, or out of all proportion to the given facts which supply the basis of comment." It is thus seen that whether the inferences are related to the facts stated sufficiently to make them fair comment, really goes to the question of whether or not they constitute comment at all, for if the inferences are not so deducible from the facts, they are, so far as their effect upon the mind of the reader is concerned, imputations of such a character as to constitute communications of fact and not criticism. "In so far as facts are assumed as the basis of the criticism, or untrue allegations of fact are introduced in the course

Thus, the policy justification for immunizing "fair" comment is that the expression of opinion on matters of public concern has social value in democratic discourse when the opinion—an inference from facts—is stated along with its factual predicate. In this situation, the recipients of the communication can judge for themselves the soundness of the speaker's viewpoint; on these terms, the values of intelligent debate are sufficiently advanced to outweigh any damage to the subject of the remarks. In addition, the damage inflicted is only in proportion to the recipients' judgment on the soundness of the opinion, given its factual basis; consequently, the speaker may "libel himself rather than the subject of his remarks."[124] In contrast, a defamatory opinion unaccompanied by a factual predicate lacks sufficient social value in advancing intelligent debate to offset the reputational damage it may inflict.[125]

Milkovich adopts the *Restatement* view that opinion is *not* protected if it asserts or implies underlying defamatory facts.[126] Unlike the *Restatement*, however, *Milkovich* does not state that the speaker's inference or conclusion is protected as long as the factual predicate is given. *Milkovich* did not analyze Diadiun's article to determine (1) whether a reasonable reader would understand his charge of perjury to be offered as his opinion, rather than an assertion of fact, or (2) whether the author presented a sufficient factual predicate to enable the readers to judge for themselves the soundness of Diadiun's conclusion. Once the Court decided that Diadiun's statement

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of it, or personal imputations are made out arising out of it, the pretended criticism is not criticism at all. It is not a question of its title to the epithet 'fair,' or to any other epithet; it does not answer to the description of comment, and is defamation, pure and simple."

Id. at 544-45 (footnotes omitted).

[124] Popham v. Pickburn (1862), 7 H. & N. 891, 898, 158 Eng. Rep. 730, 733, per Wilde, B., *quoted in* HARPER, *supra* note 122, at 544.

[125] In Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985), the court took issue with the *Restatement* view that opinion is protected only if the factual predicate for the opinion is made clear by the speaker:

> [F]actors besides the disclosure of facts are relevant in determining whether a statement implies factual allegations to the reasonable reader. Here, for instance . . . that the statements challenged by Professor Ollman were found in a column on the Op-Ed page suggests, among other factors, that the statements would be understood by the reasonable reader as opinion—even in the absence of full disclosure of facts signalling to the reader that the allegedly defamatory statement was a characterization. In a word, disclosure of facts in the surrounding text is not the *only* signal that hard facts cannot reasonably be inferred from a statement. We think that our four-factor test takes account of the insights provided by section 566, while not rejecting the other factors that may signal that a statement is to be read as opinion.

Id. at 985 (footnote omitted).

[126] *Milkovich*, 497 U.S. at 14.

could be understood as "an assertion that petitioner Milkovich perjured himself in a judicial proceeding," rather than "the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury," the only question left to decide was whether the assertion was "sufficiently factual to be susceptible of being proved true or false."[127]

Clearly the Court did not intend to immunize the statement of an opinion, even if the factual predicate were sufficient to permit the recipients to judge the soundness of the inference, if the inference could be proved false on the basis of objective evidence. Thus, the Court stated:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. *Even if the speaker states the facts upon which he bases his opinion,* if those facts are either incorrect or incomplete, or *if his assessment of them is erroneous, the statement may still imply a false assertion of fact.* Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'"[128]

Here the Court seems to be saying that, even if the speaker made a defamatory charge couched as opinion *and* stated the facts upon which the opinion was based, the speaker nevertheless is subject to liability if (1) the factfinder reasonably could find that the speaker was not using merely figurative or hyperbolic language, but was asserting his belief that the plaintiff had engaged in the conduct charged, and (2) the speaker's assessment of the facts (her inference from them) was erroneous. The assessment would be "erroneous" if it could be proved false on the basis of objective evidence. This position differs from that of the *Restatement (Second) of Torts*.[129]

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[127] *Id.* at 21.

[128] *Id.* at 18-19 (emphasis added).

[129] The commentary to section 566 does not state any requirement that the speaker's comment must not be provable as true or false to qualify as opinion. Moreover, illustration four in the commentary suggests the contrary:

> *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 around 5:30 seated in a deck chair with a portable radio listening to a news

The Court's illustration of the type of opinion that would receive First Amendment protection is consistent with this view of the Court's approach. The Court stated:

> [U]nlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures 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.[130]

The Court's example of protected opinion is the assertion that Mayor Jones is abysmally ignorant. The factual predicate is that Mayor Jones accepts the teachings of Marx and Lenin. The charge of abysmal ignorance is not provably true or false. It is similar to the language at issue in *Bresler, Letter Carriers,* and *Falwell*; in context, the charge is rhetorical hyperbole or mere name-calling, rather than a literal charge of ignorance. It is different in character from a charge of perjury, which has a "provably false factual connotation."[131]

2. *The Court's Analysis Compared with that of Judge Friendly in* Cianci v. New Times Publishing Co.[132]

The conclusion that *Milkovich* recognizes a narrower immunity for opinion than does the *Restatement* finds support in the Court's references to Judge Friendly's decision in *Cianci*. In that case, the plaintiff alleged that a newspaper article charged him with the crimes of rape and obstruction of

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broadcast, and with a drink in his hand. I think he must be an alcoholic." The 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.

RESTATEMENT (SECOND) OF TORTS § 566 illus. 4 (1977). Arguably at least, whether one is an alcoholic is provable as true or false. *See Ollman*, 750 F.2d at 986 n.31 ("Whether *A* is an 'alcoholic,' as the term is commonly understood, is capable of being proven true or false through the submission to a trier of fact of evidence of *A*'s actions and conditions at various times in *A*'s life, coupled presumably with expert testimony."); Haworth v. Feigon, 623 A.2d 150, 156-57 (Me. 1993) (holding jury could find that the statement, "I hear you hired the drunk," had a factual connotation and bore the defamatory meaning alleged by the plaintiff).

[130] *Milkovich*, 497 U.S. at 20 (footnote omitted) (emphasis added).

[131] *Id.*

[132] 639 F.2d 54 (2d Cir. 1980).

justice.[133] At the time of publication, the plaintiff was seeking reelection as mayor.[134] The trial court dismissed the complaint on the ground, among others, that any defamatory implications in the article were protected as opinion.[135] In an opinion written by Judge Friendly, the United States Court of Appeals for the Second Circuit reversed and remanded.[136] Judge Friendly first rejected the contention that immunity was conferred by the dictum in *Gertz*: "A statement that Cianci raped Redlick at gunpoint twelve years ago and then paid her in an effort to obstruct justice falls within the Court's explication of false statements of fact rather than its illustrations of false ideas where public debate is the best solvent."[137] He stated that "when an 'opinion' is something more than a generally derogatory remark but is laden with factual content, such as charging the commission of serious crimes, the First Amendment confers no absolute immunity."[138] He further stated:

> Almost any charge of crime, unless made by an observer and sometimes even by him . . . is by necessity a statement of opinion. It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words "I think."[139]

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[133] *Id.* at 57.

[134] *Id.* at 58.

[135] *Id.* at 59.

[136] *Id.* at 54.

[137] *Id.* at 62.

[138] *Id.* at 63. Judge Friendly observed that decisions by the highest courts of both New York and California were consistent with this conclusion. He stated:

> In *Rinaldi v. Holt, Rinehart & Winston, Inc.*, [366 N.E.2d 1299 (N.Y. Ct. App.), *cert. denied*, 434 U.S. 969 (1977)], plaintiff, a state court judge, charged defendants with libel in writing and publishing a book which charged the judge with being corrupt and incompetent and advocated his removal from office. The court ruled that the charge of incompetence and the advocacy of the judge's removal were protected as statements of opinion, but the charge of corruption was not:
>
> > Accusations of criminal activity, *even in the form of opinion*, are not constitutionally protected . . . . While inquiry into motivation is within the scope of absolute privilege, outright charges of illegal conduct, if false, are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusation, *in whatever form*, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior. [*Id.* at 1307 (citing Gregory v. McDonnell Douglas Corp., 552 P.2d 425 (Cal. 1976))].

Cianci, 639 F.2d at 63.

[139] *Cianci*, 639 F.2d at 64 (footnote omitted).

In passages resembling the Court's analysis in *Milkovich*, Judge Friendly then elaborated on the limits upon any First Amendment immunity for opinion:

> The principle of the *Greenbelt-Letter Carriers-Gertz* trilogy, of our own *Buckley* decision, and of the New York Court of Appeals decision in *Rinaldi* is (1) that a pejorative statement of opinion concerning a public figure generally is constitutionally protected, quite apart from *Sullivan*, no matter how vigorously expressed; (2) that this principle applies even when the statement includes a term which could refer to criminal conduct *if the term could not reasonably be so understood in context*; but (3) that *the principle does not cover a charge which could reasonably be understood as imputing specific criminal or other wrongful acts.*
>
> It is clear from the foregoing that even if the article were to be read as only expressing the "opinion" that Cianci committed the crimes of rape and obstruction of justice, it is not absolutely protected as distinguished from the protection afforded by *Sullivan*. The charges of rape and obstruction of justice were not employed in a "loose, figurative sense" or as "rhetorical hyperbole." A jury could find that the effect of the article was not simply to convey the idea that Cianci was a bad man unworthy of the confidence of the voters of Providence but rather to produce a specific image of depraved conduct. . . . To call such charges merely an expression of "opinion" would be to indulge in Humpty-Dumpty's use of language. We see not the slightest indication that the Supreme Court or this court ever intended anything of this sort and much to demonstrate the contrary.[140]

Further rejecting the defendant's argument that the opinion should be protected under the rule stated in section 566 of the *Restatement*, Judge Friendly stated:

> While the disclosure of factual background may indicate whether a particular word constituted a direct charge of crime or a looser protected opinion, as with "blackmail" in *Greenbelt* or "traitor" in *Letter Carriers*, nothing in those cases nor in our own *Buckley* and *Hotchner* decisions suggests that such disclosure would protect as opinion a direct

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[140] *Id.* (emphasis added).

accusation of criminal misconduct.[141]

He also rejected the contention that the common law privilege of fair comment warranted dismissal of the complaint, because that privilege applied only if the stated factual basis for the opinion were true or privileged.[142] The plaintiff was entitled to an opportunity to prove his claims that the article contained numerous defamatory facts that were made with knowledge of falsity or reckless disregard of the truth. In addition, however, Judge Friendly went on to state:

> Moreover it is unlikely that an expression in the form of "I think Cianci raped Redick at gunpoint" would be considered a "comment" so as to come within the fair comment privilege. It is far from the usual sort of *evaluative judgment* with which the privilege has traditionally been concerned. Contrast Restatement, First, Torts § 607, illustration 1 (police chief unfit for office); illustration 2 (magistrate criticized for fixing high bail); illustration 3 (quality of work by contractor on public streets criticized); illustration 4 (European dictator criticized for acts which impair world peace). The problems with an extension of the privilege of fair comment to include specific allegations of fact were articulated long ago and have not lost their validity:
>
> > Were such an objection to be sustained to an action for slanderous words, it would be easy for one who designed to injure the character of another to effect his malicious purpose without incurring any responsibility. By circulating the slander, clothed in expression of opinion or belief, he might destroy the fairest reputation with impunity. But the law will not permit an injury to character to be without remedy by such an artifice as this. Whatever may be the mode of expression used, if an assertion of guilt is implied or intended, the words will be actionable. *Logan v. Steele*, 1 Bibb. 593, 595 (Ky. 1809) . . . . *See also* P. Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1254 (1976) (arguing that when fault with respect to the truth or falsity of the defamatory matter published is a prerequisite to recovery "[a]ny charge of specific misconduct or defamatory fact should be treated as a statement of fact regardless of whether the publisher conveys his *deductive opinion*

[141] *Id.* at 65.
[142] *Id.* at 66.

alone or with the information to support it.").[143]

In summary, Judge Friendly took the position that a statement asserting as an opinion that another has engaged in criminal conduct does not qualify as opinion for the purpose of a First Amendment immunity or the common law privilege of fair comment, whether or not the factual basis for the opinion is stated along with the opinion. Judge Friendly's justification for this conclusion was that immunizing an opinion that another has committed a crime would be "destructive of the law of libel;" virtually all criminal accusations could be immunized under this approach.[144] The basic implications are that a charge of criminal conduct, whether couched as a statement of fact or an expression of opinion, has the potential for great damage to reputation, and the policies underlying the immunization of opinion do not outweigh the plaintiff's interest in reputation when an "opinion" of this sort is expressed. Essentially, Judge Friendly's analysis is based on Dean Keeton's distinction between pure evaluative opinion, which carries immunity, and deductive opinion, which does not.[145]

Judge Friendly's analysis in *Cianci* is consistent with my interpretation of the Court's opinion in *Milkovich*. The opinion of the Court in *Milkovich* is not as clear as Judge Friendly's opinion in *Cianci*. Nevertheless, the Court's reliance on *Cianci* reinforces the conclusion that the Court did not intend to immunize a statement of a belief that the plaintiff had committed perjury, even if the factual predicate for the belief was stated along with the "opinion."[146]

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[143] *Id.* at 66-67 (emphasis added).

[144] *Id.* at 64.

[145] *See* Keeton, *supra* note 36, at 1221.

[146] In *Milkovich*, the Court referred to *Cianci* on two points. First, the Court adopted the view expressed by Judge Friendly in *Cianci* that the *Gertz* dictum was not "intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990). The Court agreed with Judge Friendly that the dictum "was merely a reiteration of Justice Holmes' classic 'marketplace of ideas' concept." *Id.* Second, the Court cited *Cianci* in the following passage:

> Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'"

Id. at 18-19; *see Cianci*, 639 F.2d at 64. Citation to *Cianci* in this passage at least suggests approval of *Cianci*'s holding that an expression of an opinion that the plaintiff has

3. *The Court's Analysis Compared with that of Justice Brennan's Dissent*

Justice Brennan's dissent, in which Justice Marshall joined, employed an analysis consistent with that of the *Restatement* and inconsistent with that of Judge Friendly in *Cianci*. Justice Brennan cited with approval section 566 of the *Restatement* and an illustration set forth in the commentary.[147] That illustration involved the speaker's stated conclusion that *C* "must be an alcoholic," together with the factual basis for the conclusion.[148] The *Restatement* took the position that *A*'s opinion or conclusion that *C* "must be an alcoholic" is protected opinion. Arguably, however, whether *C* is an alcoholic is provable as true or false.[149] In addition, Justice Brennan presented a hypothetical of his own in which the speaker states "I think Jones lied about his age just now," as well as the factual predicate for his belief.[150] Clearly, whether Jones lied about his age would be provable as true or false. Justice Brennan, however, regarded this statement as protected opinion. He took the position that the only fact implied by the speaker was, not that Jones had lied, but rather that the speaker had drawn the inference that Jones had lied.[151] He further stated that "Jones cannot recover for defamation for the statement 'I think Jones lied about his age just now' by pro-

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committed a crime is not immune just because the factual predicate for the opinion is disclosed.

[147] *Milkovich*, 497 U.S. at 27 (Brennan, J., dissenting).

[148] *See id.* at 27 n.3 (Brennan, J., dissenting). For the illustration, see *supra* note 129.

[149] *See supra* note 129.

[150] *Milkovich*, 497 U.S. at 26 (Brennan, J., dissenting).

[151] Justice Brennan stated:

> [T]he statement that "Jones is a liar," or the example given by the majority, "In my opinion John Jones is a liar"—standing alone—can reasonably be interpreted as implying that there are facts known to the speaker to cause him to form such an opinion . . . . But a different result must obtain if the speaker's comments had instead been as follows: "Jones' brother once lied to me; Jones just told me he was 25; I've never met Jones before and I don't actually know how old he is or anything else about him, but he looks 16; I think Jones lied about his age just now." In the latter case, there are at least six statements, two of which may arguably be actionable. The first such statement is factual and defamatory and may support a defamation action by Jones' brother. The second statement, however, that "I think Jones lied about his age just now," can be reasonably interpreted in context only as a statement that the speaker infers, from the facts stated, that Jones told a particular lie. It is clear to the listener that the speaker does not actually know whether Jones lied and does not have any other reasons for thinking he did. Thus, the only fact implied by the second statement is that the speaker drew this inference. If the inference is sincere or nondefamatory, the speaker is not liable for damages.

Id., 497 U.S. at 26-27 (Brennan, J., dissenting) (footnotes omitted).

ducing proof that he did not lie about his age because . . . he would have proved the wrong assertion false. The assertion Jones must prove false is that the speaker had, in fact, drawn the inference that Jones lied."[152] The majority disagreed, taking the position that the issue of falsity relates to the defamatory facts implied by a statement.[153] The majority has the sounder linguistic position on this issue.[154]

Turning to the facts of *Milkovich*, Justice Brennan thoroughly analyzed Diadiun's column, concluding that reasonable readers could understand only that Diadiun was expressing his *belief* that Milkovich lied at the court hearing, and that the belief was based upon facts disclosed in the article.[155] The readers could evaluate the merits of the author's conclusions; consequently, there was no assertion or implication of fact that Milkovich had committed perjury.[156]

This analysis is consistent with that of the *Restatement* but inconsistent with that of the Court.[157] It appears, however, that Justice Brennan misconstrued the thrust of the Court's opinion. In the following passage, he noted the point at which he believed that he and the Court had diverged:

> The majority does not rest its decision today on any finding that the statements at issue explicitly state a false and defamatory fact. Nor could it. Diadiun's assumption that Milkovich must have lied at the court hearing is patently conjecture. The majority finds Diadiun's statements actionable, however, because it concludes that these statements imply a factual assertion that Milkovich perjured himself at the judicial proceeding. I disagree. 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. Read in context, the statements cannot reasonably be inter-

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[152] *Id.* at 27-28 n.4 (Brennan, J., dissenting).

[153] The Court stated:

> We note that the issue of falsity relates to the *defamatory* facts implied by a statement. For instance, the statement, "I think Jones lied," may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.

Id. at 20 n.7.

[154] *See* discussion *infra* part V.C.

[155] *Milkovich*, 497 U.S. at 30 (Brennan, J., dissenting).

[156] *Id.* at 28-33 (Brennan, J., dissenting).

[157] *See* discussion *supra* part III.B.1.

preted as implying such an assertion as fact.[158]

This passage suggests that Justice Brennan thought that the Court agreed with him that the assertion of a *belief* that Milkovich committed perjury, together with the factual basis for that belief, would be protected speech. More likely, however, the Court held that a statement of a *belief* that one committed perjury is simply not protected as opinion, whether or not the factual predicate was stated; as long as the statement was understood as "an assertion that petitioner Milkovich perjured himself in a judicial proceeding,"[159] it did not matter whether the "assertion" was one of belief or known fact. Diadiun would be immune from liability only if the statement was "the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining [his belief] that petitioner committed the crime of perjury."[160]

Thus, it seems reasonable to conclude that *Milkovich* held that constitutional immunity for the expression of a defamatory opinion on a matter of public concern exists only if (1) the speaker does not imply the existence of undisclosed facts as the basis for the opinion, *and* (2) the opinion itself is not provable as true or false on the basis of objective evidence. Conversely, a speaker is subject to liability for a defamatory charge, even if she couches the charge as her opinion and the factual basis is known or available to the recipients, if (1) the recipient reasonably construes the statement as an assertion of the charge, rather than as mere figurative or pejorative language, and (2) the charge is provable as false on the basis of objective evidence.

IV. THE LOWER COURTS' TREATMENT OF OPINION SINCE *MILKOVICH*

Since *Milkovich*, the lower courts' decisions in opinion cases fall roughly into eight categories: (1) applications of the *Milkovich* holding that statements are actionable if they state or imply false statements of fact; (2) applications of the *Restatement* pure opinion rule, without distinguishing between deductive and evaluative opinions; (3) the use of a multifactor analysis that, expressly or by implication, immunizes statements reasonably understood as expressing the speaker's point of view, even if supporting facts are not stated or available to the recipients; (4) use of a multifactor analysis that immunizes statements because reliable evidence is unavailable on the issue of falsity; (5) use of a multifactor analysis that immunizes ambiguous statements; (6) use of a multifactor analysis to hold that statements are factual; (7) the immunization of hyperbole and invective; and, (8) conclusory holdings that statements are opinion, without accompanying anal-

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[158] *Milkovich*, 497 U.S. at 28 (Brennan, J., dissenting).

[159] *Id.* at 21.

[160] *Id.*

ysis. Some cases fall into more than one of these categories, and for some the category is uncertain because of the brevity of the analysis. In addition, a given state's decisions may fall into more than one category.

A. *The Eight Categories of Lower Court Decisions Since* Milkovich

1. *Applications of the* Milkovich *Holding that Statements are Actionable if they State or Imply False Statements of Fact*

Some of the lower court decisions are uncontroversial applications of the *Milkovich* holding that statements are actionable if they state or imply false statements of fact.[161] In addition, an Illinois intermediate appellate court and the Supreme Court of Maine have rendered decisions consistent with *Milkovich* by applying state law.[162] A United States District Court appears to have held that a pure deductive opinion is actionable under *Milkovich*.[163] Finally, the Supreme Courts of Arizona and Wyoming have made questionable holdings that the statements at issue were factual under *Milkovich*.[164]

In *Shearson Lehman Hutton, Inc. v. Tucker*,[165] relying on *Milkovich*,[166] the Texas Court of Appeals stated:

> Wilde's statements that Tucker was going to lose his stockbroker's license, was in big trouble with the Securities and Exchange Commission ("SEC"), and would never work again as a stockbroker are statements of fact which were

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[161] Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); White v. Fraternal Order of Police, 909 F.2d 512 (D.C. Cir. 1990); *In re* Thompson, 162 B.R. 748 (Bankr. E.D. Mich. 1993); Edwards v. Hall, 285 Cal. Rptr. 810 (Ct. App. 1991); Weller v. American Broadcasting Cos., 283 Cal. Rptr. 644 (Ct. App. 1991); Gill v. Hughes, 278 Cal. Rptr. 306 (Ct. App. 1991); Florida Medical Center, Inc. v. New York Post Co., 568 So. 2d 454 (Fla. Dist. Ct. App. 1990); Eidson v. Berry, 415 S.E.2d 16 (Ga. Ct. App. 1992); Beasley v. St. Mary's Hosp. of Centralia, 558 N.E.2d 677 (Ill. App. Ct. 1990); Benner v. Johnson Controls, Inc., 813 S.W.2d 16 (Mo. Ct. App. 1991); Wellman v. Fox, 825 P.2d 208 (Nev.), *cert. denied*, 113 S. Ct. 68 (1992); Jacobs v. Frank, 573 N.E.2d 609 (Ohio 1991); Petula v. Mellody, 588 A.2d 103 (Pa. Commw. Ct. 1991); Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914 (Tex. Ct. App. 1991).

[162] Rosner v. Field Enters., Inc., 564 N.E.2d 131 (Ill. App. Ct. 1990); Lester v. Powers, 596 A.2d 65 (Me. 1991).

[163] Scheidler v. National Org. for Women, Inc., 751 F. Supp. 743 (N.D. Ill. 1990).

[164] Yetman v. English, 811 P.2d 323 (Ariz. 1991) (en banc); Spence v. Flynt, 816 P.2d 771 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992).

[165] 806 S.W.2d 914 (Tex. Ct. App. 1991).

[166] *See id.* at 920.

> capable of damaging Tucker's reputation as a stock broker.
>
> Even assuming, that the statements could be characterized as opinion, the statements clearly imply the existence of undisclosed facts that Tucker had engaged in serious misconduct, which adversely reflected upon his reputation and fitness as a stockbroker.[167]

In *Unelko Corp. v. Rooney*,[168] the Court of Appeals for the Ninth Circuit held that Andy Rooney's statements on "60 Minutes" that defendant's product "didn't work" were statements of fact susceptible of being proved true or false under *Milkovich*, despite the humorous tenor of the broadcast.[169] The court further held, however, that plaintiff had produced insufficient evidence of substantial falsity to survive the defendant's motion for summary judgment.[170]

In *Gill v. Hughes*,[171] the California Court of Appeals, applying *Milkovich*,[172] held that the "statement that plaintiff 'is an incompetent surgeon and needs more training' implies a knowledge of facts which lead to this conclusion and further is susceptible of being proved true or false."[173] The court further held, however, that the truth of the statement had been determined in a separate writ proceeding; consequently, the trial court did not err in dismissing the complaint.[174]

Other cases fall into this category as well.[175] At least two cases holding

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[167] *Id.* at 921.

[168] 912 F.2d 1049 (9th Cir. 1990), *cert denied*, 499 U.S. 961 (1991).

[169] *Id.* at 1052-55.

[170] *Id.* at 1055-57.

[171] 278 Cal. Rptr. 306 (Ct. App. 1991).

[172] *Id.* at 311.

[173] *Id.*

[174] *Id.*

[175] *See* White v. Fraternal Order of Police, 909 F.2d 512, 523 (D.C. Cir. 1990) ("The assertions that someone used illegal drugs and that he engaged in illegal activity such as bribery—whether express or implied—are 'articulation[s] of . . . objectively verifiable event[s].'") (citing *Milkovich*, 497 U.S. at 21); *In re* Thompson, 162 B.R. 748, 768-72 (Bankr. E.D. Mich. 1993) (holding that a charge of child abuse, unaccompanied by a full and accurate account of the bases for the charge, is actionable and that failure to provide an accurate account constituted negligence); Edwards v. Hall, 285 Cal. Rptr. 810, 818-20 (Ct. App. 1991) (holding that assertions made by Arsenio Hall that the president of a branch of the NAACP was an "extortionist" and that he had requested a $40,000 donation in exchange for not criticizing employment practices of The Arsenio Hall Show were actionable under *Milkovich*); Weller v. American Broadcasting Cos., 283 Cal. Rptr. 644, 648, 652 (Ct. App. 1991) (holding that in broadcasts about defendants' sale of antique candelabra to a museum, implications that defendant had sold stolen goods, misrepresented their condition, and generally defrauded museum were factual charges and unprotected even if couched in terms of conjecture or inquiry);

that assertions state or imply defamatory facts rely on the *Restatement* rule of pure opinion or state precedents consistent with *Milkovich*.[176]

A United States District Court has rendered a decision that some might find controversial. *Scheidler v. National Organization for Women, Inc.*,[177] involved charges made by Patricia Ireland, then Vice-President of NOW, at

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Florida Medical Center, Inc. v. New York Post Co., 568 So. 2d 454, 460 (Fla. Dist. Ct. App. 1990) ("[T]he statements that the hospital is robbing the insurance company attributes to the hospital dishonesty in taking the insurance company's money through improper billing and other hospital procedures. This is also a statement subject to proof of truth or falsity.") (applying *Milkovich*); Eidson v. Berry, 415 S.E.2d 16, 17 (Ga. Ct. App. 1992) (holding that a charge that plaintiff city attorney had given tapes of private conversation to newspaper and that consequently he should be prosecuted and barred from practicing law "because he knowingly violated Federal law" was susceptible of being proved false under *Milkovich*); Beasley v. St. Mary's Hosp. of Centralia, 558 N.E.2d 677, 683 (Ill. App. Ct. 1990) (holding that charge that plaintiff, as an emergency room physician, had failed to provide a "minimal amount of emergency intervention" was a statement of fact under *Milkovich*); Benner v. Johnson Controls, Inc., 813 S.W.2d 16, 20 (Mo. Ct. App. 1991) (holding that defendants' statement that plaintiff released confidential information met the test established in *Milkovich* and clearly implied an assertion of objective fact); *see* Wellman v. Fox, 825 P.2d 208, 210-11 (Nev.) (holding that charges in flyer that defendant distributed prior to union election that "Dalton gang" was led by member who had been thrown off the executive board for fraudulently obtaining union funds, was replete with nepotism, and included a strikebreaker were factual under *Milkovich*, but were true and that characterization of plaintiffs as the "Dalton gang" was rhetorical hyperbole and would not be construed in the context of union election as charge of criminality), *cert. denied*, 113 S. Ct. 68 (1992); Jacobs v. Frank, 573 N.E.2d 609, 611, 617 (Ohio 1991) (upholding summary judgment for defendant on privilege grounds, but rejecting defendant's claim that statements in question were protected as opinion under *Milkovich* because defendant had stated, inter alia, without supporting facts, that "he did not feel [plaintiff] was ethical and honest, he did not get along well with others, and his character was poor although his professional ability was adequate"); Petula v. Mellody, 588 A.2d 103, 106, 109 (Pa. Commw. Ct. 1991) (holding that criticisms of former school administrator to potential employers, such as statement that plaintiff "had trouble getting along with other administrators because he was physically present but emotionally absent," were not protected opinion under *Milkovich* because they "tend to imply that they are based on defamatory facts").

[176] *See, e.g.*, Rosner v. Field Enterprises, Inc., 564 N.E.2d 131, 154-55, 157 (Ill. App. Ct. 1990) (holding that newspaper articles implying that plaintiff podiatrist had participated in automobile accident insurance fraud either were not opinion or were opinion of the "mixed" type) (referring to *Milkovich* only in a Supplemental Opinion on Denial of Rehearing); Lester v. Powers, 596 A.2d 65, 70-72, 71 n.9 (Me. 1991) (relying on state precedent, which court said comports with *Milkovich*, to hold that letter written by former student of college professor incident to tenure review process was conditionally privileged, the record did not show abuse of the privilege, and letter stated defendant's opinions, but if it implied undisclosed defamatory facts, plaintiff nevertheless failed to produce evidence of knowledge of falsity or reckless disregard of truth).

[177] 739 F. Supp. 1210 (N.D. Ill. 1990).

a press conference. Ireland referred to several statements that had been made by an anti-abortion activist and concluded that "*[c]ertainly that is encouraging and aiding abetting [sic] the people who are involved in the arson and bombings.*"[178] In a pre-*Milkovich* decision, the court held that the "aiding and abetting" charge was protected under the pure opinion rule.[179] The court stated that the charge was "supported by underlying facts which she specifically states and which Scheidler has nowhere alleged are false or defamatory."[180] Subsequently the court reversed this holding, agreeing with the plaintiff's argument that *Milkovich* required the court to reinstate the claim against Ireland.[181] Without elaboration, the court found "that Ireland's statements [were] sufficiently factual to be susceptible of being proved true or false,"[182] and reversed its earlier decision in light of *Milkovich*. Although the court did not discuss the question of what happens to pure opinion under *Milkovich*, its decision is consistent with this Article's contention that *Milkovich* does not provide immunity for pure deductive opinion.

The foregoing decisions seem to be straightforward applications of *Milkovich*, or of common-law rules consistent therewith. Two decisions falling into this category, however, are debatable, raising the question whether the statements were entitled to protection as opinion or mere hyperbole or invective.[183]

One of these debatable decisions is *Yetman v. English*,[184] which presents the difficult issue whether it is actionable today to call another a "communist."[185] In *Yetman*, the defendant, a Republican, was a member of the Arizona House of Representatives, and the plaintiff, a Democrat, was a member of the Pima County Board of Supervisors.[186] The defendant made a speech to the Pima County Republican Club and then took questions from the audience.[187] In response to a question about a proposed rural zoning change, the defendant "specifically referred to Yetman's alleged refusal to consider input from property owners and asked, 'What kind of communist do we have up there that thinks it's improper to protect your interests?'"[188]

In Yetman's libel action against English, the trial court ruled that the

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[178] *Id.* at 1214.

[179] *Id.* at 1217.

[180] *Id.*

[181] Scheidler v. National Org. for Women, Inc., 751 F. Supp. 743, 745 (N.D. Ill. 1990).

[182] *Id.*

[183] *See* discussion *infra* part IV.A.7.

[184] 811 P.2d 323 (Ariz. 1991) (en banc).

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.* at 325.

defendant's remark was libelous per se, and the jury awarded Yetman $5,000 in damages.[189] In a three-to-two en banc opinion, the Arizona Supreme Court rejected the defendant's claim that, as a matter of law, his remark was absolutely protected under the federal and state constitutions.[190] The court held that the statement reasonably could be interpreted as an assertion of fact about the plaintiff, particularly given the defendant's own deposition testimony that he intended to assert as a fact that Yetman believed in a philosophy that English regarded as communist.[191] The court also carefully reviewed decisions holding that a charge that another is a communist is defamatory.[192] The court "recognize[d] that standards of defamation necessarily fluctuate with the vicissitudes of time and public opinion."[193] It further noted, however, that "[w]hen English made his remarks in 1985, then-President Reagan had recently characterized the Soviet Union as the 'evil empire,' and the specter of communist domination was still very real to a sizeable segment of the populace."[194] As to the meaning of the defendant's charge, the court doubted "that the average person would interpret the remark as an assertion that Yetman was a card-carrying member of the Communist Party or otherwise connected in some formal capacity."[195] It held, however, that "if a reasonable listener could have taken English's comment as stating or implying factual assertions that Yetman espoused and applied communist doctrine or ideology, then it was not absolutely privileged."[196] The court ruled that the remark was provably false:

> We believe that if English's remarks were interpreted to convey actual facts, those facts do not fall within the zone of unprovable statements. A reasonable fact-finder could determine from evidence presented whether Yetman did, in fact, espouse and practice communist philosophy or tactics such as denying citizens the opportunity to petition government officials. Therefore, the requirement of proving falsity provides no additional protection to English.[197]

The court, however, reversed and remanded on the ground that the defen-

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[189] *Id.*
[190] *Id.*
[191] *Id.* at 332 & n.5.
[192] *Id.* at 328-29.
[193] *Id.* at 329.
[194] *Id.*
[195] *Id.* at 328.
[196] *Id.* at 329.
[197] *Id.* at 333 (footnote omitted).

dant was entitled to a jury instruction "that if the comment is not interpreted as asserting or implying actual fact, but only as 'mere opinion,' hyperbole, parody, invective, or the like, then it is absolutely privileged and their verdict must be for the defendant."[198] In a strong dissent, Justice Corcoran stated:

> This puerile generic invective has spawned a tempest in a teapot . . . .
>
> This kind of juvenile vituperation has been and is epidemic in politics. The law of defamation, however, should not be used to impose a code of conduct on unruly politicians in an attempt to elevate their discourse. This obnoxious hyperbole, unfortunately, is here to stay.
>
> The majority reverses and sends this case back for yet another trial. To allow this lawsuit, which is here being reviewed by the third level of the judicial system, to start all over again is to permit the misuse of principles of defamation to intimidate and flog political opponents.[199]

Yetman exemplifies two problems raised by a charge that one is a communist. The first is whether the charge is merely hyperbolic or if it actually implies that the person holds communist beliefs. If the answer is the latter, the second problem is how one can prove he does *not* hold communist beliefs.

In some situations, a charge of communism or fascism is clearly invective or hyperbole, and the issue of the meaning of the language should not reach the jury.[200] On the facts of *Yetman*, however, the evidence appeared to support a finding that it was intended to be a factual charge and was reasonably understood as such.[201] Whether a charge that one is a communist can be proved false, however, appears to pose great difficulty in a case such as *Yetman*. What evidence of falsity would suffice? Would the plaintiff

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[198] *Id.* at 332-33.

[199] *Id.* at 335 (Corcoran, J., dissenting).

[200] *See* Buckley v. Littell, 539 F.2d 882, 893 (2d Cir. 1976) ("[T]he use of 'fascist,' 'fellow traveler,' and 'radical right' as political labels in Wild Tongues cannot be regarded as having been proved to be statements of fact, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate, an imprecision which is simply echoed in the book."), *cert. denied*, 429 U.S. 1062 (1977); National Ass'n of Gov't Employees v. Central Broadcasting Corp., 396 N.E.2d 996, 1000-02 (Mass. 1979) (holding charge of "inroad of communism" into union was nonactionable because it was pure opinion based on disclosed facts, and because it was "mere pejorative rhetoric") (citing Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977)), *cert. denied*, 446 U.S. 935 (1980).

[201] *See supra* text accompanying note 191.

need to prove that he holds *no* beliefs that communists share?[202] This issue is addressed below, in a discussion of the problems posed by ambiguous language. The short answer for present purposes is that, when defamatory language is broad and ambiguous, the plaintiff must be cautious in his pleadings. Although the plaintiff must prove falsity, the problem of proving the falsity of a broad charge can be surmounted. The plaintiff controls the truth/falsity issue by his allegation of the meaning of the language. Thus, on the facts of *Yetman*, the plaintiff may have alleged that the defendant's charge meant to those who heard it that Yetman refused property owners any opportunity to express their views to him. Such an allegation can narrow the falsity issue to manageable proportions for the plaintiff.

The second debatable, indeed highly questionable, decision that falls into this category is *Spence v. Flynt*.[203] In *Spence*, *Hustler Magazine* named the plaintiff lawyer, Gerry L. Spence, its "Asshole of the Month" for representing Andrea Dworkin in her invasion of privacy action against *Hustler*.[204] A majority of the Wyoming Supreme Court held that the implication that Spence had sold out his personal values for a possible fee of $75 million[205] might be a false statement of fact, because Spence might be able to prove that he had assigned his fee to a charitable organization.[206] One justice, dissenting from this view, regarded the charge as mere nondefamatory lawyer bashing.[207] The majority also held that *Hustler*'s use of epithets might be actionable.[208] This holding seems clearly unsupportable.[209]

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[202] *See* Turner v. Devlin, 848 P.2d 286, 296 (Ariz. 1993) (Martone, J., concurring in the judgment and in the opinion in part) ("[H]ow can it be said that being a communist is provably false? What litmus test does one use to test the label? Marx? Engels? Lenin? Gorbachev? Sartre? Kazantzakis?").

[203] 816 P.2d 771 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992).

[204] *Id.* at 772.

[205] The article stated:

> Many of the vermin-infested turd dispensers we name Asshole of the Month are members of that group of parasitic scum-suckers often referred to as lawyers. These shameless shitholes (whose main allegiance is to money) are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets. The latest of these hemorrhoidal types to make this page is Jackson, Wyoming, attorney Gerry Spence, our Asshole of the Month for July.

Id. at 773. The article further implied that Spence was seeking $150 million in the Dworkin suit and stated, "Spence . . . can demand as much as 50% of the take from his cases. And a possible $75 million would buy a lot of country for this lawyer." *Id.*

[206] *Id.* at 776.

[207] *Id.* at 786-88 (Golden, J., concurring in part and dissenting in part).

[208] The court stated:

> Was Hustler exercising a privilege of "fair comment" for an honest expression of opinion, on a matter of public concern, when Hustler stated that Spence was a "vermin-infested turd dispenser," a "parasitic scum-sucker," a "shameless shithole," a "reeking rectum," a "hemorrhoidal type" and "Asshole of the Month

2. *Applications of the Pure Opinion Rule, Without Distinguishing Between Deductive and Evaluative Opinions*

Several cases have found statements to be "pure opinion," without distinguishing between evaluative and deductive opinions.[210] In *Phantom Touring, Inc. v. Affiliated Publications,*[211] the First Circuit Court of Appeals held nonactionable statements insinuating that the Phantom Touring Company was deliberately marketing its version of "The Phantom of the Opera" dishonestly, to confuse the public and to take advantage of the success of Andrew Lloyd Weber's version of the "Phantom."[212] The court employed a multifactor analysis,[213] but placed strong reliance upon the articles' complete presentation of the facts underlying the author's conclusion, and their presentation of "information from which readers might draw

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> for July?" Was that publication made solely for the purpose of causing harm? It is at least questionable whether that was fair comment on a matter of public concern not made solely for the purpose of causing harm . . . . The statements by Hustler about Spence are clearly defamatory, for they are such as would hold him up to *hatred, contempt or ridicule.* Unless they are protected defamatory criticism of a public figure, they are actionable, and Spence should be allowed to pursue his claim.

Id. at 775-76.

[209] Justices dissenting from the court's view believed that these statements were either expressions of opinion or rhetorical hyperbole. *Id.* at 782 (Macy, J., concurring in part and dissenting in part). *Id.* at 789 (Golden, J., concurring in part and dissenting in part); *see* discussion *infra* part IV.A.7.

[210] Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993); Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993); Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir.), *cert. denied*, 112 S. Ct. 2942 (1992); Gehl Group v. Koby, 838 F. Supp. 1409 (D. Colo. 1993); Maholick v. WNEP TV, 20 Media L. Rep. (BNA) 1022 (M.D. Pa.), *aff'd without published opinion*, 981 F.2d 1247 (3d Cir. 1992); Miyata v. Bungei Shunju Ltd., 19 Media L. Rep. (BNA) 1400 (Cal. Ct. App. 1991); Keohane v. Stewart, No. 93SC382, 1994 Colo. LEXIS 532 (July 11, 1994); Living Will Center v. NBC Subsidiary (KCNC), Inc., No. 93SC214, 1994 Colo. LEXIS 527 (July 11, 1994); Lyons v. Globe Newspaper Co., 612 N.E.2d 1158 (Mass. 1993); Fortier v. International Bhd. of Elec. Workers, Local 2327, 605 A.2d 79 (Me. 1992); Miele v. Rosenblum, 603 A.2d 43 (N.J. Super. Ct. App. Div. 1991); Cassidy v. Merin, 582 A.2d 1039 (N.J. Super. Ct. App. Div. 1990); Park v. Capital Cities Communications, Inc., 585 N.Y.S.2d 902 (App. Div. 1992); Gottfried v. Smithtown Tara Homeowner's Inc., 21 Media L. Rep. (BNA) 1670 (N.Y. Sup. Ct. 1992); Mathias v. Carpenter, 587 A.2d 1 (Pa. Super. Ct. 1991).

[211] 953 F.2d 724 (1st Cir.), *cert. denied*, 112 S. Ct. 2942 (1992).

[212] *Id.* at 729.

[213] "[W]hile eschewing the fact/opinion terminology, *Milkovich* did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion." *Id.* at 727.

contrary conclusions."[214]

Phantom Touring protects a deductive and not an evaluative opinion. The court asserted that "[a]rguably, the connotation of deliberate deception is sufficiently factual to be proved true or false, and therefore is vulnerable under *Milkovich*."[215] The court held nevertheless that the context clearly indicated that the author was expressing his "point of view only."[216] The court determined that "[b]ecause all sides of the issue, as well as the rationale for Kelly's view, were exposed, the assertion of deceit reasonably could be understood only as Kelly's personal conclusion about the information presented, not as a statement of fact."[217] Under *Milkovich*, however, a statement susceptible of being proved true or false is actionable as long as the charge was seriously maintained and was not mere figurative language.[218] Pursuant to my interpretation of *Milkovich*, even if the assertion of deceit was a deductive opinion based on stated facts, the defendant would be subject to liability.

Lyons v. Globe Newspaper Co.[219] is a similar case in which the Supreme Judicial Court of Massachusetts held that statements expressing "suspicion" about the motives of police union picketers who delayed the start of a state party convention were pure opinion.[220] Following the *Restatement* opinion rule, the court held that the statements about motive were based on fully disclosed facts.[221] They qualified as expressions of opinion on those facts because they were couched in terms of suspicion and thus "cautioned the reader that the article referred to a theory rather than to facts."[222] Some of the allegedly defamatory charges were "mere vituperation and verbal abuse."[223] The court determined that its holding was consistent with *Milkovich*, but also noted that the state's common law and Declaration of Rights would lead to the same result.[224]

Two New Jersey intermediate appellate court decisions apply the *Re-*

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[214] *Id.* at 730.

[215] *Id.* at 729.

[216] *Id.*

[217] *Id.* at 730.

[218] Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990) ("This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.")

[219] 612 N.E.2d 1158 (Mass. 1993).

[220] *See, e.g., id.* at 1167 ("Critics of [gubernatorial candidate] Silber also voiced suspicions that his supporters promoted the picket line to undercut the convention. The Springfield police local is a member of the National Association of Government Employees, which is headed by Silber supporter Kenneth Lyons.")

[221] *Id.* at 1161-63.

[222] *Id.* at 1162.

[223] *Id.* at 1162 n.6. For a discussion of this holding, see discussion *infra* part IV.A.7.

[224] *Lyons*, 612 N.E.2d at 1163-65.

statement rule of pure opinion, without distinguishing between evaluative and deductive opinion. Both appear to immunize deductive opinions. One of these decisions cites *Milkovich*, and both rely upon *Kotlikoff v. The Community News*,[225] decided by the New Jersey Supreme Court in 1982. *Kotlikoff* adopted the *Restatement*'s interpretation of *Gertz* as protecting pure opinion.[226]

In *Cassidy v. Merin*,[227] the defendant, the State Commissioner of Insurance, informed reporters that he had asked for a determination by either the courts or the Committee on Attorney Ethics whether the plaintiff attorneys had engaged in unethical conduct by sending letters to their clients and others warning that, under a new insurance law, their insurance agents might not explain fully the options for coverage available to them.[228] For the purpose of appeal, the court assumed that the defendant's statements to the press "were tantamount to his telling them that that letter writing campaign violated the Rules of Professional Conduct or judicial decisions defining the ethical practice of law."[229] Because all of the reporters had copies of the plaintiffs' letters, the court held that the charge of unethical conduct was pure opinion.[230] The court relied on *Kotlikoff* and other New Jersey cases, stating that *Milkovich* was consistent with those decisions.[231] *Cassidy* did not distinguish between deductive and evaluative opinion. The defendant's assertion, however, appears to be deductive. It was not simply a charge that the plaintiffs' conduct was unethical as a general matter, but that the plaintiffs had violated a professional code of ethics.[232] Like an accusation of criminal conduct, such a charge would seem to be factual and not evaluative.

In *Miele v. Rosenblum*,[233] a community newspaper published two articles reporting that the mayor and borough council were negotiating a sale of borough land to Miele Sanitation to permit the expansion of Miele's opera-

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[225] 444 A.2d 1086 (N.J. 1982).

[226] *Id.* at 1089-90.

[227] 582 A.2d 1039 (N.J. Super. Ct. App. Div. 1990).

[228] *Id.* at 1041-42.

[229] *Id.* at 1042 (citing Lawrence v. Bauer Publications & Printing Ltd., 446 A.2d 469, 473, *cert. denied*, 459 U.S. 999 (1982) (holding statement that plaintiffs "may be" charged with criminal conduct is little different from an assertion that plaintiffs have actually been charged with certain crimes)).

[230] *Id.* at 1047-48.

[231] *Id.* at 1047 n.5.

[232] "For the purpose of this appeal we assume that Commissioner Merin's . . . statements to the communications media were tantamount to his telling them that that letter writing campaign violated the Rules of Professional Conduct or judicial decisions defining the ethical practice of law." *Id.* at 1042.

[233] 603 A.2d 43 (N.J. Super. Ct. App. Div. 1991).

tions.[234] The articles opposed the sale of land and any expansion of Miele's business.[235] Both articles closed with a notice of public meetings on the matter.[236] The complaint did not set forth specific language in the articles that was alleged to be defamatory,[237] and the court was unable to "find anything in the complaint to justify a finding that any statement in the two publications pleaded was defamatory as to Miele."[238] The court added, however, that the charge that Miele was planning an expansion of its business was pure opinion.[239] The court relied on *Kotlikoff* and made no reference to *Milkovich*.[240]

The court may well have been justified in holding that the publications did not defame the plaintiff. The alternative holding on pure opinion, however, is inconsistent with my interpretation of *Milkovich*. If the statement was a pure opinion, which seems doubtful,[241] it was deductive and not evaluative. Whether the plaintiff was planning a business expansion would be subject to objective verification.

Another decision employed a doubtful application of the pure opinion rule and an application of that rule to a deductive opinion. In *Gottfried v. Smithtown Tara Homeowner's Inc.*,[242] the defendants alleged, in a communication to the members of the homeowner's association, that the plaintiff's lawsuit against the association was causing a "frivolous use of your hard-earned money."[243] The court agreed with the defendants that "even if the original law suit was not frivolous, the fact that their opinion may have been erroneous does not make it actionable."[244] The court determined that the defendants had set forth the facts underlying the charge by stating in the communication the legal theories used by the plaintiff in his action and relating that the association's insurance company had advised the association that it had no coverage for intentional or illegal misconduct or for punitive

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[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.* at 44.

[238] *Id.* at 47.

[239] *Id.*

[240] *Id.*

[241] The factual basis for the "opinion" was not stated by the defendant. The court held, however, that the factual basis was available because the defendant concluded his publications with a notice of a public meeting. "Assuming that any words in the two publications were capable of being construed as damaging plaintiff's reputation, the writer urged the reader to check by attending the public meeting. It is questionable that such a suggestion did not negate any 'allegation of undisclosed defamatory facts.'" *Id.* at 48. The court did not state, however, that facts to support the conclusion that the plaintiff was planning a business expansion were made available at the public meeting.

[242] 21 Media L. Rep. (BNA) 1670 (N.Y. Sup. Ct. 1992).

[243] *Id.* at 1671.

[244] *Id.*

damages.[245] However, merely explaining the legal theories used in the plaintiff's action would not present to the members of the association a basis for the opinion that this action was frivolous; thus the use of the pure opinion rule was inappropriate. Moreover, even if the communication qualified as pure opinion, it was deductive and not evaluative. Whether an action is groundless seems provable as true or false.

Other lower court decisions also have immunized pure deductive opinion.[246] Still others that have followed the pure opinion rule, and not distinguished between deductive and evaluative opinions, nevertheless seem con-

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[245] *Id.* at 1672.

[246] *See, e.g.*, Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993). The court in *Haynes* held that statements in the book *The Promised Land: The Great Black Migration and How It Changed America*, by the former wife of the plaintiff Luthor Haynes, blaming their child's defects on Luthor's drinking, and alleging that Luthor's motives for leaving her were financial, were not actionable because they were not defamatory per se under Illinois law, and the plaintiff had not alleged special damages. *Id.* at 1226. The court further stated that the facts about the child's condition and about the relevant financial circumstances were uncontested, and the statements were subjective interpretations of the facts. *Id.* at 1228. "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Id.* at 1226-27 (citations omitted); *see also* Miyata v. Bungei Shunju Ltd., 19 Media L. Rep. (BNA) 1400, 1402-04 (Cal. Ct. App. 1991) (holding that italicized statement in newspaper article about murder of woman whose husband discovered her body at 11:00 p.m. and notified police at 11:21 p.m. that "*[i]t is a little too long to take 21 minutes from the discovery of the body to the notice to the police*" was pure opinion and that the article could not reasonably be interpreted to accuse husband of murdering wife); Keohane v. Stewart, 859 P.2d 291 (Colo. Ct. App. 1993), *aff'd*, No. 93SC382, 1994 Colo. LEXIS 532 (July 11, 1994) (using a multifactor analysis and applying the pure opinion rule to hold that letter published in newspaper charging that judge had taken bribe stated or implied verifiable facts, but was not actionable because reasonable reader would perceive that charges were author's personal conclusions based on generally known facts and did not imply firsthand knowledge of other facts); Park v. Capital Cities Communications, Inc., 585 N.Y.S.2d 902, 904-05 (App. Div. 1992), *appeal dismissed*, 607 N.E.2d 815 (N.Y. 1992), *and leave to appeal dismissed in part, denied in part*, 613 N.E.2d 961 (N.Y. 1993). The court in *Park* held that the statement on news broadcast that "I guess we all have what you might call a rotten apple" was "susceptible of the defamatory meaning that Dr. Park is unfit or unethical in his profession" but the statement was an opinion because it was "vague, ambiguous, indefinite and incapable of being objectively characterized as true or false." *Id.* at 905. Furthermore, the opinion was nonactionable because "[t]he bases for the 'rotten apple' remark, as set forth in the broadcast, [were] the uncontested facts that plaintiff was the subject of a State Health Department investigation and that local ophthalmologists expected to present evidence against him." *Id.* The court also held that the public figure plaintiff had failed to present sufficient evidence to support a finding of actual malice. *Id.*

sistent with *Milkovich*, in that they immunized pure evaluative opinions.[247]

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[247] *See* Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1093 (4th Cir. 1993) ("Because the bases for the 'hefty mark-up' conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related."); Gehl Group v. Koby, 838 F. Supp. 1409, 1416-17 (D. Colo. 1993) (applying Colorado law) (holding that defendants' charge that Fraternal Order of Police plaintiffs were "the prostitutes of the law enforcement profession" was pure opinion, meaning that plaintiff F.O.P. organizations demeaned the law enforcement profession by allowing charitable fundraising organization to profit off of F.O.P. name); Maholick v. WNEP TV, 20 Media L. Rep. (BNA) 1022, 1024-25 (M.D. Pa.) (holding that caustic editorial, including invective and hyperbole, critical of borough council member for regaining seat of council by appointment after losing primary election was protected opinion), *aff'd without published opinion*, 981 F.2d 1247 (3d Cir. 1992); Living Will Center v. NBC Subsidiary (KCNC-TV), Inc., No. 93SC214, 1994 Colo. LEXIS 527 at *19-*23 (July 11, 1994) (holding that telecast asserting that plaintiff's sale of living will packets was "scam" and that purchasers were "totally taken" hyperbolically expressed view that packet was not worth price of $29.95, given availability of essentials for living will from other sources at little or no cost, and employing a multifactor analysis along with pure opinion rule to hold that charges were based on facts disclosed in the broadcast); Fortier v. International Bhd. of Elec. Workers, Local 2327, 605 A.2d 79, 80 (Me. 1992) ("[T]he flyer accuses Fortier of having no morals because he crossed the picket line and characterizes that conduct as a betrayal of Fortier's fellow workers. The reader is free to evaluate that characterization on the basis of disclosed facts that are admittedly correct."); *see also* Mathias v. Carpenter, 587 A.2d 1 (Pa. Super. Ct. 1991), *appeal denied*, 602 A.2d 860 (Pa. 1992). In *Mathias*, a newspaper column expressed regret for having published a photograph of school board members smiling as they left a hearing at which they had been found guilty of violating the Sunshine Law:

> It's one thing to portray a hardened criminal smiling as he displays his contempt for law. It's quite another when the people who are smiling—just after being found guilty of breaking the law—are the supposed leaders of a community's education establishment. What kind of message does that convey to the young people they are responsible for educating?

Id. at 2. The plaintiff school board members alleged that the column "implied falsely that they had committed heinous crimes and had demonstrated contempt for the law." *Id.* The court affirmed the trial court's dismissal of the complaint. *Id.* at 1. Applying the *Restatement* pure opinion rule, the court held that the statement that the photograph showed the board members smiling after being found guilty of violating the sunshine law was factual. *Id.* at 3.

> To regret publication of the picture because the persons depicted were leaders of the community's educational establishment is purely the opinion of the writer. So, too, is the implication that smiles under such circumstances had an even more unfortunate message than the portrayal of a hardened criminal who displays contempt for the law. The column, when carefully read, does not state, either expressly or by implication, that the school directors were hardened criminals or that they had committed heinous crimes.

Id. at 3-4. The court added: "The reasonable reader, having access to the facts on which the comparison was based, could decide for himself or herself whether the facts supported the writer's comparison." *Id.* at 4.

3. *Use of a Multifactor Analysis that Immunizes Expression of the Speaker's Point of View, even if Supporting Facts are Not Stated or Available to the Recipients*

Some courts that follow a multifactor analysis interpret *Milkovich* as immunizing statements reasonably understood as expressing the speaker's point of view, even if supporting facts are not stated or available to the recipients.[248] Under this approach, an assertion of the speaker's *belief or conjecture* that certain facts are true, as opposed to an assertion that the facts *are* true, is a statement of opinion. Similarly, an evaluative conclusion, without the statement or availability of supporting facts, is opinion.

In *Piersall v. Sportsvision of Chicago*,[249] the defendant called the plaintiff, a former broadcast commentator, a liar, and said that the plaintiff "told a lot of lies," and "said things on the air [he] knew were not true."[250] The court affirmed the trial court's grant of summary judgment for the defendant on the well supported ground that the public figure plaintiff had not produced evidence of actual malice.[251] In addition, however, the court stated that "the trial judge properly determined that Reinsdorf's statements were opinion . . . ."[252] Applying a "totality of the circumstances" analysis,[253] the court "agree[d] with the trial court that the general statement that someone is a liar, not being put in context of specific facts, is merely opinion."[254] The court rejected the plaintiff's argument that under *Milkovich* such a charge is factual:

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[248] *See, e.g.*, Henry v. National Ass'n of Air Traffic Specialists, 836 F. Supp. 1204 (D. Md. 1993), *aff'd*, 1994 WL 406550 (4th Cir., Aug. 4, 1994); Dodson v. Dicker, 812 S.W.2d 97 (Ark. 1991); George v. Iskcon of Cal., 4 Cal. Rptr. 2d 473 (Ct. App. 1992); Kahn v. Bower, 284 Cal. Rptr. 244 (Ct. App. 1991); Moyer v. Amador Valley Joint Union High Sch. Dist., 275 Cal. Rptr. 494 (Ct. App. 1990); Piersall v. Sportsvision of Chicago, 595 N.E.2d 103 (Ill. App. Ct. 1992); Huyen v. Driscoll, 479 N.W.2d 76 (Minn. Ct. App. 1991); Wheeler v. Nebraska State Bar Ass'n, 508 N.W.2d 917, 923-24 (Neb. 1993), *cert. denied*, 114 S. Ct. 1835 (1994); *see also*, Lapkoff v. Wilks, 969 F.2d 78, 81-83 (4th Cir. 1992) (applying Virginia law); Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270 (N.Y.), *cert. denied*, 500 U.S. 954 (1991); McGill v. Parker, 582 N.Y.S.2d 91 (App. Div. 1992); Behr v. Weber, 568 N.Y.S.2d 948, 949 (App. Div.), *appeal denied*, 582 N.E.2d 602 (N.Y. 1991); Janklow v. Viking Press, 459 N.W.2d 415 (S.D. 1990).

[249] 595 N.E.2d 103 (Ill. App. Ct. 1992).

[250] *Id.* at 104.

[251] *Id.* at 105-07.

[252] *Id.* at 108.

[253] *Id.* at 107.

[254] *Id.*

> Piersall relies on *Milkovich* for *dicta* wherein the Court concludes that the sentence "Jones is a liar" may imply a false assertion of fact, even if those specific facts are either incorrect or incomplete, or if the speaker's assessment of them is erroneous. However, in the present case, there are no specific facts at the root of Reinsdorf's statement, complete or incomplete, capable of being objectively verified as true or false.[255]

The defendant's charge that the plaintiff was a liar was not merely an epithet. It implied the existence of defamatory facts to support the charge—namely specific instances in which the plaintiff had made false statements. The court apparently immunized the charge on the ground that it was the expression of the defendant's viewpoint. The court's statement that "there are no specific facts at the root of Reinsdorf's statement" is incongruous, given the defendant's evidence in support of his motion for summary judgment of specific instances in which the plaintiff had lied.[256] Thus, the court ignored the implication of the existence of supporting facts that arose from the conclusionary charge that the plaintiff was a liar. Its immunization of a charge of lying on the ground that the defendant stated no supporting facts is patently inconsistent with *Milkovich*.

In *George v. Iskcon of California*,[257] a Krishna group issued a press release concerning Robin George, a former Krishna follower who had become an anti-Krishna activist.[258] The press release included a statement that when Robin left home and joined the Krishnas, she complained of beatings by her parents.[259] It added: "For all we know now, her accounts of brutality and beatings were exaggerated or totally fabricated."[260] The court upheld a libel verdict in favor of Robin's mother, on the ground that the evidence supported findings that the charge that Robin's parents had beaten her were false and defamatory.[261] The court, however, reversed a libel judgment in favor of Robin.[262] The court held that the assertions that Robin had been beaten by her parents "do not libel *Robin* even if she never made those claims to the Krishna devotees."[263] The court also held that the

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[255] *Id.* at 107 (citation omitted).
[256] *Id.* at 106.
[257] 4 Cal. Rptr. 2d 473 (Ct. App. 1992).
[258] *Id.* at 488.
[259] *Id.* at 489.
[260] *Id.* at 501.
[261] *Id.* at 502.
[262] *Id.* at 479.
[263] *Id.* at 503.

suggestion that Robin may have fabricated her claims of beatings was "not a provably false statement of fact about Robin."[264] The court noted that "[t]he use of the prefatory language '[f]or all we know now' alerted readers that defendants were merely expressing their opinion regarding the truth of Robin's supposed earlier accounts of brutality at the hands of her parents based on admittedly incomplete information."[265] The court did "not think the quoted statement [could] be reasonably understood as doing other than *suggesting the possibility* that Robin may have been lying."[266] The court's conclusion rests on *Milkovich* and *Baker v. Los Angeles Herald Examiner*,[267] a California Supreme Court decision applying a "totality of the circumstances" multifactor analysis.[268]

The court's holding on Robin George's claim is unsound. Whether Robin lied is provable as true or false. That the press release merely suggested the possibility that she had lied, or expressed an opinion that she may have lied, should not shield the defendants from liability.[269] If *X* repeats a defamatory charge originally made by another, *X* is subject to liability for republication of the charge, even if *X* states that the charge is only a rumor, or that he does not believe it is true.[270] If a defendant is subject to liability for repetition of a defamatory charge in an action by the object of the repeated charge, even though the defendant expressed disbelief in the accusation, it makes no sense to deny liability to the alleged source of the charge when the defendant has fabricated the original charge and also said the source may have lied. The same reasons supporting the defendants' liability to Robin's mother support liability to Robin. The defendants were liable to Robin's mother for the beating accusation, even though the press release said that Robin may have fabricated it. The defendants likewise should be subject to liability to Robin for the fabrication charge, even though the press release merely said she *may* have lied. The reason for the rule that allowed Robin's mother to recover is that "[n]o character or reputation would be safe if a mere statement of personal disbelief of a rumor which the speaker

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[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] 721 P.2d 87 (Cal. 1986), *cert. denied*, 479 U.S. 1032 (1987).

[268] *George*, 4 Cal. Rptr. 2d at 502-03; *see Baker*, 721 P.2d at 90-91.

[269] *See, e.g.*, Weller v. American Broadcasting Cos., 283 Cal. Rptr. 644, 652 (Ct. App. 1991) ("[W]e reject the notion that merely couching an assertion of a defamatory fact in cautionary language such as 'apparently' or 'some sources say' or even putting it in the form of a question, necessarily defuses the impression that the speaker is communicating an actual fact."); RESTATEMENT (SECOND) OF TORTS § 563 cmt. c (1977) ("A conditional or alternative statement may be defamatory if, notwithstanding its conditional or alternative form it is reasonably understood in a defamatory sense.").

[270] 2 FOWLER HARPER ET AL., THE LAW OF TORTS 143 (2d ed. 1986); RESTATEMENT (SECOND) OF TORTS § 578 cmts. c, e (1977).

was engaged in circulating could be made to defeat the right of recovery for the slander."[271] Similarly, it would make reputation too vulnerable if speakers were allowed to insulate themselves from liability merely by couching defamatory charges in conditional terms.[272]

Several other cases purporting to apply *Milkovich* fall into this category.[273] Some decisions using the "point of view" approach rely upon state

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[271] Nicholson v. Merritt, 59 S.W. 25, 26 (Ky. 1900) (holding that defendant's expression of personal disbelief while republishing slander should be considered only in damages phase).

[272] *See, e.g.*, Lawrence v. Bauer Publishing & Printing Ltd., 446 A.2d 469 (N.J. 1982), *cert. denied*, 459 U.S. 999 (1982).

> To establish the defamatory nature of the articles it was not necessary for plaintiffs to prove that defendants had accused them of the commission of a crime. Words that clearly "sound to the disreputation" of an individual are defamatory on their face. The unambiguous import of the two articles is to cast doubt on the reputations of plaintiffs, Lawrence and Simpson. The statement that plaintiffs "may be" charged with criminal conduct diminishes their standing in the community and is little different from an assertion that plaintiffs have actually been charged with certain crimes. Hence the court correctly ruled that the articles were libelous *per se, i.e.*, not susceptible of a nondefamatory interpretation.

Id. at 473 (citation omitted).

[273] Dodson v. Dicker, 812 S.W.2d 97 (Ark. 1991), was a defamation and invasion of privacy action that involved a letter written by the defendant, a massage therapist, to the State Board of Therapy Technology. *Id.* at 110. Copies of the letter were sent to various other persons, including a reporter. *Id.* The plaintiff, the husband of the president of the Board, recovered a judgment against the defendant after a jury trial. *Id.* The court summarized the statements made in the letter:

> Ms. Dodson's letter focused on the actions of the president of the State Board of Therapy Technology, Marinetta Dicker, and also included references to her husband, appellee David Dicker. The letter asserted, among other things, that David Dicker assisted Marinetta Dicker in rewriting the test of licensing of therapy technicians, which may have been done for profit; the Dickers drafted the budget for the board without the approval of other board members; the Dickers drew up a proposed license law for presentation to the Arkansas legislature without the approval of the board; and, David Dicker has imposed himself as the sixth member of the board. Dodson also stated that, in her opinion, the board has slandered a fellow therapist, Steve Schechter, and, David Dicker's letter to the Rolf Institute was a good example of it; and she wrote "he [Dicker] has such a 'hate' for Steve, and to be fair, Steve does not have any great love for him either, and in fact neither do I. I hate a bully . . . especially a sneaky bully, which is what he appears to be in my opinion."

Id. at 97-98 (footnote omitted). The court held that the defendant's motion for a directed verdict should have been granted on both the libel and privacy claims. *Id.* at 112. Regarding the libel claim, the court stated that *Milkovich* requires a determination whether a statement implies an assertion of objectively verifiable fact. *Id.* at 111. The court then adopted a multifactor analysis to determine whether the defendant's statements implied an assertion of fact. *Id.* at 98. The court found, however, that it was

unnecessary to examine all of the facts because "evidence supporting the second category—the tenor, or general drift of thought of Dodson's letter—completely negates any impression that Dodson's statements were presented as an assertion of objective facts about David Dicker." *Id.* at 99. The fact that Dodson referred to David Dicker with intemperate language did not convince the court "that the statements, in their totality, were the type of assertions of objective facts about Mr. Dicker that give rise to liability in a defamation action." *Id.*

As is typical of decisions using a multifactor analysis, the rationale of this decision is unclear because the court did not state what ultimate test of opinion the various factors are supposed to elucidate. *See supra* text accompanying note 11. It is reasonable to imply from the court's analysis, however, that it immunized the assertions on the ground that they were statements of the defendant's belief or conjecture that the stated facts were true. The court did not reveal precisely what statements in the letter were alleged to be defamatory; nor did the court give any information that would show why the statements in the letter would defame the plaintiff. Most of the statements, however, are clearly factual. For example, Dicker either did or did not assist his wife in rewriting the licensing test for profit; the Dickers either did or did not draft the board's budget without board approval; and Dicker either did or did not slander a fellow therapist. The defendant's use of the term "sneaky bully" might be a mere epithet, or it might be pure opinion if based on the facts stated in the letter. If, however, the facts stated were defamatory, the defense of pure opinion would not apply. The court, however, did not refer to the pure opinion rule. Moreover, the court's discussion of the privacy claim makes it clear that, at trial, a number of the facts stated in the letter were disputed and some were apparently false. *See Dodson*, 812 S.W.2d at 99-100. It may well be that the court in *Dodson* reached the correct result. Yet it is difficult to understand how most of the statements in the letter could be regarded as opinion.

In Wheeler v. Nebraska State Bar Ass'n, 508 N.W.2d 917 (Neb. 1993), *cert. denied*, 114 S. Ct. 1835 (1994), the court used a "totality of the circumstances" analysis to hold that the publication of the results of a poll of attorneys' ratings of judges' performances "was a compilation of attorneys' subjective ratings" and, as such, "cannot imply a provably false factual assertion." *Id.* at 923-24. It is clear that accurate reports of such polls have such value to the public in the election of judges that they should not be actionable. It is questionable, however, to treat such publications as protected opinion. Conclusory ratings imply the existence of factual support. Moreover, the truth or falsity of some ratings, such as on "punctuality in attending court proceedings" could be established with ease, at least in some cases. *See id.* at 923. Instead of using an opinion rationale, it would seem better to give direct recognition to the value of the publication of such polls by using a report privilege. *Cf.* Edwards v. National Audubon Society, Inc., 556 F.2d 113 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977).

In Moyer v. Amador Valley Joint Union High Sch. Dist., 275 Cal. Rptr. 494 (Ct. App. 1990), a student high school publication reported that a smoke bomb had gone off in the plaintiff's classroom. *Id.* at 495. The headline stated "Students terrorize Moyer." *Id.* at 497. The article quoted "the Shadow," who provided the smoke bomb to the bomb thrower, as saying he did so because "Mr. Moyer is a babbler, and babblers are annoying to me." *Id.* The Shadow was also quoted as saying: "[H]e pissed me off, he is the worst teacher at FHS." *Id.* at 495. The California Court of Appeal analyzed the facts under the *Ollman* multifactor test, stating that under *Milkovich* the question was "wheth-

er a reasonable factfinder could conclude that the published statements imply a provably false factual assertion." *Id.* at 497. The court answered that question "by applying the 'totality of circumstances' test—a review of the meaning of the language in context and its susceptibility of being proved true or false." *Id.* The court held that the "worst teacher" charge was not actionable because it contained "no verifiable facts" and was "simply an expression of anger or disgust." *Id.* As to the charge that the plaintiff was a "babbler," the court found that "the readers of the article would have understood that the word was not used literally but as a form of exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching or speaking style. *Id.* at . The statement could not reasonably have been understood to be stating actual facts about plaintiff." *Id.* at 498.

The court's views on the statements that "Mr. Moyer is a babbler" and "He pissed me off" are not problematic. The holding on the "worst teacher" charge, however, appears to protect an "impure" statement of opinion. No factual basis for the charges was stated in the article, and, unlike a review of a restaurant or a book, the underlying facts were not available or known to readers who had not taken the plaintiff's classes. The charge does not appear to be a mere epithet or "preference expression," neither of which is actionable. On epithets, see *supra* note 16. On preference expressions, see *infra* text accompanying notes 664-66. The statement was a comment on the quality of the plaintiff as a teacher. It implied the existence of defamatory facts to support the opinion. Thus, the holding seems inconsistent with *Milkovich*'s immunization of only pure opinion. It should be noted, however, that, even under *Milkovich*, the plaintiff probably would have great difficulty recovering in this type of case, given his burden of proving both falsity and fault. Charges of this nature would seem impervious to proof of actual malice, and proof of negligence might be very difficult.

Courts are divided on the issue of whether a public school teacher is a public official or public figure. *See* Peter S. Cane, Note, *Defamation of Teachers: Behind the Times?*, 56 FORDHAM L. REV. 1191 (1988). Cane supports the view expressed in Justice Brennan's dissent from the denial of certiorari in Lorain Journal Co. v. Milkovich, 474 U.S. 953, 959-60 (1985), that public school teachers are public officials. Cane, *supra*, at 1200-01.

Another California case is Kahn v. Bower, 284 Cal. Rptr. 244 (Ct. App. 1991), which held that the trial court properly entered summary judgment for the defendants because the plaintiff, a social worker, was a public official and had failed to allege actual malice. *Id.* at 246, 251, 254. The court, however, also addressed the trial court's holding that the statements in question were nonactionable opinion. *Id.* at 247. Applying *Milkovich* and a "totality-of-the-circumstances" analysis, the court held that the defendants' charge that the plaintiff was incompetent was "reasonably susceptible of a provably false meaning." *Id.* at 248-50. Yet the court also held that a statement asserting that the conduct of the plaintiff "goes so far beyond incompetence that I almost wonder about some kind of hostility towards the child or toward handicapped children in general" was nonactionable opinion. *Id.* The court did not believe the statement could be "reasonably understood to assert as an actual fact that plaintiff is hostile to children," adding that it was "nothing more than speculation or rumination—something less even than surmise or conjecture." *Id.* As noted in the discussion of the *George* case, *supra* notes 257-72 and accompanying text, the assertion of a defamatory charge in the form of surmise or conjecture should not immunize the speaker. Moreover, if such issues as actual and common-law malice are factual, so too should be the issue of hostility to

law, rather than on *Milkovich*.[274] The most notable in this category is

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children. For definitions of actual and express malice, see, e.g., Jacobs v. Frank, 573 N.E.2d 609, 613 (Ohio 1991); 2 HARPER ET AL., *supra* note 270, at 232-42.

In Huyen v. Driscoll, 479 N.W.2d 76 (Minn. Ct. App. 1991), the plaintiff, a former director of the St. Paul Human Rights Department, brought a libel action based on statements made in a report of a study of the department conduct by a committee of the St. Paul Human Rights Commission. *Id.* at 77. The court upheld a judgment notwithstanding the verdict for the defendants, holding that the evidence was insufficient to support a finding of actual malice. *Id.* at 78. In addition, the court held that the statements at issue were protected statements of opinion. *Id.* The court used a multifactor analysis, which it found consistent with *Milkovich*. *Id.* at 79-80. Under that analysis, the court held that the statements were not objectively verifiable. *Id.* at 80. The court's decision may have been correct, as evaluative statements in the report may not have implied facts beyond those stated in the report. The decision, however, did not rest on an analysis of the statements as pure opinion. The court noted that "[e]ven if the statements are hybrid statements containing both opinion and underlying facts, the statements still cannot be proven false because 'when all the underlying predicate facts are considered, with all their conflicting inferences, the statement is not provable one way or the other.'" *Id.* at 81 (citing Diesen v. Hessburg, 455 N.W.2d 446, 456 (Minn. 1990) (Simonett, J., concurring specially), *cert. denied*, 498 U.S. 1119 (1991)). This statement demonstrates some ambiguity in the court's analysis of whether the statement was pure opinion. The "point-of-view" approach seems evident in the following conclusion of the court:

> All of these statements were contained in a report, the sole purpose of which was to measure subjectively the government's performance in the human rights arena. The report states clearly that it is a "collection of ideas and conclusions, not facts." As the trial court correctly noted, a reader of the report would expect the statements to convey impressions and evaluations, not facts. The statements in the report were non-actionable opinions.

Id.

In Henry v. National Ass'n of Air Traffic Specialists, 836 F. Supp. 1204 (D. Md. 1993), *aff'd*, No. 93-2526, 1994 WL 406550 (4th Cir. Oct. 27, 1993), the court used an *Ollman*-type of analysis in reliance on a pre-*Milkovich* Fourth Circuit decision, Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987). The court held that the statements in question were verifiable and precise in meaning; they were protected, nonetheless, because they occurred in a heated labor dispute and therefore the reasonable reader would understand them as subjective assertions. *Henry*, 836 F. Supp. at 1217-19. In addition, the court held that the plaintiffs had failed to meet the required showing of actual malice for purposes of summary judgment, and also had failed to show that most of the statements were false. *Id.* at 1213, 1214.

[274] *See* Lapkoff v. Wilks, 969 F.2d 78 (4th Cir. 1992). In *Lapkoff*, the Fourth Circuit applied Virginia's multifactor test and held that the defendant's statements concerning the plaintiff's performance in a previous job, which caused the plaintiff's current employer to fire him, were opinion. *Id.* at 83. The court found the statement "I wouldn't trust him as far as I can throw him" to be "clearly Wilks' opinion because it is a relative statement completely dependent on Wilks' obvious bias toward Lapkoff." *Id.* at 82. Similarly, a statement imputing either condonation of fraud in loan applications, or negligence in not knowing about the fraud, was opinion because "by couching the state-

Immuno AG. v. Moor-Jankowski,[275] a decision of the New York Court of Appeals rendered after the Supreme Court had granted certiorari, vacated the prior judgment of the New York Court of Appeals, and remanded the case for further consideration in light of *Milkovich*.[276] On remand, the court adhered to its previous determination that the publications in question were not actionable.[277] The court held that *Milkovich* did not require a different result,[278] and that the state constitution provided an independant basis for the decision.[279] Under *Milkovich*, the court held that the "core premise" of the alleged defamation was factual, and that the plaintiff had not shown the premise to be false.[280]

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ment in the disjunctive, that is either/or, no reasonable jury could interpret the statement as expressing an established fact about Lapkoff." *Id.* In addition, the court found that "[a]s to Wilks' belief that Lapkoff's inaction in the face of fraudulent activity created some type of 'problem,' presumably that Lapkoff was a poor sales manager, that position can only be construed as a relative statement, again dependent on Wilks' viewpoint that it was a problem." *Id*; *see also* Behr v. Weber, 568 N.Y.S.2d 948, 949 (App. Div.), *appeal denied*, 582 N.E.2d 602 (N.Y. 1991). The Appellate Division in *Behr* held that defendant's display of a picket sign in front of plaintiffs' store and on the Donahue program that read "Behr's Does Not Deliver," parodying plaintiffs slogan, "We Deliver When You Deliver," *id.* at 949, and defendant's complaints "about the plaintiffs' poor service and incomplete delivery of a furniture order," made on the Donahue program and in letters to several organizations, were "clearly a personal expression of defendant Weber's disapproval of plaintiffs' furniture delivery services, based upon defendant Weber's own documented efforts to obtain a promised delivery, and were, therefore, not actionable." *Id.* It should be noted that the defendant's statements on the Donahue program and in letters to organizations may have been pure opinion. Display of the picket sign in front of the defendant's store, however, would imply the existence of supporting facts. The defendant's "documented efforts to obtain a promised delivery," *id.*, may have "justified" the statement on the picket sign. *See* 2 HARPER ET AL., *supra* note 270, at 67 (stating that "at common law, if the facts on which the opinion was based were not stated or otherwise known, the appropriate defense was in 'rolled up' form" and that "it had to be shown (1) that facts actually exist or the statement thereof is privileged, which (2) would justify the opinion, i.e., make it a reasonable one."). In *Behr*, however, the court appears to use a point-of-view approach rather than justification. *See also* Janklow v. Viking Press, 459 N.W.2d 415 (S.D. 1990); *infra* notes 299-313 and accompanying text.

[275] 567 N.E.2d 1270 (N.Y.), *cert. denied*, 500 U.S. 954 (1991).

[276] 497 U.S. 1021 (1990).

[277] *Immuno*, 567 N.E.2d at 1272.

[278] *Id.* at 1276.

[279] *Id.* at 1280.

[280] *Id.* at 1276. In *Immuno*, the plaintiff was a multinational corporation that planned to open a facility in West Africa in which chimpanzees would be used for hepatitis research. *Id.* at 1272. The defendant was the editor of a scientific journal and a professor who used primates in medical research. *Id.* In the journal the defendant published a letter to the editor written by the chairwoman of an organization that opposed the use of primates for biomedical research. *Id.* The New York Court of Appeals stated that the

The letter involved in *Immuno* criticized the manufacturer's plan to establish African facilities and to use African chimpanzees to study hepatitis. The court, however, expressed uncertainty as to whether some of the many statements in the letter that the court previously had held to be protected opinion might not be regarded as factual under a *Milkovich* analysis.[281] As an example, the court stated that the letter writer's assertions about the plaintiff's motivation might imply facts under a *Milkovich* analysis.[282] Consequently, the court turned to state law and held that the letter expressed protected opinion under the New York Constitution.[283] Using a multifactor analysis,[284] the court employed a "point of view" approach:

> We conclude that the body of the letter in issue communicated the accusations of a group committed to the protection of primates, and that the writer's presumptions and predictions as to what "appeared to be" or "might well be" or "could well happen" or "should be" would not have been viewed by the average reader of the Journal as conveying actual facts about plaintiff. It may well be, for example, that McGreal's statements regarding plaintiff's motivations—if studied long enough in isolation—could be found to contain implied factual assertions, but viewed as IPPL's letter to the editor, it would be plain to the reasonable reader of this scientific publication that McGreal was voicing no more than a highly partisan point of view.[285]

Since the *Immuno* decision, at least two New York decisions have applied its point-of-view approach.[286]

"core premise" of the letter was that the plaintiff planned to release into the wild chimpanzees who might be disease carriers, as there was no way to determine that an animal was not a carrier. *Id.* at 1275.

[281] *Id.* at 1277 n.3.

[282] *Id.* at 1281.

[283] *Id.*

[284] The court did not describe the multifactor approach, but stated, "as we previously held in *Immuno*—the standard articulated and applied in *Steinhilber* furnishes the operative standard in this state for separating actionable fact from protected opinion." *Id.* at 1280. In its earlier *Immuno* opinion, the court had followed Steinhilber v. Alphonse, 501 N.E.2d 550, 554 (N.Y. 1986), in employing the *Ollman* multifactor analysis. *See* Immuno AG. v. Moor-Jankowski, 549 N.E.2d 129, 133 (N.Y. 1989).

[285] *Immuno*, 567 N.E.2d at 1281.

[286] *See* 600 W. 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 938 (N.Y. 1992) (holding that defendant's statement that "this entire lease and proposition . . . is as fraudulent as you can get and it smells of bribery and corruption" was protected opinion under *Milkovich* and *Immuno* and stating that "given the loose nature of the language,

4. *Use of a Multifactor Analysis that Immunizes Statements Because Reliable Evidence is Unavailable on the Issue of Falsity*

The Supreme Courts of South Dakota and Utah have held, under a multifactor analysis, that a statement qualifies as nonactionable opinion if no reliable evidence is available on the issue of falsity.[287] In *West v. Thomson Newspapers*,[288] the Utah Supreme Court held that a charge in a newspaper editorial that the mayor had changed his stance on a hotly contested political issue after he was elected was not actionable.[289] The mayor alleged that the charge was defamatory because it implied that he had deceived the voters to get elected.[290] Assuming that the charge was false, and that the charge implied a deliberate deception of the voters, the court stated that the common law privilege of fair comment was inapplicable because the defamatory implication was not based on a true or privileged assertion of fact.[291] Nevertheless, the court held that the charge was nonactionable under the state constitution's protections for freedom of speech.[292] The court employed an *Ollman* analysis, but unlike the point-of-view opinions discussed in the previous section, the court stressed evidentiary issues.[293]

The court first examined the verifiability question. The court acknowledged that a jury could find that the change-of-position charge implied that the mayor had misrepresented his views to the voters.[294] It held, however, that "the implication [was not] sufficiently factual to be susceptible of being

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the 'general tenor' of the remarks made at a public hearing, and the skepticism a reasonable listener brings to such proceeding, we believe the . . . statement is not such that a reasonable listener would conclude factual assertions were being made about plaintiff"), *cert. denied*, 113 S. Ct. 2341 (1993); McGill v. Parker, 582 N.Y.S.2d 91 (App. Div. 1992).

> No reasonable person reading the letters and leaflets in their entirety would find these conclusions to be anything other than highly partisan expressions of opinion by animal rights activists that the carriage horse trade was not providing adequate and humane treatment of its animal . . . . [and that] such communications, as *Immuno* held, should not be hypercritically scrutinized for the extraction of possible assertions of fact from what in context is a clear expression of opinion.

Id. at 99.

[287] *See* Janklow v. Viking Press, 459 N.W.2d 415 (S.D. 1990); West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994).

[288] 872 P.2d 999 (Utah 1994).

[289] *Id.* at 1020.

[290] *Id.* at 1011.

[291] *Id.* at 1012.

[292] *Id.* at 1020-21.

[293] *Id.* at 1018.

[294] *Id.*

proven true or false."[295] In an unconvincing line of reasoning, the court stated:

> Whether West actually intended to dupe voters into electing him mayor by misrepresenting his position on municipal power is something only West himself knows, not something that is subject to objective verification. Even if we assume for the sake of argument that West did change his position after being elected mayor, there are a number of entirely legitimate reasons for doing so. For example, he could have simply decided that municipal power was a fiscal imperative. Thus, asking a fact finder to determine the subjective intent behind West's alleged change of position will inevitably produce a verdict based on speculation. "An obvious potential for quashing or muting [free speech] looms large when [fact finders] attempt to assess the truth of a statement that admits of no method of verification."[296]

This analysis involved a sleight of hand because the court addressed the wrong issue. The plaintiff alleged that the defamatory implication—deliberate deception—was false, not because his change of position involved no voter deception, but because he had not changed his position.[297] Proof that the mayor had made his position clear on the municipal power issue prior to the election would show that there had been no voter deception. The jury question would not involve the subjective issue of the mayor's motivation, but rather the objective issue of pre-election statements. Turning to the immediate and broader contextual questions, the court found that the charge was political commentary and, as such, was "entitled to the fullest protection afforded by our state's constitution."[298]

Like *West*, *Janklow v. Viking Press*,[299] also seems to have held that if reliable evidence is unavailable on the issue of falsity, the statement is opinion. *Janklow* was a libel action by a former state governor against the author and publisher of a book entitled *In the Spirit of Crazy Horse*.[300] Regarding the claimed libels, the South Dakota Supreme Court stated:

> The statements concern allegations of a rape, driving drunk

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[295] *Id.*

[296] *Id.* (citations omitted) (quoting Ollman v. Evans, 750 F.2d 970, 981-82 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985)).

[297] *Id.* at 1001.

[298] *Id.* at 1020.

[299] 459 N.W.2d 415 (S.D. 1990).

[300] *Id.* at 417.

> while nude from the waist down, and shooting dogs while riding a motorcycle in the residential area of a reservation. Matthiessen admits that the book is not entirely objective; however, the purpose of the book is to promote the historical viewpoint of traditional Indians.[301]

The trial court granted the defendants' motion for summary judgment.[302] The Supreme Court of South Dakota affirmed, principally on the ground that the plaintiff had failed to produce sufficient evidence of actual malice to submit the case to the jury.[303] However, the court also held that some of the statements at issue were protected as opinion.[304] On that issue, the court observed that "[t]he most significant statement is Russell Means' quote which infers that Janklow actually raped Jancita Eagle Deer."[305] The quotation of Russell Means included the following statement: "I guess it was alcohol behind the rape of Jancita Eagle Deer. He did it, all right. I knew Jancita—that really ruined her life. . . . Janklow went from raping young girls to raping Mother Earth [referring to Janklow's support of the mining industry]."[306]

In deciding that this statement was opinion, the court made no reference to *Milkovich*, although it was cited by the dissent.[307] Instead, the court used the four-factor test adopted by the Eighth Circuit Court of Appeals in *Janklow v. Newsweek, Inc.*[308] Under this test, which is the same as the *Ollman* test,[309] the court held that the Means quote was opinion.[310] On the verifiability factor, the court determined that "Russell Means cannot verify that Janklow actually raped Jancita Eagle Deer. Further, Means does not make any specific detailed account of facts which would lead a person to believe his statement is factual. If a statement cannot plausibly be verified, it cannot be seen as 'fact.'"[311]

The court's statement that "Means [did] not make any specific detailed account of facts which would lead a person to believe his statement [was] factual"[312] appears to mean that a statement is opinion if reasonably under-

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[301] *Id.* (footnote omitted).

[302] *Id.*

[303] *Id.* at 418-22.

[304] *Id.* at 424.

[305] *Id.* at 423.

[306] *Id.* at 418 (alteration in original).

[307] *See id.* at 428 (Henderson, J., dissenting).

[308] 788 F.2d 1300 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986); *see also*, Janklow v. Viking Press, 459 N.W.2d 415, 423 (S.D. 1990).

[309] *See Newsweek*, 788 F.2d at 1302-03.

[310] *Janklow*, 459 N.W.2d at 424.

[311] *Id.* at 423 (citing *Newsweek*, 788 F.2d at 1302).

[312] *Id.*

stood to be a statement of the speaker's belief. The rest of this statement, however, apparently means that a statement is opinion if reliable evidence is unavailable on the truth/falsity issue. If reliable evidence is unavailable, the plaintiff should lose because he cannot prove falsity. The lack of evidence of falsity, however, does not make a factual statement opinion.[313]

5. *Use of* Milkovich *or a Multifactor Analysis to Immunize Ambiguous Statements*

Following in the path of *Ollman v. Evans*,[314] two United States Courts of Appeals, and intermediate appellate courts in California and Minnesota have employed the verifiability test to immunize statements that are imprecise or ambiguous.[315] Notable in part because a panel of the United States Court of Appeals of the District of Columbia reversed itself less than three months after its original decision in the case, *Moldea v. New York Times Company* ("*Moldea II*")[316] held that statements about a book in a book review are not actionable if they are "rationally supportable by reference to the actual text,"[317] even if a reasonable jury could find that the statements mischaracterized portrayals in the book.[318] Thus, if a defamatory statement in a book review is subject to two rational interpretations, one of which is false, the statement is not actionable because it is not verifiable. The court held that when "[a]pplying the 'supportable interpretation' standard, the correct measure of the challenged statements' verifiability as a matter of law is whether no reasonable person could find that the review's characterizations were supportable interpretations of [the book]."[319] Under its newly adopted test, the court held that the book review in question was not actionable.[320]

The book, entitled *Interference: How Organized Crime Influences Professional Football*, was written by Dan E. Moldea, an investigative journalist

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[313] *See* discussion *infra* part V.D.

[314] 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *see* discussion *infra* part V.D.

[315] Moldea v. New York Times Co. [hereinafter "Moldea II"], 22 F.3d 310 (D.C. Cir.), *cert. denied*, No. 94-192, 1994 U.S. LEXIS 6371 (Oct. 3, 1994); Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir.), *cert. denied*, 112 S. Ct. 2942 (1992); James v. San Jose Mercury News, Inc., 20 Cal. Rptr. 2d 890 (Ct. App. 1993); Lund v. Chicago & Northwestern Transp. Co., 467 N.W.2d 366 (Minn. Ct. App. 1991); Hunt v. University of Minn., 465 N.W.2d 88 (Minn. Ct. App. 1991); *see also* discussion *infra* part V.D. (discussing problem of immunizing ambiguity).

[316] 22 F.3d 310 (D.C. Cir. 1994).

[317] *Id.* at 315.

[318] *Id.* at 316.

[319] *Id.* at 317.

[320] *Id.*

who specialized in reports about organized crime.[321] Moldea had published many newspaper and magazine articles, as well as three other books on this subject.[322] The book review was written by Gerald Eskenazi, a sports writer for the *New York Times*. In his libel action, Moldea claimed that six statements in the review defamed him "by accusing him of being an incompetent practitioner of his chosen profession, investigative journalism, and by supporting that accusation with false characterizations of his book."[323] He further alleged that the review "both destroyed public interest in his book and effectively ended his career as an investigative journalist."[324] In addition, he claimed that the review had prevented him from obtaining lecture bookings, from which he previously had earned a significant income.[325]

In its first *Moldea* opinion ("*Moldea I*"),[326] the D.C. Circuit Court held that the review contained three defamatory charges that a jury could find were false.[327] The first was the statement that "[t]here is too much sloppy journalism to trust the bulk of this book's 512 pages—including its whopping 64 pages of notes."[328] As to this charge, the court determined:

> To assert that *Interference* is "sloppy" necessarily implies that Eskenazi concluded that it is sloppy *because of* specific shortcomings he found in the book. In order for the review to be nonactionable as a matter of law, the Times must show that it offered true facts in support of its judgment that served to support its statement of opinion.[329]

The court held that a jury could find that two statements in the book review, presented in support of this opinion, were false.[330] The first was the following passage in the review:

> Mr. Moldea tells as well of Mr. Namath's "guaranteeing" a victory in Super Bowl III shortly after a sinister meeting in a bar with a member of the opposition, Lou Michaels, the Baltimore Colts' place-kicker. The truth is that the pair al-

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[321] *Id.* at 312.

[322] Moldea v. New York Times Co. [hereinafter "Moldea I"], 15 F.3d 1137, 1140 (D.C. Cir.), *modified*, 22 F.3d 310 (D.C. Cir. 1994).

[323] *Id.* at 1141.

[324] *Id.* at 1140.

[325] *Id.*

[326] *Moldea I*, 15 F.3d 1137 (D.C. Cir. 1994).

[327] *Id.* at 1146-49.

[328] *Id.* at 1141.

[329] *Id.* at 1146.

[330] *Id.* at 1149.

> most came to blows after they both had been drinking; and Mr. Namath's well-publicized "guarantee" came about quite innocently at a Miami Touchdown Club dinner when a fan asked him if he thought the Jets had a chance. "We'll win. I guarantee it," Mr. Namath replied.[331]

The court held that a jury could find that the review falsely characterized Moldea's portrayal of the meeting between Namath and Michaels as "sinister," because the book quotes Michaels and another player who was present as stating that the meeting was "confrontational" and that "nothing technical" about the game was discussed.[332] The second statement that the jury could have found to be false was the assertion that "[Moldea] revives the discredited notion that Carroll Rosenbloom, the ornery owner of the Rams, who had a penchant for gambling, met foul play when he drowned in Florida 10 years ago."[333] The court observed that Moldea's discussion of the drowning on pages 319 through 326 of the book ends with "quoted observations from several of Rosenbloom's friends who speculate that he was murdered."[334] The court added:

> However, later in his book, on page 360, Moldea states that he has located previously unknown photographs taken at Rosenbloom's autopsy which he presented for inspection to "several friends within the law-enforcement community." Moldea then concludes that "In short, the evidence appears to be clear that Rosenbloom died in a tragic accident and was not murdered."[335]

The court determined that the "revival" charge was supportable in the sense that Moldea referred to suspicions of Rosenbloom's friends.[336] The charge, however, could be found false:

> A jury could, taking into consideration the generally negative tone of the review as a whole, find that the implication intended by the "revives the discredited notion" passage was not simply that Moldea discusses a "discredited notion," but that Moldea does not reveal what Eskenazi implies is the well known truth about Rosenbloom's death. Read in this

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[331] *Id.* at 1147.
[332] *Id.*
[333] *Id.*
[334] *Id.*
[335] *Id.* at 1147-48.
[336] *Id.* at 1148.

> fashion, the Times review implied that Moldea is a poor journalist indeed—one who accepts versions of events that he should know already have been disproved; or worse still, intentionally purveys "discredited notions" in an effort to suggest scandal where there is none.[337]

In *Moldea II*, the D.C. Circuit Court of Appeals decided that the interest in freedom of expression in book reviews requires a different verifiability test than the customary test whether a jury could find that a charge was false.[338] The court held that the review was not actionable under its new test—whether the charge was a reasonable interpretation of the book's characterizations.[339] The court held that the "sloppy journalism" charge "is supported by revealed premises that we cannot hold to be false in the context of a book review."[340] The "revival" charge was a reasonable interpretation of the book's accounts of Rosenbloom's drowning:

> Given that *Interference* does not reveal that Rosenbloom's death was accidental until 35 pages after giving undeniably titillating hints of homicide, we cannot hold that a reviewer could not reasonably suggest that Moldea sought to "revive" the notion that Rosenbloom was murdered in order to build suspense before disproving that theory.[341]

This holding is questionable, even under the court's "reasonable construction" theory. It is one thing to charge that Moldea revived the drowning suspicions to build suspense before disproving the theory, and quite another thing to charge that Moldea revived the suspicions without explaining that he disagreed with the theory, and came up with newly discovered evidence that disproved it. The "reasonable construction" test of verifiability, however, itself is questionable.[342]

The court's treatment of the "sinister meeting" statement is even more curious than its treatment of the "revival" charge. The court could not bring itself to hold that the review's characterization of Moldea's account of Namath's encounter with Michaels was a "supportable interpretation."[343] Although it was "troubled by the 'sinister meeting' passage," the court was

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[337] *Id.*

[338] *Moldea II*, 22 F.3d at 315.

[339] *Id.* at 319.

[340] *Id.* at 317.

[341] *Id.* at 318.

[342] *See* discussion *infra* part V.D.

[343] "Even applying the 'supportable interpretation' standard, this review passage is close to the line." *Moldea II*, 22 F.3d at 318.

"constrained to conclude that it [did] not give rise to an actionable claim."[344] The statement was not actionable because the "sloppy journalism" charge was supported by five examples that could not be proven false.[345] Thus, "even without the support of the 'sinister meeting' passage, the review's assertion that *Interference* is marred by 'too much sloppy journalism' is (as a legal matter) 'substantially true.'"[346] The "sinister meeting" charge, standing alone, was not "defamatory on its face" or "inherently defamatory."[347] The court explained that "the discussion of the 'sinister meeting' [was] but one of several interpretations of the book offered to support the claim of 'sloppy journalism.'"[348]

The court used this rationale to get around its rejection in *Moldea I* of the "incremental harm" rule.[349] In *Moldea I*, the court would not allow the *Times* to "establish on remand that the review is nonactionable merely by proving that *some* of the factual claims it makes to support its assertion that *Interference* is 'sloppy' are true."[350] The complaint in *Moldea I* was actionable because two of the review's examples of "sloppy journalism" could be found false.[351] In *Moldea II*, the court found that the complaint was not actionable if *only one* of the examples could be found false.[352]

Whether the court's approach to the issue of substantial truth is defensible, its newly adopted test of verifiability is not. The court justified adoption of the test by a misapplication of Supreme Court decisions, and its new test does not advance First Amendment values. The court asserted that its "decision to apply the 'supportable interpretation' standard to book reviews [found] strong support in analogous decisions of the Supreme Court, all decided or reaffirmed after *Milkovich*."[353] The court interpreted those "cases [to] establish that when a writer is evaluating or giving an account of inherently ambiguous materials or subject matter, the First Amendment requires that the courts allow latitude for interpretation."[354] The decisions on which the court relied, however, concern the applicability of the rational interpretation test to the issue of actual malice.[355] The court recognized

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[344] *Id.*

[345] *Id.*

[346] *Id.*

[347] *Id.* at 319.

[348] *Id.*

[349] In *Moldea I*, the court noted that it had "squarely rejected the argument that a false defamatory statement made among other true ones cannot be actionable because it does only 'incremental harm' to a plaintiff's reputation." *Moldea I*, 15 F.3d at 1149.

[350] *Id.* at 1150.

[351] *Id.* at 1146.

[352] *Moldea II*, 22 F.3d at 318-19.

[353] *Id.* at 315.

[354] *Id.*

[355] *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991); Bose Corp. v.

this fact, but stated:

> Although *Masson*, *Bose* and *Pape* all concerned the evidence necessary to establish "actual malice," those decisions are rooted in the question of a plaintiff's ability to prove falsity so as to show that a defendant presented information he or she knew to be false. Because of their focus on falsity, the reasoning of these decisions is fully applicable to the instant case.[356]

The court's conclusion elides important differences between the application of a rational interpretation standard to the issue of actual malice, and its application to the issue of falsity. The focus of the Supreme Court decisions in *Bose*, *Pape*, and *Masson* was not on falsity, but on actual malice. These decisions did not hold that a plaintiff may never recover for a defamatory statement that is a rational interpretation of an event or source. In *Bose* and *Pape*, the only evidence of actual malice was the publisher's deliberate choice of the language in question.[357] The Court in *Pape* held that even if the language used carried a false meaning, the deliberate choice of the language alone could not support a finding of actual malice when the language chosen was "one of a number of possible rational interpretations of a document [or event] that bristled with ambiguities."[358] In *Masson*, the Court refused to apply the rational interpretation test to the use of deliberately altered quotations of the plaintiff's words, recognizing that such an "orthodox use of a quotation is the quintessential 'direct account of events that speak for themselves.'"[359] The defendant would be subject to liability if the alterations in the plaintiff's language made the quotation substantially false.[360] Actual malice could be inferred from the deliberate choice of words because the author was not purporting to interpret the statements of the plaintiff, but was purporting to state them precisely.[361]

In *Masson*, the Court elaborated on the issue of falsity in language that seems particularly relevant to *Moldea II*:

> The common law of libel takes but one approach to the question of falsity, regardless of the form of the communica-

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Consumers Union of United States, 466 U.S. 485 (1984); Time, Inc. v. Pape, 401 U.S. 279 (1971).

[356] *Moldea II*, 22 F.3d at 316 (footnotes omitted).

[357] *Bose Corp.*, 466 U.S. at 511-12; *Pape*, 401 U.S. at 285.

[358] *Pape*, 401 U.S. at 290, *quoted in Bose Corp.*, 466 U.S. at 512.

[359] *Masson*, 501 U.S. at 519 (quoting *Pape*, 401 U.S. at 285).

[360] *Id.* at 516.

[361] *Id.* at 518-20.

> tion. It overlooks minor inaccuracies and concentrates upon substantial truth . . . . [T]he statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Our definition of actual malice relies upon this historical understanding.[362]

This language suggests that the common law test of falsity applies to all communications, regardless of their form. Therefore, *Masson* stands for the proposition that malice may be inferred from the deliberate alteration of the plaintiff's language in a manner that makes the altered quotation substantially false.

In none of the cases relied upon in *Moldea II* does the Court hold that the rational interpretation test would preclude the plaintiff from recovery if the plaintiff could prove substantial falsity under the traditional common law test and could establish actual malice by evidence other than mere inference from the choice of language. At least one lower court has allowed recovery under these circumstances,[363] and the Supreme Court decisions do not suggest this result is invalid.

The reasonable construction test as applied to the falsity issue does not advance First Amendment interests; it virtually immunizes reviewers at the expense of authors. The extensive protections already given to reviewers by the rules on actual malice and the burden of persuasion on falsity are sufficient. The plaintiff should be required to prove not only fault with regard to falsity, but also fault with regard to readers' interpretations of ambiguous charges, in order to show actual malice.[364] With this proviso, current protections are more than adequate to protect the interest of reviewers. The new protection extended in *Moldea II* is counterproductive. Under the new test, Moldea could not recover even if he could prove that the review presented an inaccurate account of what the book reported, and that the reviewer knew that the reasonable reader would receive a false impression of what the book said. Such a rule protects the crafty at the expense of the innocent; it even protects the deliberate liar. If Moldea's allegations are true, the effect of this book review was to silence Moldea as a writer and a lecturer.[365]

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[362] *Id.* at 516-17 (citations omitted).

[363] *See infra* notes 706-13 and accompanying text (discussing Good Gov't Group of Seal Beach, Inc. v. Superior Court, 586 P.2d 572 (Cal. 1978), *cert. denied*, 441 U.S. 961 (1979)).

[364] *See* discussion *infra* part V.D.

[365] Moldea's publications did in fact diminish for a period of time. It was recently reported that "after several discouraging years of having his proposals rejected, [Moldea] recently signed a $75,000 advance for a book on the Robert Kennedy assassination." Carlin Romano, *Paper Chase—I*, 258 THE NATION 778, 780 (June 6, 1994) [hereinafter *Paper Chase—I*].

The broad freedom of speech granted to reviewers threatens to diminish the speech of bookwriters and lessen the aggregate number of voices in the marketplace of ideas.[366]

In *Phantom Touring, Inc. v. Affiliated Publications,*[367] the court held that certain statements in a series of articles published by the *Boston Globe* about the Phantom Touring Company were protected opinions under *Milkovich* because they were ambiguous:

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[366] Carlin Romano, who is the literary critic of *The Philadelphia Inquirer* and president of the National Book Critics Circle, also has expressed concern about the free speech implications of *Moldea II*, given the *New York Times*'s media power and its refusal to publish a response by Moldea to its review of *Interference*. *See id.* at 778; Carlin Romano, *Paper Chase—II*, 258 THE NATION 874 (June 20, 1994) [hereinafter *Paper Chase—II*]. Regarding First Amendment theory, he noted that there is a recognized "need for the press to curb the bad institutional impulses of government." *Id.* He added:

> The Moldea case, by contrast, forces us to weigh whether free-expression theory, and First Amendment jurisprudence, must also take better account of the institutional impulses of the elite daily newspaper: its tendency to keep secrets about its internal operations, to reject outside criticism, to muffle internal dissent, to promote the public impression that it has always acted properly. When those impulses combine, as they do at the *Times*, with a marketing approach that touts the paper as the one necessary and sufficient news product for all readers, a threat to free expression looms. When that alliance further combines with raw private power as chief evaluator of the country's books (a power *The Boston Globe*'s editorial on the Moldea case rightly attributed to "how spineless the rest of the media are in the shadow of the *Times*"), lovers of robust debate must re-examine their premises.

Id. Romano stingingly asserted:

> [D]espite the reflex posturing of big media organizations praising Moldea II as a victory for freedom of speech, it's actually the opposite. It's a victory not for working journalists, authors and critics who thrive on debating issues and interpretations but for corporate media managers who want to squelch criticism of what they publish, escape tightening their standards to eliminate shoddy reviewing, evade questioning of the judgment of their critics, avoid paying for their mistakes as other corporate managers must and, above all, prevent ordinary Americans—the members of a jury—from getting a look at their practices.

Paper Chase—I, *supra* note 365 at 780. Romano argued that "[a court] should err on the side of little-guy plaintiffs versus powerful media defendants when the defendant's allegedly libelous statements are arguably factual and false, the plaintiff is a subject of the media defendant's criticism and the plaintiff has been offered no opportunity to reply." *Paper Chase—II*, *supra* at 877-78. He concluded: "[T]he right to sue for libel remains one of the few weapons a stigmatized author retains in a corporate media environment. It should not be necessary for an author who has a grievance against the *Times Book Review* to sue." *Id.* at 878.

[367] 953 F.2d 724 (1st Cir.), *cert. denied*, 112 S. Ct. 2942 (1992); *see also supra* notes 211-18 and accompanying text.

> Many of the statements cited in the complaint and appellate brief either constitute obviously protected hyperbole or are not susceptible of being proved true or false. Such, for example, is the language in "The phantom of the 'Phantom'" quoting a critic who described the Hill production as "a rip-off, a fraud, a scandal, a snake-oil job." Not only is this commentary figurative and hyperbolic, but we also can imagine no objective evidence to disprove it. Whether appellant's "Phantom" is "fake" or "phony" is similarly unprovable, since those adjectives admit of numerous interpretations.[368]

The court also stated that the assertion that the defendants were "blatantly misleading the public" was nonactionable because it "is subjective and imprecise, and therefore not capable of verification or refutation by means of objective proof."[369] The court's analysis is highly questionable as a proper interpretation of *Milkovich* because the charge that the defendants were misleading the public is at least an impure opinion that states or implies defamatory fact.

In *James v. San Jose Mercury News, Inc.*,[370] the court held that vague, subjective terms used in a critical column about a public defender's acquisition of the school records of victims of alleged sexual assaults were opinion:

> The statements that "when the legal community turns on kids, it doubles their trauma," and that [an attorney who advised school districts] "get[s] hassled all the time by attorneys wanting school records without going through the proper motions," contain too many generalizations, elastic terms, and elements of subjectivity to be susceptible of proof or disproof. When does the "legal community" "turn on" "kids"? What is "trauma" in this context, and how can its increments by measured? What does "hassled" mean? What are "the proper motions," and what is the implication of the fact attorneys do not want to go through them: Beyond "hassling," are we to understand that these attorneys would simply take the records without going through the proper motions?
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> The columnist's perception that "the judge has taken a

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[368] *Phantom*, 953 F.2d at 728.

[369] *Id.* at 728 n.7.

[370] 20 Cal. Rptr. 2d 890 (Ct. App. 1993).

> dim view of the defense tactics" is plainly labeled as opinion but arguably implies that the judge has indeed taken "a dim view." But what is a "dim view"? In common parlance it means disapproval or dissatisfaction. But how much or how little of either would suffice to connote a "dim view"? These matters, again, are not susceptible of proof or disproof.[371]

The result in *James* may be appropriate on the grounds that the defendants' statements either were not of and concerning the plaintiff, or that they were true.[372] Immunizing statements because they are vague or ambiguous, however, is a problematic practice.[373]

In *Lund v. Chicago and Northwestern Transportation Co.*,[374] a manager of the defendant company held a "brainstorming session" with employees to discuss their problems and concerns.[375] After the meeting, which the plaintiff, Lund, did not attend, the manager posted on a bulletin board a memorandum about the complaints aired at the meeting.[376] Number sixty-six of the eighty-five numbered entries read: "FAVORITISM, DICK LUND, SICK, MOVE-UPS, BROWN NOSE, SHIT HEADS."[377] The plaintiff alleged that other employees harassed him after this memorandum was posted, causing him to suffer emotional and physical problems.[378] The Minnesota Court of Appeals held that the statements in entry sixty-six were constitutionally protected as opinion.[379] The court employed a multifactor analysis, which the court noted was no longer binding after *Milkovich*, but was "still helpful for determining whether a statement implies actual facts that can be proven false."[380] The court held that the factor of precision and specificity ruled out liability for the words "move-ups" and "shit heads."[381] The court

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[371] *Id.* at 898.

[372] It seems doubtful that the defendants' references to the legal community in general and to attorneys hassling school-district attorneys would be understood as referring to the plaintiff public defender. It further appears that the statement that the judge had taken a "dim view" of the plaintiff's defense tactics was true. On being informed that the public defender's office had obtained possession of the children's school records, the judge stated: "[I]f that has occurred—Apparently it has—that is in violation of, at a minimum, the rules of Court." *Id.* at 892. The judge set a date for a further hearing on the matter. *Id.*

[373] *See* discussion *infra* part V.D.

[374] 467 N.W.2d 366 (Minn. Ct. App. 1991).

[375] *Id.* at 368.

[376] *Id.*

[377] *Id.*

[378] *Id.*

[379] *Id.* at 370.

[380] *Id.* at 369.

[381] *Id.*

added that "the underlying facts to be inferred from these terms are unclear. Although uncomplimentary, 'shit heads' does not suggest verifiably false facts about Lund."[382] As for the remaining words, the court stated:

> The terms "favoritism" and "brown nose" require a similar conclusion. They are not themselves factual assertions, and it is unclear what, if any, underlying facts they imply. Even if the terms are viewed as hybrid statements of opinion and fact, we conclude that the ambiguous implications of the words prevent them from being proven true or false.[383]

Arguably the terms used in *Lund* were, as a matter of law, mere invectives or insults, and therefore not actionable. However, the court's holding that they were protected as opinion because they were ambiguous, even if they were "hybrid statements of opinion and fact," is highly questionable.[384]

In *Hunt v. University of Minnesota*,[385] the Minnesota Court of Appeals considered statements made by a former co-employee of the plaintiff to a member of a county board that was considering hiring plaintiff as a lobbyist.[386] The court affirmed the trial court's award of summary judgment to the defendant on the uncontroversial ground that the statements were conditionally privileged and there was "no jury issue on malice."[387] In addition, the court held that the statements in question were constitutionally protected opinion.[388] The statements were "that Hunt had trouble dealing with legislators because she lacked warmth, was insincere, and had no sense of integrity."[389] Hunt did not contend that the statements about her warmth and sincerity could be proved false, but asserted that the charge about her integrity "can be interpreted as stating facts."[390] Based on a multifactor analysis, which the court determined was "still helpful under *Milkovich*,"[391] the court held that the statement was opinion.[392]

The court in *Hunt* appears to have based this conclusion on two tests. The first was the ambiguity test. The court found that the charge was not

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[382] *Id.*
[383] *Id.*
[384] *See* discussion *infra* part V.D.
[385] 465 N.W.2d 88 (Minn. Ct. App. 1991).
[386] *Id.* at 91.
[387] *Id.* at 90.
[388] *Id.*
[389] *Id.* at 91.
[390] *Id.* at 94.
[391] *Id.*
[392] *Id.* at 92.

provable as false because "when all the underlying predicate facts are considered, with all their conflicting inferences, the statement is not provable one way or the other."[393] Thus, the conflicting inferences of the underlying, unstated facts gave the statement variable meanings, making it unverifiable. The second test immunizes the statement of a speaker's point of view or conjecture, even without supporting facts. Thus, the court reasoned that "[a]ny evaluation of Hunt's work in this context [could not] be seen as fact, but instead must be viewed as a personal impression built over the course of time, based on general past experience and limited solely to the individual speaker."[394] This holding is questionable because impugning one's "integrity" is highly defamatory.[395]

The conditional privilege for statements in the context of employment references was designed to facilitate socially important speech, as long as the privilege is not abused.[396] Treating an unsubstantiated charge of a lack of a "sense of integrity" as immune opinion, however, goes far beyond the fact/opinion distinction made in *Milkovich*, and is not required by First Amendment policy.[397]

6. *Use of a Multifactor Analysis to Hold that Statements are Factual*

Not all decisions that use a multifactor analysis hold that statements are opinion. Some courts have held that charges were factual under a multifactor analysis.[398] Although most of these decisions seem correct, two

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[393] *Id.* at 94-95 (quoting Diesen v. Hessburg, 455 N.W.2d 446, 456 (Minn. 1990) (Simonett, J., concurring)).

[394] *Id.* at 95.

[395] The *Restatement (Second) of Torts* states:

> It is actionable per se to impute to another in libelous form conduct that tends to lower the other's reputation for veracity or honesty, irrespective of whether the conduct constitutes a criminal offense and irrespective of whether it tends to affect the trade, business or profession of the other. Thus it is actionable so to accuse another of the crime of perjury, larceny or embezzlement, or to make any derogatory imputation of fact concerning another's veracity or integrity.

RESTATEMENT (SECOND) OF TORTS § 569 cmt. g (1977). Although *Hunt* was an action based on slander, there was no issue on appeal as to whether the statement was slander per se. It may be that the defendant did not contest that the statement was slander per se, or that the action was for slander per quod, with the plaintiff alleging special damages resulting from her failure to get the job with the county board. Regarding slander per se and per quod, see RESTATEMENT (SECOND) OF TORTS §§ 570-75 (1977).

[396] LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION 465-66 (1978).

[397] *See* discussion *infra* part V.C.

[398] *See, e.g.*, Cliniatis v. Dimas, 848 F. Supp. 462 (S.D.N.Y. 1994); Keohane v. Stewart, No. 93SC382, 1994 Colo. LEXIS 532 (July 11, 1994); Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204 (D.C. 1991); Kumaran v. Brotman, 617 N.E.2d 191 (Ill. App. Ct. 1993); Armstrong v. Simon & Schuster Inc., 610 N.Y.S.2d 503 (1994); Gross v.

of the cases decided under New York law demonstrate the vagaries of multifactor analysis.

In *Gross v. New York Times Co.*,[399] the New York Court of Appeals used the multifactor point-of-view analysis that it had adopted in *Immuno AG. v. Moor-Jankowski*[400] to hold that the complaint alleged charges of defamatory fact and therefore was sufficient to withstand a motion to dismiss.[401] The action was based on a series of investigative reports in the *New York Times* on charges that the plaintiff, then the Chief Medical Examiner of New York City, had produced misleading or inaccurate autopsy reports on people who had died in police custody.[402] The court stated:

> [A]lthough the articles contain many assertions that would be understood by the reasonable reader as mere hypotheses premised on stated facts, there are also actionable charges made in the articles—such as the charges that plaintiff engaged in cover-ups, directed the creation of "misleading" autopsy reports and was guilty of "possibly illegal" conduct—that, although couched in the language of hypothesis or conclusion, actually would be understood by the reasonable reader as assertions of fact.[403]

The court observed that these charges were made in a special feature series in the paper's news section, that they contained copious documentation, and that they purported to be based on a thorough investigation.[404] The court asserted that "the circumstances under which these accusations were published 'encourag[ed] the reasonable reader to be less skeptical and more willing to conclude that [they] stat[ed] or impl[ied] facts.'"[405]

This opinion illustrates the difficulty of applying the multifactor, point-of-view analysis to the fact/opinion distinction. It gave no guidance to the trial court as to which statements in the articles in question should be regarded as factual, beyond the examples given in the quotation set forth above. The court explicitly rejected the plaintiff's contention that charges of criminal conduct are actionable, whether or not expressed as the opinion of the author.[406] Noting that such charges may be merely rhetorical hyper-

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New York Times Co., 623 N.E.2d 1163 (N.Y. 1993).

[399] 623 N.E.2d 1163 (N.Y. 1993).

[400] 567 N.E.2d 1270 (N.Y.), *cert. denied*, 500 U.S. 954 (1991). For a discussion of *Immuno*, see *supra* notes 275-86 and accompanying text.

[401] *Gross*, 623 N.E.2d at 1165.

[402] *Id.*

[403] *Id.* at 1168 (citation omitted).

[404] *Id.* at 1169.

[405] *Id.* (citation omitted).

[406] "Although plaintiff repeatedly suggests otherwise, there is simply no special rule

bole, the court further stated:

> Similarly, even when uttered or published in a more serious tone, accusations of criminality could be regarded as mere hypothesis and therefore not actionable if the facts on which they are based are fully and accurately set forth and it is clear to the reasonable reader or listener that the accusation is merely a personal surmise built upon those facts.[407]

It is unclear how this statement can be reconciled with the court's previous assertion that the articles' charges as to cover-ups and misleading autopsy reports, "although couched in the language of hypothesis or conclusion, actually would be understood by the reasonable reader as assertions of fact."[408] The context of the charge was crucial to the court in determining whether the reasonable reader would understand the charge as a personal surmise or an assertion of fact.[409] Still, it concluded that some unspecified assertions in the articles would be understood as "mere hypotheses premised on stated fact," while other charges "couched in the language of hypothesis or conclusion" would be understood as assertions of fact.[410]

The court may have been implying that the statement of a hypothesis or conclusion in a news report is not opinion if the facts on which it is based are not fully and accurately stated; yet *Immuno* did not limit protected opinion to hypotheses based on disclosed facts.[411] *Immuno* involved a letter to the editor, written from a clearly partisan stance, rather than an investigative report printed in the news section of a newspaper.[412] The significance of *Gross* and *Immuno* may be that the statement of a point of view without a factual predicate is opinion in a partisan letter to the editor, but not in an investigative news story. Still, *Gross* is unclear on the question whether hypotheses stated in a news article are factual only when unaccompanied by

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of law making criminal slurs actionable regardless of whether they are asserted as opinion or fact." *Id.*

[407] *Id.*

[408] *Id.* at 1168.

[409] The court in *Gross* stated:

> In all cases, whether the challenged remark concerns criminality or some other defamatory category, the courts are obliged to consider the communication as a whole, as well as its immediate and broader social contexts, to determine whether the reasonable listener or reader is likely to understand the remark as an assertion of provable fact . . . .

Id. at 1169 (citation omitted).

[410] *Id.* at 1168.

[411] *See Immuno*, 567 N.E.2d at 1280-82 (employing a contextual analysis and not inquiring about a factual predicate).

[412] *Id.* at 1280.

a factual predicate.

In *Gross*, the appellate division had affirmed the trial court's dismissal of the complaint.[413] The opinion of the New York Court of Appeals reflects the ad hoc character of multifactor analysis, giving little guidance to the lower courts for the resolution of the issues in *Gross* on remand or in future cases. Because the approach lacks a core definition of opinion, courts using the analysis select the factor or factors they believe are decisive in particular cases, but they have no basis for explaining the reasons for their choices.[414]

Applying New York law and following *Gross*, a United States district court also has held that allegations of criminal conduct were factual. In *Coliniatis v. Dimas*,[415] a letter sent by a law firm to its client reported a charge by a real estate agent that the plaintiff, an employee of the client, was attempting to exact kick-backs from the agent.[416] The letter stated that the charges were "of substantial but not absolute reliability," and that "[if the charges] be true," then the plaintiff was planning to obtain kick-backs in excess of $500,000.[417] The court held that under both *Milkovich* and the New York multifactor analysis, the kick-back charges were factual.[418]

Applying the multifactor analysis of *Gross*, the court found that "[t]he statements contained in the Letter, 'although couched in the language of hypothesis or conclusion, actually would be understood by the reasonable reader as assertions of fact.'"[419] The court held that the first two parts of the multifactor analysis were satisfied because "[t]he Letter charges Coliniatis with criminal behavior in precise language that is both readily understandable and verifiable."[420] The third factor was met because "the Letter gives the impression that it was written after lengthy deliberation."[421] The court determined that "the Letter's verbal context suggests to

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[413] *Gross*, 623 N.E.2d at 1166.

[414] *See supra* text accompanying note 11.

[415] 848 F. Supp. 462 (S.D.N.Y. 1994).

[416] *Id.* at 466.

[417] *Id.*

[418] Applying the *Milkovich* analysis, the court stated:

> First, the Letter addresses an area of public concern, the possibility that Coliniatis was engaging in an illegal scheme to defraud Olympic, an arm of the government of Greece. Second, the truth or falsity of the statement that Coliniatis expected to receive a kick-back from all of the professional arrangements entered into between Sfouggatakis and Olympic can be factually verified. Third, the statements contained in the Letter are not "the sort of loose, figurative or hyperbolic language which would negate the impression that the writer [is] seriously maintaining" that plaintiff engaged in an illegal kickback scheme.

Id. at 467 (quoting Milkovich v. Lorain Journal, 497 U.S. 1, 21 (1990)).

[419] *Id.* at 468 (quoting *Gross*, 623 N.E.2d at 1168).

[420] *Id.* at 468-69.

[421] *Id.* at 469.

the reader that the statements were intended to be understood as assertions of fact."[422] The fourth factor was also met:

> The statements contained in the Letter were made in the context of an attorney-client relationship in which the attorney sought to relay sensitive information of importance to his client, presumably because of his professional obligation to do so. Under these circumstances, the Court finds that a reasonable reader would believe that the Letter was conveying facts about the plaintiff.[423]

Relying on *Gross*, the court asserted that "there is no special rule of law making allegations of criminal conduct actionable regardless of whether they are asserted as opinion or fact."[424] Like *Gross*, however, the decision in *Coliniatis* provides no basis for determining when a statement couched in terms of hypothesis or opinion will be treated as factual. The holdings in both *Gross* and *Coliniatis* appear to be ad hoc determinations not linked to any general definition of protected opinion.

Less problematic than these New York decisions are four cases in which the courts used a multifactor analysis to determine that the assertions in question were factual. In *Sigal Construction Corp. v. Stanbury*,[425] the District of Columbia Court of Appeals held that it did not need to decide whether *Milkovich* applied to statements made prior to that decision because the statements were factual under the court's pre-*Milkovich* multifactor test.[426] The statements were made by the plaintiff's former employer to a prospective employer about the plaintiff's job performance as a construction project manager.[427] The court held that the defendant's assertion that the plaintiff was "detail oriented . . . to the point of losing sight of the big picture" was factual because of the context.[428] The court reasoned that "[i]n commenting on Stanbury's work habits, Littman must have known, or at least should have known, that Janes would interpret his statements as factual evaluations of Stanbury's approach to managing a construction project."[429] The court held that defendant's statement that the plaintiff did not "see the big picture" was factual because it "implied undisclosed defamatory

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[422] *Id.*
[423] *Id.*
[424] *Id.* at 469 n.5 (citing *Gross*, 623 N.E.2d at 1169).
[425] 586 A.2d 1204 (D.C. 1991).
[426] *Id.* at 1210.
[427] *Id.* at 1206.
[428] *Id.* at 1211.
[429] *Id.*

facts."[430] Furthermore "Stanbury testified, without contradiction, that 'not seeing the big picture' meant in the construction trade that he did not perform his job properly, could not recognize unusual problems, and thus could not determine what is necessary to correct such problems so that the project would be properly completed on time."[431] The court determined that the defendant's statements were verifiable, as demonstrated by the evidence presented at trial: "This evidence made clear that whether Stanbury was too detail oriented to complete the project properly and on time could be objectively evaluated and thus verified."[432]

In *Keohane v. Stewart*,[433] the court used a multifactor analysis to hold that a councilman's questions addressed to a reporter following a judge's ruling in a criminal trial—"What do you think, was [he] paid off with drugs or money?" and "Do you think he was paid off in cash or cocaine?"—were, under the circumstances, implicit assertions that the plaintiff judge had taken a bribe.[434] In *Armstrong v. Simon & Schuster, Inc.*,[435] the New York Supreme Court, Appellate Division, held that a book's statements implying that the plaintiff attorney had a conflict of interest in representing a client, and that he had suborned perjury, were not protected opinion, considering the immediate context of the statements and the context of the entire book.[436] In *Kumaran v. Brotman*,[437] an Illinois intermediate appellate court held, under a totality-of-circumstances test, that the use of the word "scam," implying that the plaintiff frequently brought unwarranted lawsuits to procure settlements, was a factual charge.[438]

7. *The Immunization of Hyperbole and Invective*

Since *Milkovich*, seven decisions have immunized language involving hyperbole and invective.[439] To some extent the cases in this category may

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[430] *Id.*

[431] *Id.*

[432] *Id.* at 1212.

[433] No. 93SC382, 1994 Colo. LEXIS 532 (July 11, 1994).

[434] *Id.* at *3.

[435] 610 N.Y.S.2d 503 (1994).

[436] *Id.* at 506.

[437] 617 N.E.2d 191 (Ill. App. Ct. 1993).

[438] *Id.* at 200-01.

[439] Turner v. Devlin, 848 P.2d 286, 292 (Ariz. 1993) (en banc); Morningstar, Inc. v. Superior Court, 29 Cal. Rptr. 2d 547 (Ct. App. 1994); Kimura v. Superior Court, 281 Cal. Rptr. 691, 696 (Ct. App. 1991); Lyons v. Globe Newspaper Co., 612 N.E.2d 1158, 1164 (Mass. 1993); Polish American Immigration Relief Comm., Inc. v. RELAX, 596 N.Y.S.2d 756, 758 (App. Div. 1993); Milford Plaza Assoc. v. The Hearst Corp., 20 Media L. Rep. (BNA) 1967, 1968 (N.Y. Sup. Ct. 1992); Bross v. Smith, 608 N.E.2d 1175, 1180 (Ohio Ct. App. 1992), *cert. denied*, 113 S. Ct. 2340 (1993).

overlap with those in the third category, immunizing a speaker's "point of view"; that is, the courts may be resting on the proposition that when highly insulting language is used in the course of a heated controversy, those to whom the language is published will understand it to represent the speaker's point of view. Four of these decisions are not problematic.[440] The other

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[440] In Lyons v. Globe Newspaper Co., 612 N.E.2d 1158 (Mass. 1993), the court immunized as hyperbole or invective a charge concerning picketing of a state party convention by a police union. *Id.* at 1163. The article stated: "Luis Prado, executive director of La Alianza Hispana in Roxbury, said the situation was far worse than the February elections in Nicaragua, where he served as a United Nations monitor. 'The Sandinistas never dared to do anything like this,' he said. 'This is like using brute force in politics.'" *Id.* at 1167. The court concluded that statements in the article concerning the motives of the picketers were pure opinion. *Id.* at 1163. The court then stated:

> Our conclusion that the challenged statements constituted expressions of opinion remains unchanged when we read the theory that Silber supporters promoted the picketing together with Prado's reference to the Sandinistas and with the use of such words as "hostage" or "brute force." These utterances readily fall into the category of mere vituperation and verbal abuse and reasonably could not be construed to state facts.

Lyons, 612 N.E.2d at 1162 n.6 (citations omitted). Given that the article contained a full description of the picketing of the convention, it appears that the charge that "the situation was far worse than the February election in Nicaragua" was a hyperbolic characterization of picketing that disrupted a party's political process. *Id.* at 1167. It does not appear to imply defamatory unstated facts.

In Morningstar, Inc. v. Superior Court, 29 Cal. Rptr. 547 (Ct. App. 1994), the defendant published a financial newsletter in which it strongly criticized the plaintiff for its advertisements of its mutual fund rankings by Lipper Analytical Services. *Id.* at 548. The criticisms appeared in a column labeled "Commentary." Heading the column was an italicized statement "Pilgrim dominates the charts?" and then the title in bold type, reading "Lies, Damn Lies, and Fund Advertisements." *Id.* at 549. The article portrayed the advertisements as misleading because of their use of fine print and their manipulation of the Lipper mutual fund categories to suggest that Pilgrim funds had placed in the top five rankings of some unidentified, single category. *Id.* at 549-51. The plaintiff did not allege that any statement in the article itself was false. The plaintiff alleged it had been libelled because (1) the defendant did not disclose that Lipper was the source of the rankings featured in the ads, (2) the title of the article falsely charged that Pilgrim's ads contained lies, and (3) the article questioned the validity of the plaintiff's rankings. *Id.* The court easily dismissed the first and third bases for a libel action, holding that disclosure of the source of the rankings would not have changed the effect of the article on the mind of the reader, *id.* at 552, and that the plaintiff had failed to allege that any statements in the article were false, *id.* at 558. With respect to the assertion that the title of the article accused the plaintiff of lying, the court held that the sophisticated readers of this newsletter would construe the title as mere rhetorical hyperbole. *Id.* at 554-55. The court noted that the heading was a play on Mark Twain's attribution to Benjamin Disraeli of the quip that there are three kinds of lies: "lies, damned lies, and statistics." *Id.* at 553. The court observed that "the title conveyed the sense this was an article expressing an opinion about how statistics were manipulated,

three, however, are questionable.

In *Kimura v. Superior Court*,[441] a California intermediate appellate court immunized language it found to be political rhetoric and invective in the context of a heated campus controversy.[442] This category of political speech is not precisely "opinion" as such, but, as the court stated, is "more opinion than fact" and not provable false.[443] Lower court decisions before *Milkovich* have held that political invective is not actionable,[444] and *Milkovich* approved the Court's previous decisions holding that such rhetoric is absolutely privileged under the Constitution when it does not carry a provable false factual connotation.[445] The difficulty lies in distinguishing between charges that do and do not carry factual implications.

Kimura held that the defendant's charges of racism and bigotry were

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not that the statistics themselves were false." *Id.* The court concluded that the hyperbolic language in the title "was protected before *Milkovich* and remains protected in its wake." *Id.* at 555.

In Polish American Immigration Relief Comm., Inc. v. RELAX, 596 N.Y.S.2d 756 (App. Div. 1993), the court held that the use of the words "thieves," "madhouse," and "false do-gooders," in reference to the plaintiff Polish-American immigrant organization, were clearly rhetorical hyperbole and invective in the context of the publication. *Id.* at 757. Because the factual bases for the charges were disclosed, the pure opinion rule applied. *Id.* at 758-59.

In Milford Plaza Associates v. The Hearst Corp., 20 Media L. Rep. (BNA) 1967 (N.Y. Sup. Ct. 1992), the court held that a humorous newspaper column complaining about a hotel commercial broadcast during a PGA golf tournament contained no factual charges. *Id.* at 1968. The column stated: "For 50 bucks, you can stay in the Milford Plaza. But be sure to take some Gold Bond itch powder with you. Any hotel in Manhattan that would offer you a room at that meager cost might also offer you the risk of catching Lyme Disease." *Id.* at 1968. The court ruled that the column "did not purport to assert facts or observations based on knowledge of facts and the remarks at issue were prompted by curmudgeonly reaction to TV ads, not a survey of the quality of hotel accommodations in New York." *Id.* Although the court did not expressly rely on the rhetorical hyperbole rule, the brief opinion is consistent with the principle that mere invective is nonactionable. It was clear to the reader that the comment about Lyme Disease was merely a humorous, negative reaction to the commercial.

[441] 281 Cal. Rptr. 691 (Ct. App. 1991).

[442] *Id.* at 692-93.

[443] *Id.* at 701.

[444] The leading case is Buckley v. Littell, 539 F.2d 882, 893 (2d Cir. 1976) (involving the terms "fascist," "fellow traveler," and "radical right"), *cert. denied*, 429 U.S. 1062 (1977).

"[W]hen it appears that political labels are used loosely as epithets or as characterizations in the realm of opinion, rather than as factual implications, the courts tend to treat such use as nondefamatory." 2 HARPER ET AL., *supra* note 270, at 32 n.34.

[445] Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (discussing "the *Bresler-Letter Carriers-Falwell* line of cases"); *see supra* note 83 (discussing those cases).

constitutionally protected expressions.[446] The case grew out of a controversy at Crown College of the University of California at Santa Cruz. Crown and Merrill Colleges jointly held monthly theme dinners, each honoring a particular culture.[447] The activities coordinators of the two colleges proposed holding a Filipino College Night on December 7, 1988.[448] The plaintiff, Don Vandenberg, the Bursar of Crown College and its head of staff, cancelled the participation of Crown College in the dinner because it was scheduled on the anniversary of the Japanese attack on Pearl Harbor.[449] Various members of the campus community criticized Vandenberg for that action.[450]

Among his strongest critics was the defendant Victor Kimura, a university official of Japanese descent. Kimura wrote an emotional two-page letter to Vandenberg saying that he was "absolutely appalled and disgusted" with the cancellation of Filipino College Night, and that Vandenberg's "attempt 'to punish'" the Filipino students demonstrated "not only an incredible level of bigotry, but also a total ignorance of two of the most fundamental requirements of affirmative action: the need to recognize ethnic differences and the ability to not discriminate because of those differences."[451] The letter also stated:

> You and [the Provost] are perfect examples of what enlightened people of all ethnic and cultural backgrounds define as "racist" and "bigoted," and are at least responsible for severely impeding in a major way the campus' ability to mount a truly effective affirmative action program. The commitment to affirmative action . . . stops at the level of provost and bursar.[452]

Kimura distributed copies of the letter to university officials, students, and media representatives.[453] The campus newspaper published the letter, and "[t]he discussion became so emotional in tone that Vandenberg even received death threats from some individuals."[454] The Provost resigned, "citing a lack of support from [the university chancellor] with regard to

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[446] *Kimura*, 281 Cal. Rptr. at 692-93.
[447] *Id.* at 694.
[448] *Id.*
[449] *Id.*
[450] *Id.*
[451] *Id.* at 701.
[452] *Id.* at 701-02.
[453] *Id.* at 693.
[454] *Id.* at 694.

Kimura's attack upon her and Vandenberg,"[455] and Vandenberg claimed that he had suffered "total psychiatric disability such that he will never be able to return to his former job."[456]

Relying on *Milkovich* and a "totality-of-the-circumstances" analysis,[457] the court held that "the allegedly defamatory communication is not actionable because it constitutes constitutionally protected rhetoric generated in discussion of a matter of public concern, and does not imply the existence of defamatory facts."[458] The court did not base its holding on the pure opinion rule, although it noted that the letter "plainly refers to and is *primarily* based on the known fact that Vandenberg cancelled the Filipino dinner."[459] Rather, the court relied on the imprecision of the charges and the use of the terms "racist" and "bigot" as epithets:

> [T]he language of the letter, and particularly its use of the epithet "racist," does not have the tone of a reasoned accusation, but rather is more like the emotional rhetoric characteristic of debate in this area. One decision has noted that the term "racist" has no precise meaning, can imply many different kinds of facts, and is no more than meaningless name-calling, not actionable under Illinois state defamation law.[460]

The court observed that "[a]ccusations of racism in a college community are more apt to be expressions of anger, resentment, and possibly political differences of opinion, than to be factual accusations intended to be taken literally."[461]

The *Kimura* decision seems correct with regard to the defendant's charges of racism and bigotry in connection with the plaintiff's cancellation of Filipino College Night. The letter in effect characterized the cancellation as an act of bigotry, and the characterization was either an evaluative comment or a mere insulting invective critical of the plaintiff's action.

The court's treatment of the charges on affirmative action, however, is questionable. The letter's statements—that the plaintiff was "at least responsible for impeding in a major way the campus' ability to mount a truly effective affirmative action program" and that "[t]he commitment to affir-

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[455] *Id.*

[456] *Id.*

[457] *Id.* at 695-96.

[458] *Id.* at 693.

[459] *Id.* at 698 (emphasis added).

[460] *Id.* (citing Stevens v. Tillman, 855 F.2d 394, 401-02 (7th Cir. 1988)).

[461] *Id.*

mative action . . . stops at the level of provost and bursar"[462]—received only glancing attention by the court. It said: "Vandenburg argues that the reference to affirmative action means that he impeded the University's affirmative action program, but 'affirmative action' is itself an exceptionally imprecise term which lacks uniform understanding."[463] This rationale is unconvincing. The letter may have been interpreted to mean that Vandenberg had impeded the college's adoption of an affirmative action program or that he had hampered efforts to carry out one that had been adopted. If the letter were so understood, it would have had a specific factual connotation, unaffected by the imprecision of the term "affirmative action" as a generic concept. The trial court had denied the defendant's motion for summary judgment, perhaps on that ground.[464]

The court may have believed that the angry, indignant tone of the entire letter made the affirmative action charge mere invective. The court stated, before addressing the affirmative action charge, that "the letter here is . . . readily characterized as an expression of anger and resentment which will not be regarded in [a college] community as a literal, factual accusation."[465] Still, the charge appears to imply that Kimura's accusation of racism and bigotry are based on more than Vandenberg's cancellation of Filipino College Night, and involved obstruction of affirmative action. The court's view that the entire letter would be viewed as political invective is questionable; it appears that the trial court was correct in holding that there were factual issues to be resolved.[466]

The second decision in this category, *Bross v. Smith*,[467] grew out of a controversy within a police department over the suspension of the police chief.[468] Following the suspension, a series of unsigned letters appeared on the department bulletin board and in the police officers' mailboxes.[469] Those letters (the "rat letters"), in vulgar and profane language, accused the plaintiff police officers of plotting to have the chief suspended.[470] They also "made various allegations of wrongdoing, and threatened firing and criminal prosecution of individuals associated with the 'B team' [those opposed to the suspended chief]."[471]

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[462] *Id.* at 701-02.

[463] *Id.* at 701.

[464] *Id.* at 692.

[465] *Id.* at 699.

[466] The trial court had denied the defendants' motions for summary judgment or summary adjudication. *Id.* at 692. The case went to the appellate court on a petition for a writ of mandate. *Id.*

[467] 608 N.E.2d 1175 (Ohio Ct. App. 1992), *cert. denied*, 113 S. Ct. 2340 (1993).

[468] *Id.* at 1176-77.

[469] *Id.* at 1177.

[470] *Id.*

[471] *Id.* at 1176-77.

The letters were not reproduced in the court's opinion, but with reference to their content, the court stated:

> We find that application of the principles set forth in [*Falwell v.*] *Hustler* and *Milkovich* to the present case to be problematic. The writings in this case seem to fall in a gray area between the writings in *Hustler* and in *Milkovich*. The rat letters contain assertions that are arguably provable as true or false. For example, was Bross a "doper" or "pill head," *i.e.*, did he use illegal drugs; did Marsh and Schmidt "fuck" the chief, *i.e.*, did they falsely accuse the chief to obtain power for themselves; did Dwyer "cover" for them; did Marsh and Schmidt steal ammunition; were the rats "fucking each other's wives and girlfriends," *i.e.*, engaging in the same types of sexual misconduct of which they accused Dwyer? Nevertheless, it is certainly arguable that the letters use the "sort of loose, figurative or hyperbolic language which would negate the impression" that these individuals committed these acts. Further, the "general tenor" of the letters could negate any impression that the "rats" committed any improprieties.[472]

The court concluded, largely on the basis of the decision in *Phantom Touring, Inc. v. Affiliated Publications,*[473] that the letters were nonactionable:[474]

> [The letters'] general tenor negates any impression that the statements contained in them are factual assertions. The letters are so couched in exaggeration and hyperbole and are so subjective in tone that a reasonable person could only conclude that the author was voicing an opinion rather than stating actual facts.[475]

The basis for this holding is unclear. The court may have meant that the language in the letters was so extreme that the reader would interpret them as stating the author's point of view. Or the court may have meant that the reader would not give any credence to the letters. Either way, the decision

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[472] *Id.* at 1181.

[473] 953 F.2d 724 (1st Cir.), *cert. denied*, 112 S. Ct. 2942 (1992); *see supra* text accompanying notes 211-18, 367-69.

[474] *Bross*, 608 N.E.2d at 1182.

[475] *Id.*

seems unsound. If the letters contained charges of drug use, theft, sexual misconduct, and making false accusations against the police chief, should the question of the meaning of the language have been decided as a matter of law, just because the language was extreme? Such charges are provable as false, and the court should not determine the matter of credence.[476] The use of rhetorical hyperbole is not always protected opinion; the question is what the language reasonably would be construed to mean.[477] Those who read the letters may have understood them as making factual charges.

Turner v. Devlin[478] raises similar issues. In *Turner*, the Arizona Supreme Court held that a letter complaining about the conduct of a police officer, sent by a school nurse to the police chief and other officials, could not reasonably be interpreted as stating actual facts about the officer.[479] The letter criticized the manner in which the officer had handled an investigation of child abuse at the high school where the nurse worked:

> When the Phoenix police officer arrived, rather than visiting the student at his bedside where he was being monitored for symptoms of concussion, possible damage to the internal left ear and left eye; the officer demanded that the student stand against the wall. The student was interrogated as if he, the victim, had committed an illegal act. The officer was rude and disrespectful, and his manner bordered on police brutality.[480]

Combining the point-of-view and rhetorical-hyperbole rationales, the court

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[476] Professor Phillips has made the point well:

> [I]t appears disingenuous to argue that statements are not actionable because, owing to the context in which they are made, nobody believes them. If nobody believes them, then why does the speaker bother to make them? Is he a bigger fool than all the rest of the gullible world? The disclaimer-of-belief argument closely resembles the often unsuccessful argument against liability for alleged puffing in the sales context. . . . [M]any people do in fact rely on the presumed superior knowledge of persons allegedly possessing such knowledge or who have access thereto. The apparent decisive effect of the political hyperbole, rhetoric, invective, and innuendo during the 1988 United States presidential election bears telling witness to the force of opinion on the public mind.

Phillips, *supra* note 11, at 663 (footnotes omitted).

[477] *See, e.g.*, Morgan v. Bulletin Co., 85 A.2d 869, 871-72 (Pa. 1952) (holding that a reference in newspaper story to the "Mata Hari of the parking meters" could be reasonably construed to imply that plaintiff was involved in attempted bribery to obtain contracts with the city to install parking meters).

[478] 848 P.2d 286 (Ariz. 1993) (en banc).

[479] *Id.* at 292.

[480] *Id.* at 294.

held that the statements characterizing the officer's behavior were "subjective impressions, unprovable as false," and were mere rhetorical hyperbole.[481] The disputed charge that the officer "demanded that the student stand during questioning" was not defamatory.[482] The characterizations of the officer's behavior did not imply a false assertion of fact because they did not imply physical abuse.[483]

The court's rationale is questionable. At a minimum, a reasonable reader of the letter could understand it to charge that the officer required a student with symptoms of severe injuries to leave a bed where he was being monitored and to stand for interrogation. The charge that the officer's "manner bordered on police brutality"[484] reinforces the implication that the officer's handling of the investigation caused at least a threat of physical and emotional harm to the high school student. The plaintiff officer claimed that the student's injuries were not as severe as the nurse portrayed them, and that he had not demanded that the student stand.[485] Whether the officer reasonably should have realized under the circumstances that he was causing a risk of physical and emotional harm to the student is the kind of issue that juries frequently resolve as one of fact. The outraged tone of the letter suggests the officer engaged in unprofessional behavior.

8. *Conclusory Holdings that Statements are Opinion, Without Accompanying Analysis*

A United States District Court and two New York intermediate appellate courts have held that assertions were protected opinion, without describing the analytical approach they used to distinguish between fact and opinion.[486]

In *In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*,[487] the court held that some assertions by the defendants of wrongdoing by the plaintiffs were factual, and that other assertions were not.[488] The latter included "statements made by [an individual defendant

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[481] *Id.* at 293-94.

[482] *Id.* at 291.

[483] *Id.* at 293.

[484] *Id.* at 287.

[485] *Id.* at 291.

[486] *In re* American Continental Corp./Lincoln Savings & Loan Securities Litigation, 845 F. Supp. 1377 (D. Ariz. 1993); DRT Constr. Co. v. Lenkei, 576 N.Y.S.2d 724 (App. Div. 1991), *appeal denied*, 79 N.Y.2d 753 (1992); Williams v. Varig Brazilian Airlines, 564 N.Y.S.2d 328 (App. Div.), *appeal denied*, 78 N.Y.2d 854 (1991).

[487] 845 F. Supp. 1377 (D. Ariz. 1993).

[488] The court did not describe any of these assertions in detail. The assertions included statements in a "Sixth Amended Complaint" that the defendants had widely circulated to potential clients of the plaintiffs, but had never filed in a class action suit involv-

attorney] to the press that plaintiff Fischel [an economic consultant] ha[d] made the 'biggest mistake any guy made in the country' in supposedly reaching the conclusion that Lincoln Savings was safe,"[489] "statements by [another individual defendant attorney] at a seminar maintaining that Fischel had given Charles Keating a 'clean bill of health,'"[490] and "continuing statements made to Lexecon's prospective clients that Lexecon 'carried too much baggage to be effective expert witnesses.'"[491] The court did not explain why these statements did not imply defamatory facts, except for noting that it agreed with defendant's assertion that their statements were "no more than a lawyer's 'expression of [his] opinion regarding his client's allegations against' Lexecon, as anyone reading or hearing the statements would have understood."[492] The first two statements appear to be evaluative comments based on the true fact that the plaintiffs had prepared reports describing Lincoln Savings as "sound."[493] The "too much baggage" comments, however, might have implied defamatory facts. Without a more complete description by the court of these charges, it is unclear whether they were pure evaluative opinions.

In *Williams v. Varig Brazilian Airlines*,[494] the court held that statements in a memorandum from the plaintiff's supervisor to a company manager and statements in the manager's discharge letter to the plaintiff were protected opinion.[495] The memo regarded "plaintiff's purportedly unsatisfactory performance and poor attitude [and] recounted various conflicts between her and her coworkers, observing that 'because of her disposition and her attitude Mrs. Williams is very difficult to work with.'"[496] The discharge letter stated, in part, that "[h]aving reviewed your employment record and, in particular your work performance and attitude since your disciplinary suspension, the Company has concluded that you are failing to meet the standards we expect from an employee occupying your position."[497] The deci-

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ing these parties. *Id.* at 1382. The court did not describe the contents of that purported complaint. *See id.* Other assertions held actionable were in a letter to the *National Law Journal* stating that the corporate plaintiff, Lexecon, had "settled" in the class action suit. *Id.* at 1387. The letter "further stated that Lexecon was guilty of 'wrongful activities on behalf of' a convicted felon and 'fraudulent dealings with regulators' and suggested that [the class action judge] found Lexecon guilty of the allegations." *Id.*

[489] *Id.* In a footnote, the court added that Lexecon opined "in the reports prepared at the behest of ACC/Lincoln Savings, that 'Lincoln is sound' and is 'safer' than other comparable thrift institutions." *Id.* at 1387 n.14 (citation omitted).

[490] *Id.* at 1387.

[491] *Id.*

[492] *Id.* at 1388.

[493] *See id.* at 1387 n.14.

[494] 564 N.Y.S.2d 328 (App. Div.), *appeal denied*, 78 N.Y.2d 854 (1991).

[495] *Id.* at 331.

[496] *Id.* at 329.

[497] *Id.* at 330.

sion does not relate precisely what language in these writings was alleged to be defamatory. Although the court might have concluded that the writings contained evaluative opinions based on disclosed or known facts, the court did not explain its holding in these terms, and its rationale is unclear.

A similar case is *DRT Construction Co. v. Lenkei*,[498] in which the court held that statements and a cartoon concerning the plaintiff land developers published in flyers by the president of a home owner's association were protected opinion.[499] One statement referred to the plaintiffs as "profit hungry land abusers."[500] Another "stated that a number of engineering reports had warned about the dangerous condition of the mines under the lands sought to be developed and had predicted collapses 'yet this project is still being pushed by profit hungry developers to whom your life and mine is of no concern.'"[501] The cartoon depicted "three men with Hitler moustaches on a bulldozer running over a deer calling for help. The men were waving an ax, a hatchet and a shovel and one had money coming out of his pockets."[502] The court determined that the phrase "profit hungry land abusers" did not contain a provable false factual connotation, could not reasonably be interpreted as stating actual facts, "and is the sort of 'loose, figurative or hyperbolic language' that is constitutionally protected opinion."[503] The court further noted that "[t]he cartoon [could not] be interpreted as anything other than the landowners' opinion concerning the effect of the development upon the town of Amherst."[504] It is likely that the statements and cartoon could be construed as evaluative comments based on facts about the plaintiffs' plans for development that were stated in the flyers or generally known in the community, and therefore were pure opinion. The court, however, rested on conclusions and did not analyze the charges in terms of the pure opinion rule.

B. *The Significance of the Treatment of Opinion in the Lower Courts Since* Milkovich

This review of the lower courts' treatment of opinion since *Milkovich* reveals no cases employing my interpretation of the decision as recognizing immunity only for pure evaluative opinion and nonfactual invective. Several lower court decisions, however, have immunized pure deductive opin-

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[498] 576 N.Y.S.2d 724 (App. Div. 1991), *appeal denied*, 79 N.Y.2d 753 (1992).
[499] *Id.* at 725.
[500] *Id.*
[501] *Id.*
[502] *Id.*
[503] *Id.* (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990)).
[504] *Id.*

ion.[505]

This review also shows many disparities among the decisions. The New York Court of Appeals extends greater protection to opinion than does *Milkovich*.[506] There are varying interpretations of *Milkovich* itself; for example, some courts interpret *Milkovich* as protecting only pure opinion,[507] while others believe it permits a point-of-view approach[508] or protection of ambiguous language.[509] Some courts that purport to apply *Milkovich* give too little protection to nonfactual language,[510] and some give too much protection to language that a factfinder could interpret as stating or implying defamatory facts.[511] Professor Anderson has observed that "[l]ibel is a field that cries out for some uniformity."[512] The disparities in the treatment of opinion may chill the speech of interstate media, which "must tailor their speech to the least protective state law to which they may be subject."[513] Inadequate protection for opinion in any state, therefore, may deter to a significant degree speech that warrants First Amendment protection. Yet excessive protection of language that states or implies defamatory facts also exacts personal and social costs.[514] The interests in freedom of speech and reputation are fundamental and competing interests, neither of which can receive total protection without the sacrifice of the other. *Milkovich* and the

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[505] *See* discussion *supra* part IV.A.2.

[506] *See supra* notes 275-86 and accompanying text (discussing New York cases).

[507] *See* discussion *supra* part IV.A.2.

[508] *See* discussion *supra* part IV.A.3.

[509] *See* discussion *supra* part IV.A.5.

[510] *See* Spence v. Flynt, 816 P.2d 771 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992); *supra* text accompanying notes 203-09 (discussing *Spence*).

[511] *See* Miele v. Rosenblum, 603 A.2d 43 (N.J. Super. Ct. App. Div. 1991); *supra* text accompanying notes 233-40 (discussing *Miele*).

[512] Anderson, *supra* note 4, at 553.

[513] *Id.*

[514] For a discussion of the reputational and social costs of the actual malice standard, see *id.* at 524-36. Regarding reputational costs, Anderson states:

> [F]or many centuries and in most of the civilizations of the world, the injuries caused by defamation were thought to be harms for which the law can and should provide remedies. Eloquent reasons for this virtually universal protection of reputation have been advanced throughout history, but the contemporary consensus is captured in Justice Stewart's classic explanation: "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." It is probably safe to say that no major legal system in the world provides as little protection for reputation as the United States now provides.

Id. at 525-26 (footnotes omitted) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)). The social costs that Anderson identifies are the deterrence of participation in public life, encouragement of the "journalism of scandal," and the "deprecation of truth in public discourse." *Id.* at 531-36.

varying treatments of opinion by the lower courts since *Milkovich* represent differing views on the proper weight to be given to these competing interests. Plainly, *Milkovich* has not produced a consensus in the lower courts on the appropriate accommodation of these interests.

V. ISSUES GENERATED BY THE *MILKOVICH* OPINION

Milkovich generates difficult questions. First is the troublesome, perhaps intractable, question whether a statement is provable as true or false on the basis of objective evidence. Second is the question whether immunity for evaluative but not deductive opinion strikes the proper balance between the relevant interests. Third is the issue regarding the proper treatment of point-of-view opinion and ambiguous language in a regime that immunizes evaluative but not deductive opinion.

A. *What Kinds of Statements Are Provable as True or False on the Basis of Objective Evidence?*

1. *The Nonactionability of Evaluative Opinion under* Milkovich

It is not necessarily the case that an evaluative opinion is insusceptible to proof of truth or falsity; both philosophy and law have allowed such proof. Some philosophers maintain that the word "true" has the function of indicating confirmation, and that both evaluative and factual assertions are open to confirmation, albeit in different ways.[515] Moreover, under common law rules, the defense of justification is available in an action based upon defamatory opinion.[516] In English cases, at least, this defense is established if the jury finds that the opinion was "true."[517] Thus, the defense is established when, in effect, the jury *agrees* with the opinion expressed. For example, the defense of justification would protect the defendant from liability for a charge of discreditable business conduct if the jury found the charge to be true.[518]

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[515] *See, e.g.*, ALAN MONTEFIORE, A MODERN INTRODUCTION TO MORAL PHILOSOPHY 71-91 (1958); PAUL W. TAYLOR, NORMATIVE DISCOURSE 163-64 (1961).

[516] *See* FOWLER V. HARPER & FLEMING JAMES JR., THE LAW OF TORTS 371 (1956).

[517] *See, e.g.*, Sutherland v. Stopes, [1925] App. Cas. 47, 62 (H.L. 1924) (opinion of Viscount Finley) ("It is clear that the truth of a libel affords a complete answer to civil proceedings. This defence is raised by a plea of justification on the ground that the words are true in substance and in fact. Such a plea in justification means that the libel is true not only in its allegations of fact but also in any comments made therein.").

[518] For example, in Broadway Approvals Ltd. v. Odhams Press, Ltd., 1 W.L.R. 805 (C.A. 1965), the plaintiff corporation alleged that the defendants defamed the corporation by implying that it "was guilty of discreditable and improper business conduct in

When the Court in *Milkovich* stated that, under *Hepps*, the plaintiff must prove falsity in order to succeed,[519] did the Court mean that, in a case involving a pure opinion charging that the plaintiff's business practices were "discreditable," the plaintiff could succeed if the plaintiff could convince the jury that the plaintiff's conduct was not "discreditable"? Clearly not. In its review of the relevant rules of defamation law, the Court summarized the common law rules regarding opinion.[520] That summary omitted any reference to the defense of justification. The Court stated that defamatory opinion is actionable under common law rules "even though the truth or falsity of an opinion—as distinguished from a statement of fact—is not a matter that can be *objectively determined* and truth is a complete defense to a suit for defamation."[521]

The Court's opinion required the plaintiff to prove falsity on the basis of "objective evidence."[522] Can it be "objectively determined" whether one

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[its] dealings with children." *Id.* at 808-09. The defendants asserted the defenses of justification and fair comment. *Id.* The jury was asked the following questions and gave the following answers:

(1) Is the article defamatory of the plaintiffs? Answer—Yes.

(2) If yes, have the defendants proved that its sting, that is to say its defamatory implication, is substantially true? Answer—No.

(3) If no, does the article consist partly of allegations of fact and partly of expression of opinion? Answer—Yes.

(4) If yes, could a fair minded man in good faith have held the opinion expressed having regard to such of the facts referred to in the article as proved? Answer—Yes.

(5) If yes, have the plaintiffs proved that in publishing the article the defendants acted with malice? Answer—Yes.

Id. at 811. Interpreting the jury's answers, Judge Sellers stated:

> The jury by its answer to question 3 clearly recognised that there were facts and comments in the article and by their answer to question 4 must have been satisfied that the article was substantially true in its statement of facts and the facts so proved justified the comments made on them. . . .
>
> The comments, as well as the facts and the inferences from both fact and comment, in defamatory statements have to be proved to be true for the defence of justification to succeed but if the facts are established and the comment is fair the defence of fair comment can succeed. An honest and fair expression of opinion on a matter of public interest is not actionable even though it be untrue and fail of justification. It may be said in the appropriate circumstances that a man's conduct is discreditable and it may be fair comment to make although a jury is not prepared to find that the substance of the comment was true. That seems to be the position here.

Id. at 817-18.

[519] Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-20 (1990).

[520] *Id.* at 12-14.

[521] *Id.* at 13 (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977)) (emphasis added).

[522] The Court held that a "determination of whether petitioner lied in this instance

has engaged in "discreditable business conduct"? Whether one is a "bad" mayor? Whether a book or a play is "trash" or "badly written" or "unoriginal"?

Plainly, the type of comment generally viewed as *evaluative* would not, in the Court's view, be provable as true or false on the basis of "objective" evidence. Although others may agree or disagree with the comment, there is no generally acceptable, objective measure of what is "discreditable." Unless the evaluative comment implies the existence of an undisclosed factual predicate warranting the comment, it is protected opinion.[523]

A different conclusion, however, can be reached with regard to *deductive* comments.[524] An opinion may state a "factual" inference from established facts; that is, the inference may be provable as true or false on the basis of objective evidence. In this situation, there is a generally acceptable, objective measure of truth or falsity. Under my interpretation of *Milkovich*, the deductive comment does not confer immunity from liability, but instead receives the same constitutional protections afforded to other statements of fact.

The defamatory connotation of a statement of an opinion or belief that another has committed perjury can be proved true or false on the basis of a generally acceptable, objective measure drawn from the criminal law. Beyond a deductive opinion that another has committed a crime, however, the determination that an assertion is provable as true or false on the basis of objective facts is problematic. For example, is it an evaluative or a deductive opinion to say that "[Professor] Ollman has no status within the profession?"[525] In *Ollman v. Evans*, the United States Court of Appeals for the District of Columbia Circuit sharply divided on whether this statement was

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[could] be made on a core of objective evidence," *id.* at 21, and it stated that "'[u]nlike a subjective assertion the averred defamatory language [was] an articulation of an objectively verifiable event,'" *id.* at 22 (quoting Scott v. News-Herald, 496 N.E.2d 699, 707 (Ohio 1986)).

[523] As the Court stated in Hustler Magazine v. Falwell, 485 U.S. 46 (1988):

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . . We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea.

Id. at 50-51.

[524] Professor Page Keeton was perhaps the first author to distinguish between evaluation and deductive opinions in defamation cases. *See* Keeton, *supra* note 36. "A deductive opinion could be characterized as an imputation of past misconduct or purportedly existing fact, drawn as an inference from the existence of other facts. By contrast, an evaluative opinion is simply a condemnation of the defendant for having committed certain conduct." *Id.* at 1233.

[525] Ollman v. Evans, 750 F.2d 970, 989 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

verifiable.[526]

The fact/opinion dichotomy is not necessarily the same in all contexts. The distinction may be different for purposes of the physical sciences, the rules of evidence, and the law of defamation.[527] Ultimately the decision as to when the truth or falsity of a comment should or should not be subjected to judicial measurement must be based upon an effort to strike the proper balance between the interest in freedom of speech protected by the First Amendment and the interest in reputation protected by the law of defamation. A decision that a comment is evaluative and does not imply defamatory facts immunizes the comment, totally sacrificing the interest in reputation. The basic issue centers upon the kinds of defamatory comment that warrant absolute protection, giving due consideration to the competing interest in reputation.[528]

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[526] The majority held that the statement, in its context, "would plainly appear to the average reader to be 'rhetorical hyperbole.'" *Id.* at 990. A concurring judge regarded the charge as unverifiable. *Id.* at 1013 (MacKinnon, J., concurring). Three judges who dissented in part regarded the charge as verifiably true or false. *Id.* at 1032 (Wald, J., dissenting); *id.* at 1035 (Edwards, J., dissenting); *id.* at 1036 (Scalia, J., dissenting); *see supra* notes 11-20 (discussing *Ollman*).

[527] Describing modern rejection of the medieval concept of intelligible essences, Roberto Unger states: "We cannot decide in the abstract whether a given classification is justified. The only standard is whether the classification serves the particular purpose we had in mind when we made it." ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 32 (1975).

[528] In Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988), Judge Easterbrook stated:

> Courts trying to find one formula to separate "fact" from "opinion" . . . are engaged in a snipe hunt, paralleling the debates between positivist and deontological thinkers in philosophy. Perhaps the Constitution requires the search for this endangered species, but more likely the difference between "fact" and "opinion" in constitutional law responds to the pressure the threat of civil liability would place on kinds of speech that are harmless or useful, not on the ability to draw a line that has vexed philosophers for centuries. . . . It is the cost of searching for "truth"—including the cost of error in condemning speech that is either harmless or in retrospect turns out to be useful, a cost both inevitable and high in our imprecise legal system—that justifies the constitutional rule. Like other attempts to compare things that can be neither quantified nor reduced to a common metric (how much does the value of free speech "weigh" compared with the value of reputational injury?), this will never yield a rule.

Id. at 399 (citation omitted).

2. *The Distinction Between Fact and Opinion—Striking the Proper Balance Between the Interest in Free Speech and the Interest in Reputation*

a. *The Balance Struck by the Court in Erroneous Fact Cases*

The Court's decision in *Milkovich* must be placed in the context of the development of the erroneous fact privileges recognized in *New York Times, Butts,* and *Gertz.*[529] In holding that public officials and public figures may recover damages for defamatory statements of fact only upon clear and convincing proof that the defendant spoke with knowledge of falsity or reckless disregard for the truth,[530] the Court struck a balance between the constitutional interest in freedom of speech upon public issues and the legitimate state interest in protecting reputation. In *New York Times,* the Court asserted that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[531] The Court however, stopped short of immunizing such debate.

In *Gertz*, the Court stated that "there is no constitutional value in false statements of fact,"[532] but it also recognized that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[533] It went on to state:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. . . . Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.
>
> The legitimate state interest underlying the law of libel is

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[529] In *New York Times*, the Court recognized a conditional privilege for honest misstatements of fact. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 278, 282 n.21, 292 n.30 (1964).

[530] *Id.* at 279-80.

[531] *Id.* at 270.

[532] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[533] *Id.* at 341.

> the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name
>
> > reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.[534]

The Court determined that "[t]he *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person," but that a different level is appropriate in the context of defamation of a private person.[535] The state interest in providing a means to protect the reputations of individuals is more limited in the case of public persons than in the case of private persons.[536] One reason concerns media access:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.[537]

Another reason concerns assumption of risk:

> [T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in

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[534] *Id.* (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).
[535] *Id.* at 342.
[536] *Id.* at 344.
[537] *Id.* (footnote omitted).

ordering society."[538]

Thus, considerations regarding media access and assumption of risk dictate different levels of protection for statements of defamatory fact about public and private persons involving matters of public concern. Such statements, however, do not warrant absolute protection because defamatory falsehoods invade the individual's interest in reputation, an interest involving "the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty" and a "right . . . entitled to . . . recognition [by the Court] as a basic of our constitutional system."[539] The Court has tried to strike the appropriate balance between First Amendment interests involving defamatory speech and the states' interest in protecting reputation because both are important interests in a decent system of ordered liberty and neither should take absolute precedence over the other.

b. *The Proper Balance in Distinguishing Between Fact and Opinion—An Analysis of the Post Approach*

The problem of distinguishing between fact and opinion in defamation law is intractable because attempts to define these terms have been unsuccessful. The Court's distinction in *Milkovich* between "subjective assertions" and an "objectively verifiable event"[540] is subject to the criticism that it reflects the discredited theories of logical positivism.[541] Yet the judicial task

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[538] *Id.* at 345 (citing Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (Warren, C.J., concurring in result)).

[539] *Rosenblatt*, 383 U.S. 92 (Stewart, J., concurring).

[540] Milkovich v. Lorain Journal Co., 497 U.S. 1, 22 (1990) (quoting Scott v. News-Herald, 496 N.E.2d 699 (Ohio 1986)).

[541] The book *Language, Truth and Logic*, by Alfred J. Ayer, is the leading Anglo-American work on logical positivism. *See* Martin F. Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43, 81-85 (1993). According to Ayer's verifiability principle, the only meaningful statements are either "analytic" or "synthetic." *Id.* at 60. Analytic statements are tautologies and are verifiable "solely in virtue of the meaning of [their] constituent symbols." ALFRED J. AYER, LANGUAGE, TRUTH AND LOGIC 16 (1946). Synthetic statements are in theory subject to verification by empirical observations. *Id.* at 35.
The verifiability principle does not survive close scrutiny:

> This idea of "[empirical] foundations" for knowledge and meaning has been subjected to sustained and effective attack ever since it was identified as an essential "dogma" of the empiricism invoked by Ayer and the logical positivists. Observation statements cannot acquire their epistemological or semantic credentials directly from experience because, as Quine and others have urged, no statement ever faces "the tribunal of experience" individually but only as a component of a network of statements, some more observational than

is to determine what speech is subject to a jury finding of falsity in defamation actions. Unless the courts abandon defamation law, they cannot avoid that question.

To determine what kinds of statements warrant absolute protection as opinion, the courts must confront two very troublesome points. First, although the philosopher can make the convincing assertion that the world is "out there" but truth is not,[542] courts cannot avoid making the fact/opinion distinction. Second, no satisfactory formula is available for making the distinction; the courts can define fact and opinion only by looking to the purposes for which the distinction is made.

In a recent article, Professor Post used sociological concepts to elucidate important features of the Supreme Court's First Amendment jurisprudence.[543] This section analyzes his proposed distinction between fact and opinion and draws upon some of his insights. In summary, Post makes a convincing case that statements warrant absolute protection as opinion when their validity depends upon community standards, whereas statements should not be immunized when their validity is determinable without reference to those standards.[544] This distinction strikes the proper balance between free speech and reputational interests because it preserves the neutrality of public discourse from the domination of community mores. Post, however, makes a less convincing case for how to decide when a statement's validity depends upon community standards and when it does not.

Post's concept of "the paradox of public discourse"[545] demonstrates why the courts cannot avoid drawing a distinction between fact and opinion. Post examines First Amendment doctrine in light of the sociological concepts of identity and community, and the concept of the public.[546] He reasons:

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others, which has to conform to the contours of experience as best it can.

Barry Gower, *Introduction: The Criterion of Significance*, *in* LOGICAL POSITIVISM IN PERSPECTIVE: ESSAYS ON LANGUAGE, TRUTH AND LOGIC 10 (Barry Gower ed., 1987) (footnote omitted). Additionally, the logical positivists have never adequately identified how one determines what empirical observations are necessary or adequate to support a synthetic assertion. *Id.* at 11-15; *see also* Hansen, *supra*, at 81-85. Hansen asserts that in both logical positivism and the *Milkovich* opinion, "the relationship of statements describing empirical (objective) facts to the states of affairs they purport to describe is presumptively stable." *Id.* at 65. He criticizes the Court for ignoring the effect of context on the meaning of an assertion. *Id.* at 69, 96-99. My disagreement with Hansen on this point is discussed *infra* part V.C.

[542] *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 4-5 (1989).

[543] Post, *supra* note 11.

[544] *Id.* at 604-05.

[545] *Id.* at 643 (citing RESTATEMENT (SECOND) TORTS § 46 cmt. d (1977)).

[546] *Id.* at 604-05.

> A public . . . is constituted precisely by the ability of persons to speak to one another across the boundaries of divergent cultures. From this perspective, of course, the social function of first amendment doctrine, as reformulated during the 1930's and 1940's, becomes plain enough: it is to establish a protected space within which this communication can occur.[547]

The "paradox of public discourse" reflects the conflicting interests in free speech and reputation. Post defines the conflicting interests as incompatible requirements for the existence of public discourse:

> Public discourse . . . entails two distinct and incompatible requirements. There is, first, the requirement of negativity, of freedom from the boundaries of community expectations and norms. This requirement initiates the very possibility of public discourse by distinguishing it as pure communication able to reach out beyond the confines of any single community. This is the requirement of *critical interaction*. But there must also be a second requirement, one of *rational deliberation*, which entails consideration and evaluation of the various positions made possible by the space of critical interaction. The constitutional purpose of public discourse requires that rational deliberation be civil and noncoercive, which is to say that it must be consistent with the very norms that are negated by critical interaction.[548]

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[547] *Id.* at 634.

[548] *Id.* at 642. Post continues:

The two requirements of public discourse thus stand in contradiction. The aspiration to be free from the constraints of existing community norms (and to attain a consequent condition of pure communication) is in tension with the aspiration to the social project of reasoned and noncoercive deliberation. The first aspiration is sustained by the values of neutrality, diversity, and individualism; the second by the deliberative enterprise of democratic self-governance. Although the success of public discourse depends upon both requirements, the primary commitment of modern first amendment jurisprudence has unquestionably been to the radical negativity that characterizes critical interaction, which defines the initial, distinguishing moment of public discourse. As a consequence the constitutional structure that regulates the domain of public discourse denies enforcement to the very norms upon which the success of the political enterprise of public discourse depends.

This contradiction is deeply disturbing. As Sabina Lovibond has recently reminded us, "the norms implicit in a community's . . . social practices are 'up-

Given the conflicting requirements of public discourse, it may be impossible to develop a coherent theory of the distinction between fact and opinion. Yet defining an "objective measure" of truth is not a purely abstract endeavor in defamation law. A court may decide that a claim is opinion even though a measure of its validity is available; the decision indicates that a judicial test of validity is inappropriate—the claim should be measured only in "the marketplace of ideas." In reaching this conclusion, the court must take into account two significant First Amendment values. First, as the Court has stated, false and defamatory facts "are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."[549] Hence, care must be taken to immunize judgments that should be tested only in the "marketplace of ideas," and to provide an appropriate degree of protection against false statements of defamatory fact, which hamper the truth-seeking function of the "marketplace of ideas" and find inadequate deterrence in that marketplace alone. Post agrees that false statements of fact impair the integrity of public discourse.[550] Indeed, there seems to be general agreement

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held,' in quite a material sense, by the sanctions which the community can bring to bear upon deviant individuals." The sanctions that the law can bring to bear to support civility rules are unique, not so much because of their monopoly of physical force, but because they alone purport to define social norms in accents that are universal. These norms can, of course, continue to be enforced by means of private and social pressure. But in the heterogeneity of contemporary culture only the law can authoritatively speak for norms that define a *common* ideal of rational deliberation. Only the law can rise above the particularity of specific social groups and definitively articulate those irreducible, minimum constraints of decency whose violation would be "utterly intolerable in a civilized community." To the extent that a constitutional commitment to critical interaction prevents the law from articulating and sustaining a common respect for the civility rules that make possible the ideal of rational deliberation, public discourse corrodes the basis of its own existence.

This might be called the "paradox of public discourse. . . . "

Id. at 642-43 (footnotes omitted) (quoting SABINA LOVIBOND, REALISM AND IMAGINATION IN ETHICS 61 (1983); RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977)).

[549] Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988).

[550] Post states:

It is true that the punishment of false statements of fact appears, at first blush, to be inconsistent with the requirement of an ideal speech situation that all force be excluded "except the force of the better argument." But statements of fact are not arguments, and the very ability to argue presupposes accurate facts. "Freedom of opinion," as Arendt notes, "is a farce unless factual information is guaranteed and the facts themselves are not in dispute. In other words, factual truth informs political thought. . . . " Thus the integrity of public discourse itself depends upon factual accuracy, a point to which *Falwell* itself appealed.

Post, *supra* note 11, at 659 (footnotes omitted) (quoting JURGEN HABERMAS, THE THE-

among First Amendment scholars on this point.[551] Of course, there is a logical dilemma in saying that false statements of fact impair public discourse, without providing the definition of a fact. Nevertheless, there is general agreement that some false assertions harm the "truth-seeking function of the marketplace of ideas."[552]

Second, as Post states, a central First Amendment concern is "the preservation of the neutrality of public discourse from the domination of community mores."[553] Thus, if a defamatory judgment were condemned as false when different communities in our society hold different views of its validity, then the standards of one or more groups would be imposed upon another:

> [B]ecause the truth or falsity of judgments is determinable only by reference to the standards of a particular community, any government effort to penalize false judgments in public discourse would in effect use the force of the state to impose the standards of a specific community. This would of course violate the constitutional principle that the arena of public discussion be neutral as to community standards. It might well be said, therefore, that from a constitutional point of view the evaluation of such statements must be left to the free play of speech and counterspeech through which communities compete within public discourse for the allegiance of individuals.[554]

Post's thesis that a central concern of the First Amendment is to preserve the neutrality of public discourse from the domination of community mores has important implications for the fact/opinion distinction. A test of opinion that is either too narrow or too broad violates this principle of neu-

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ORY OF COMMUNICATIVE ACTION 25 (T. McCarthy trans., 1987); HANNAH ARENDT, BETWEEN PAST AND FUTURE 238 (1968)).

[551] *See* Hansen, *supra* note 541, at 66-68.

[552] *Falwell*, 485 U.S. at 52.

[553] Post, *supra* note 11, at 660. In *Falwell*, the Court stated that "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Falwell*, 485 U.S. at 56 (quoting FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978)). Post comments:

> The difficulty with this gesture, however, is that, like most modern commentary, it conceives of neutrality only at the level of ideas, rather than at the more general level of the structures that establish communal life. We might correct this difficulty by saying that the concept of public discourse requires the state to remain neutral in the "marketplace of communities."

Post, *supra* note 11, at 632.

[554] Post, *supra* note 11, at 659.

trality:

> [F]irst amendment doctrine . . . [has maintained] a sphere of public discourse in which communities themselves develop through competition for the allegiance of individual adherents. The constitutional "shield" established by *Cantwell* ensures that this competition occurs on a level playing field, in which no particular community can obtain an unfair advantage and use the power of the state to prejudge the outcome of this competition by enforcing its own special norms or civility rules.[555]

The concept of a level playing field—fair competition in the marketplace of ideas—supports the conclusion that too narrow an interpretation would result in the imposition of the values of one or more communities upon another. This concept also supports the view that an arbitrary interpretation of opinion would have the same result.

The point can be illustrated by two hypotheticals. First assume that all statements of defamatory fact were immunized—that the law of defamation was abolished. In this situation, would the courts be "neutral" with regard to community mores? In this situation there would not be free competition in the marketplace of ideas because the marketplace would be dominated by "bullies" or by the most popular. The interest in reputation would be sacrificed, and the kind of public discourse that permits the existence of a "public" could not be carried on. Unpopular speech would be deterred. The courts would not be "neutral"; rather, they would cast their weight on the side of those with the greatest power of speech, or with popularity.

In the second hypothetical, assume that the definition of opinion is arbitrary, as the *Ollman* approach appears to be.[556] Under this approach, there is a serious danger that judges may make unprincipled determinations on the fact/opinion issue. Such an approach would permit judges to "play favorites" among communities; at a minimum there would be a public perception of bias.[557] An overly broad definition of opinion would sacrifice the interests

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[555] *Id.* at 630 (footnote omitted) (referring to Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[556] *See supra* note 11 and accompanying text.

[557] A perception of a court's playing favorites is evident in Justice Brown's dissent in Scott v. News-Herald, 496 N.E.2d 699, 721 (Ohio 1986) (Brown, J., dissenting in part). In that case, the Ohio Supreme Court was presented with a libel suit filed by the superintendent of Milkovich's school. The court reversed its earlier decision in Milkovich v. Lorain Journal Co., 473 N.E.2d 1191 (Ohio 1984), which originally held that the Diadiun article contained actionable statements of fact. *Scott*, 496 N.E.2d at 709. Justice Brown sharply accused the majority of setting its "own . . . jurisprudential agenda" and playing up to the media. *Id.* at 725 (Brown, J., dissenting). He asserted that, "[i]n order

in both reputation and neutrality. It would discourage unpopular speech, engendering fear that, if one spoke out, one might be subjected to a defamatory attack without any recourse.[558]

Thus, an appropriate constitutional balance in distinguishing fact from opinion requires recognition that some defamatory statements have no intrinsic value in the marketplace of ideas and that the neutrality of public discourse must be protected from the domination of the mores of particular communities. Moreover, fair competition in the marketplace of ideas—a level playing field—requires an approach to the protection of opinion that is neither too narrow nor too broad.

Although Post's analysis of the neutrality principal is elucidating, his formulation of a method to effectuate it in the fact/opinion distinction is not very helpful. Post argues:

> We can thus advance a rough justification for the position adopted in *Falwell* that false statements of fact have no constitutional value within public discourse, but that false opinions can only be regulated by the marketplace of ideas. The justification depends upon reformulating the constitutional distinction between fact and opinion in the following manner: statements of fact make claims about an independent world, the validity of which are in theory determinable without reference to the standards of any given community, and about which we therefore have a right to expect ultimate convergence or consensus. Statements of opinion, on the other hand, make claims about an independent world the validity of which depends upon the standards or conventions of a particular community, and about which we therefore cannot expect convergence under conditions of cultural heterogeneity. If this reformulation is correct, it implies that *Falwell*'s distinction between fact and opinion stems from the same central first amendment concern as that which guided *Falwell*'s other characterizations of public discourse: the preservation of the neutrality of public discourse from the

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to curry favor with the media at large in an election year, . . . a majority of four rushes hell-bent to overrule *Milkovich*." *Id.* (Brown, J., dissenting).

[558] Some believe that the state of defamation law today is not far from the second hypothetical situation I have posed in the text. Professor Anderson has stated that libel law today provides "not a general remedy with exceptions, but a general scheme of nonliability that permits a remedy only in exceptional cases." Anderson, *supra* note 4, at 510. The social costs he attributes to this situation include deterrence of participation in public life, the "journalism of scandal," and the "deprecation of truth in public discourse." *Id.* at 531-34.

domination of community mores.[559]

This formulation of the fact/opinion dichotomy is useful in some respects, but it presents some problems in application. First, when does a statement make claims about an independent world, the validity of which is determinable "in theory" without reference to the standards of any given community? Post defines community as "a social formation that inculcates norms into the very identities of its members."[560] It quickly becomes clear from this definition of community that Post's fact/opinion distinction would produce unworkable results unless the word "standard" in his fact/opinion definitions means a "norm"—a term he does not define. A hypothetical illustrates the problem. Assume that Doe is a member of a Holocaust revisionist organization. Membership in this organization appears to be based upon a "standard" that forms an important part of the identity of these revisionists—the belief that traditional historical accounts of the Holocaust are inaccurate.[561] Suppose Doe asserts that Roe's published accounts of her experiences at Auschwitz are fabrications or the product of her imagination. Roe sues Doe for libel. To maintain neutrality with regard to public discourse, must a court decline to adjudicate whether Roe's accounts are true? An affirmative answer would be ludicrous. The only way to avoid that result, however, is to assert that the Holocaust revisionists are not a "community" in Post's sense of the term. Their claims are factual rather than normative. Doe's assertion is a claim of fact because it makes "claims about an independent world, the validity of which are in theory determinable without reference to the [norms] of any given community."[562] Yet the task remains of defining what is normative.

The second problem with Post's fact/opinion dichotomy is the question of when we have a "right to expect" ultimate convergence or consensus. Post acknowledges that "[a]ll knowledge . . . ultimately depends, to one degree or another, upon social processes of discussion."[563] At the time of trial, a consensus probably will not have been reached.[564] Moreover, Post acknowledges that all community groups in a society may agree upon certain norms, and all may agree on the "validity" of an assertion that nevertheless warrants protection as opinion.[565] Thus, we cannot tell fact from

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[559] Post, *supra* note 11, at 660 (footnote omitted).

[560] *Id.* at 645 (footnote omitted).

[561] On the Holocaust revisionist movement, see PIERRE VIDAL-NAQUET, ASSASSINS OF MEMORY—ESSAYS ON THE DENIAL OF THE HOLOCAUST (1992).

[562] Post, *supra* note 11, at 660.

[563] *Id.* at 657 (footnote omitted).

[564] Post argues that "whenever the state attempts definitively to determine the truth or falsity of a specific factual statement, it truncates a potentially infinite process of investigation and therefore runs a significant risk of inaccuracy." *Id.* at 659.

[565] Post summarizes this point:

opinion on the basis of whether there is consensus among communities on the validity of an assertion. If present consensus is an improper basis, then the "right to expect" convergence is an illusive basis for the distinction, too. Post argues:

> [T]he distinction between convergent and nonconvergent assertions does not predict whether convergence "will actually occur," but instead the point of the contrast is that even if [convergence on ethical matters] happens, it will not be correct to think that it has come about because convergence has been guided by *how things actually are*, whereas convergence in the sciences might be explained in that way if it does happen. This means, among other things, that *we understand differently* in the two cases the existence of convergence or, alternatively, its failure to come about.[566]

We have come full circle. Fact is distinguished from opinion on the basis of whether we have a right to expect ultimate convergence, but, when there is ultimate convergence, we know we are dealing with fact only if the convergence has been guided by "how things actually are." We know "how things actually are" only if we have a right to expect ultimate convergence. The view is persuasive that some statements should be treated as opinion even if all communities agree on their invalidity; individuals should be free to advocate the formation of new communities.[567] Yet the convergence theory is not helpful in separating fact from opinion. Neither the existence nor the expectation of a convergence regarding an assertion can confirm

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> *Falwell* illustrates the depth of the Court's commitment to preserving the neutrality of public discourse from the imposition of these kinds of norms. Although the Court assumed that the *Hustler* parody would "doubtless [be] gross and repugnant in the eyes of most," it nevertheless refused to permit the parody to be penalized. This result comports with the reasoning of *Cantwell*: if public discourse is constitutionally protected because it is the medium for the formation of future communities, its structural independence from all civility rules must be guaranteed, *even if such rules in fact are accepted by every contemporary community*. The "marketplace of communities" must thus be understood as extending in time, as well as in space. The individualist methodology of first amendment doctrine ultimately means that individuals must be free within public discourse from the enforcement of all civility rules, so as to be able to advocate and to exemplify the creation of new forms of communal life in their speech.

Id. at 647 (emphasis added) (footnote omitted).

[566] *Id.* at 658 n.295 (emphasis added) (alteration in original) (citing Bernard Williams, *The Scientific and the Ethical*, *in* OBJECTIVITY AND CULTURAL DIVERGENCE 209, 212 (Stuart C. Brown ed., 1984)).

[567] *See supra* note 565.

whether the assertion is one of fact; the question is whether *we believe* that the actual convergence or expected convergence is or will be guided "by how things actually are."

It must be noted that Post does not state the right-to-expect-convergence test as a test separate from the first portion of his definition. Rather, he states that "statements of fact make claims about an independent world, the validity of which are in theory determinable without reference to the standards of any given community, and about which we *therefore* have a right to expect ultimate convergence or consensus."[568] The problem with using the community standards and convergence concepts in this manner is that, as noted previously, Post provides no definition of community norms; consequently, the community standards concept cannot reveal when we have a right to expect ultimate convergence.

Post's fact/opinion test is useful, nonetheless, because of its focus on the necessity of the preservation of the neutrality of government with regard to the domination of community mores—a central tenant of modern First Amendment theory.[569] A defamatory comment should not be condemned as false when there is diversity among communities, based upon community *values*, regarding its validity.[570]

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[568] Post, *supra* note 11, at 660 (emphasis added).

[569] *See, e.g.*, Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 271 (1991) ("[T]he edict of viewpoint neutrality [is] widely deemed to be the essential element of modern free speech theory."); *see also id.* at 281-82.

[570] Post remarks:

> It is possible . . . to make sense of the Court's analysis [in *Falwell*] if it is reformulated to take account of "the accepted contrast between" statements "which are expected to be highly diverse, and which are not expected and which are not required, to converge on the one hand," and statements "where there is a well established expectation of convergence" on the other. In the area of "scientific enquiry," for example, "there should ideally be convergence on an answer, where the best explanation of that convergence involves the idea that the answer represents how things are, whereas in the area of the ethical . . . there is no such coherent hope."
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> We expect scientific hypotheses ultimately to converge on a single answer because such hypotheses, in the words of Gilbert Harman, are "tested against the world," and the world exists independently of our perceptions of it. This abstract appeal to a "world" affects only the kind of claims we understand scientific statements to make; it does not affect the substance of those claims by naive reliance upon "brute data." Thus we recognize a claim as scientific if it purports to describe something independent of scientific investigators in such a way that, given enough time and effort, we would expect the claim to be confirmed or disconfirmed by a consensus of investigators. The origins of this way of thinking go back to the work of Charles Peirce, who defined scientific truth as the "opinion which is fated to be ultimately agreed to by all who investigate," and who defined reality as "the object represented in this opinion." For Peirce, reality was

The appeal to "norms," "values," or "mores," however, is problematic because it relies on the verification principle of logical positivism—an assertion is verifiable or falsifiable if it is possible to identify what kind of observations are required to confirm or discredit the assertion.[571] The difficulty lies in defining such observations. Some people once thought they could determine whether a person was a witch by dunking him or her in water for a protracted period of time.[572] Thus, people's views may change over time as to what *kinds* of observations may confirm or refute a factual hypothesis. Both fact and opinion are contingent; "[s]cience does not find hard 'facts' independent of theory and debate and existing forever."[573] As Post observed, it is erroneous "to conceive of factual truth as independent of social

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thus "independent, not necessarily of thought in general, but only of what you or I or any finite number of men may think about it."

Post, *supra* note 11, at 657-58 (footnotes omitted).

[571] Other methods of defining factual claims are subject to the same difficulties, at least for the purposes of defamation law. Thus, in describing the principle of verification, Montefiori states:

> To start with the notion of verification was required simply to serve as the criterion by which genuine hypotheses could be distinguished from those that were empty or bogus. If it was possible to say what sort of observations would be or would have been needed to confirm the theory, this showed that it was a genuine one and empirical in nature—that is to say, with some genuine relation to possible experience. The fact that there might be no known means of actually making the observations necessary to test the theory was from this point of view neither here nor there. Even in the days when it still seemed beyond all possibility to go and have a look at the other side of the moon, people could say what sorts of observations *would* establish that there were ranges of mountains there. So this suggestion was and is an empirically meaningful one, quite apart from considerations of rockets and space travel. . . . This criterion of verifiability is based obviously enough directly on such considerations as to the nature of empirical, scientific assertions. It is true that some people have in fact objected to talking of verification in such contexts on the grounds that although scientists may often reject theories as a result of the outcome of one or more experiments, there is an important sense in which no theory can ever be completely verified. But this does not matter either. One could as well talk of a falsification as of a verification theory of meaning; and some in fact have preferred to do so. All that is essential is that one must be able to say what would count for the theory and what would count against it.

MONTEFIORE, *supra* note 515, at 30-31 (footnote omitted). Under this test of a factual or empirical proposition, it must be possible to say what sort of observations would be needed to confirm or refute the theory.

[572] *See, e.g.*, GEORGE LYMAN KITTREDGE, WITCHCRAFT IN OLD AND NEW ENGLAND 233 (1929) (reissued 1956) (describing English "swimming tests" whereby the accused would be adjudged innocent if she sank and did not reemerge, and guilty if she floated).

[573] Nicholas Wolfson, *Equality in First Amendment Theory*, 38 ST. LOUIS U. L.J. 379, 387 (1993) (footnote omitted).

processes of discussion and communication."[574]

Attempting to avoid the difficulties of the verifiability principle, Martin Hansen recently proposed that "a statement should be actionable only if there exists a substantial degree of consensus within the relevant community or audience over the kinds of facts that would support finding the challenged statement to be true or false."[575] There are at least two problems with this proposal. First, it would immunize ambiguous statements.[576] In addition, it fails to take account of Post's insights regarding the need for judicial neutrality towards community norms. Thus, there may be widespread consensus on what criteria would support finding an assertion false, even when the assertion is the kind that should carry immunity to enable individuals to advocate the creation of new communities.[577]

Although no definition of the fact/opinion distinction seems satisfactory, the role of norms in distinguishing between fact and opinion has relevance to the maintenance of judicial neutrality among communities. We generally understand that to employ a standard, norm, or rule is to make a social, rather than a factual claim—a claim that appeals for the allegiance of other people.[578] Thus, in distinguishing between value judgments and factual assertions, it is useful to ask whether a statement can be justified only on the basis of a rule or standard—a social claim. The reasoning remains flawed, but the concepts are familiar. Montefiore argued that: "The distinction between value judgments and statements of fact must be regarded as fundamental, but . . . it seems to be impossible to justify [the distinction] solely as a matter of logic. . . . [W]e must be content to recognise its existence as

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[574] Post, *supra* note 11, at 656.

[575] Hansen, *supra* note 541, at 73 (footnote omitted).

[576] Hansen argues that "extending First Amendment protection only to statements around which at least a substantial consensus exists as to their verifiability criteria ensures that defendants will not effectively be required to shoulder the expense of potentially defamatory speech that is legitimately open to varying interpretations yielding disparate truth functions." *Id.* at 75. For a discussion of ambiguous statements, see discussion *infra* part V.D.

[577] *See supra* note 565.

[578] Montefiore states:

> To lay down a standard is, usually at any rate, to make a *social* claim; it is to claim other people's allegiance to the standard and their disapproval of those who deliberately reject it. The reasons it will supply for particular value judgments are claimed as reasons why anyone else should make the same value judgments.

MONTEFIORE, *supra* note 515, at 144. Similarly, A.J.M. Milne states:

> The use of evaluative terms such as 'right' and 'wrong', 'good' and 'bad', is not confined to the expression of emotion. To say that an act is right is to say that it is correct, i.e., that it complies with the requirements of a relevant rule of conduct in the context in question.

A.J.M. Milne, *Values and Ethics: The Emotive Theory*, *in* LOGICAL POSITIVISM IN PERSPECTIVE 89, 97 (Barry Gower ed., 1987).

a fact of personal experience."[579] Under the view of norms as social claims, the ultimate test remains, what kinds of defamatory assertions must carry immunity in order for communities to coexist as a "public"?

Judicial neutrality among communities serves the need of community coexistence. In its exposition of classic marketplace theory in *New York Times Co. v. Sullivan*,[580] the Supreme Court reiterated its longstanding commitment to the view that a free exchange of ideas is necessary: to ensure that government is responsive to the people; to allow the pursuit of truth without governmental interference; to achieve stable government, which is menaced by public ire; and to avoid the tyranny of the majority.[581] The question, then, is whether subjecting a given claim to a judicial test of its validity advances or threatens the type of public discourse necessary for a responsive and stable government, and for a multicultural society that is both dynamic and durable. Communities must be able to coexist, interact, and compete on a level playing field for the allegiance of others and for influence on political and social policies. Defamatory facts are claims that should be subject to a judicial validity test because they impede such public discourse; defamatory opinions are normative claims that should not be subject to a judicial validity test because they advance such discourse.

Thus, for example, a charge that one who has crossed a picket line is immoral (or is a "scab" or a traitor to fellow workers) is a normative claim that advances public discourse. Though uncivil and divisive, it is the kind of claim by which union advocates appeal for adherence to their cause. A judicial test of validity would not be neutral as to the values of different communities that disagree about the value of unions. It is the kind of claim that should not be deterred by fear that a judge or jury will disagree.

In contrast, the charge of a Holocaust revisionist that an eye-witness account of events at Auschwitz is a lie is a factual claim that, if false, impairs public discourse. False claims about historical events impair the ability of communities to coexist, and to search for the truth. Courts maintain neutrality about communities' normative claims when they make judicial determinations of the validity of such historical claims. The soundness of normative judgments such as the value of Zionism are influenced by the experience of Jews in the Holocaust, and actions of bigotry may be encouraged by the false claims of Holocaust revisionists. The lack of a judicial forum for the resolution of such claims would be highly detrimental to community coexistence. A similar case would arise if a proponent of racial segregation proclaimed, "You should vote against Joe Smith, the black candidate for mayor, because, as a black, he is of a different species, inferior to whites."

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[579] MONTEFIORE, *supra* note 515, at 120.

[580] 376 U.S. 254 (1964).

[581] *See id.* at 269-70.

If such a statement were made not as invective or hyperbole, but to invoke the theory of special creation, the charge that Smith belongs to an inferior species should be treated as factual.[582]

The claim that one has engaged in criminal conduct is also a claim of fact that, if false, impairs public discourse. Its validity cannot be resolved adequately through public debate, and choices about important political, social, and personal issues would be adversely affected without the possibility of a judicial determination of falsity. Of course, considerable protection is given to false claims of facts on matters of public concern, including the requirements that the plaintiff prove falsity and fault as to falsity. The question addressed here is whether charges of criminal conduct should be subject to question in a defamation action at all.

Such claims are not normative advocacy claims appealing for adherence to belief in a system of values. They frequently are made in the course of advocacy for a cause. Holocaust revisionists may be attempting to advance the merits of fascism by their denials of the Holocaust. Similarly, Senator Joseph McCarthy attempted to promote the dangers of communism by his accusations that individuals were communists.[583] Without the deterrent value of the possibility of a judicial determination of falsity, such claims easily proliferate. Members of the public would have little basis for deciding the validity of the charges. The more popular community, or the one with the greater media access, might gain the most adherents. There would not be a level playing field for the advocacy of different normative positions. Judgments about the fitness of a candidate for public office, or the fitness of a coach or teacher for a position of influence over children, would not be informed judgments. The McCarthy era is illustrative. A charge that communism is an evil system is a claim of opinion. A claim that particular individuals are communists is a claim of fact. Those black-listed during the McCarthy era did not find public discourse a good remedy for their loss of reputation. Moreover, judgments about the nature of the communist threat probably were impaired by false claims that many individuals in positions of power were communists.

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[582] Moral standards may be based on factual premises. The hypothetical in the text is derived from the following observations of A.J.M. Milne:

> [A]ccording to the Dutch Reform Church, there are theological grounds for regarding the physical difference of colour as morally relevant. Included in these grounds, however, is the theory of special creation, a theory of the origins of species which has been superseded by the theory of evolution in modern biological science. This is enough to discredit the Dutch Reform Church's moral position on race relations. It is a markedly unenlightened position, resting as it does upon ideas about the physical differences between human beings which have no scientific warrant.

Milne, *supra* note 578, at 106-07.

[583] *See* United States v. Woodley, 751 F.2d 1008, 1015 (9th Cir. 1984) (en banc).

Of course, many claims that are false and defamatory have nothing to do with appeals for allegiance to a community. Such claims may be made for reasons of purely personal advantage and may impair important judgments about the qualification of a person for a job or the desirability of associating with that person in other ways that may be of great importance to the defamed individual. Public discourse is not advanced by leaving such claims to the exclusive remedy of public discourse.

The distinction between fact and opinion in defamation law thus must rest on the purpose for making the distinction. A remaining question concerns whether the distinction should be influenced by a distrust of the fact-finding process. As Post observes, legal fact-finding may be inaccurate and influenced by community biases; consequently, First Amendment theory should allow for this phenomenon, which probably explains, in part, the requirement of fault concerning falsity.[584] Other constitutional requirements, such as the rule of independent appellate review[585] and the requirement of placing the burden on plaintiffs to prove falsity,[586] also help protect speakers from the danger that juries may punish unpopular opinion.

In his separate opinion in *Ollman v. Evans,* however, Judge Bork argued that a court has the constitutional duty to decline to allow a jury to decide the truth or falsity of an issue when the issue "is inherently unsusceptible to accurate resolution by a jury."[587] He believed that the defendants' charge

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[584] Post argues:

> Whenever the state attempts definitively to determine the truth or falsity of a particular factual statement, it truncates a potentially infinite process of investigation and therefore runs a significant risk of inaccuracy. Thus although legal fact-finding may in theory be neutral, in practice we can expect it to be often inaccurate and inappropriately influenced by particular community sentiment and prejudice. Any respectable First Amendment theory should allow for this phenomenon, and it is no doubt part of the underlying explanation of why the Court in *Falwell* did not permit liability to be imposed for false statements of fact *simpliciter*, but instead imposed the additional requirement of "actual malice," so as "to give adequate 'breathing space' to the freedoms protected by the First Amendment."

Post, *supra* note 11, at 659-60 (footnotes omitted).

[585] *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" (citation omitted)).

[586] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775, 777 (1986) (noting that a public-figure plaintiff has the burden of proving falsity, and holding that a private-figure plaintiff has the burden of proving the falsity of speech on a matter of public concern when the defendant is a media defendant).

[587] Ollman v. Evans, 750 F.2d 970, 1006 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

that Professor Ollman had "no status" within his profession was incapable of accurate resolution.[588] He argued, for example, that allowing evidence of poll results would require the jury to resolve difficult questions regarding the methodological soundness of the polls.[589] In effect, Judge Bork would require that a statement be immunized absent a consensus on what objective measure should be used to test the truth or falsity of the charge. Such a requirement is particularly harsh when the defendant's own choice of language created the problem of proof.[590] Moreover, the requirement hardly would strike the proper balance between the interests in reputation and free speech—between rational deliberation and critical interaction. Any contested issue of falsity may involve evidence that one community or another believes is an invalid measure of a claim's validity. For example, eyewitness testimony about what occurred at the high school wrestling match that gave rise to the *Milkovich* case might be distrusted by the wrestling fans of one team or another. Likewise, expert witnesses belonging to different schools of thought might disagree on the significance of various historical documents; in the hypothetical Holocaust revisionist case, revisionist historians would disagree with other historians about whether the events described by Roe could have taken place. To require agreement among communities on a proper objective measure of truth, however, probably would abolish the defamation action.[591] It seems preferable to trust in the soundness of the judicial fact-finding system, along with the protective procedures that the Supreme Court has applied to defamation cases, to give "breathing space" for true assertions, than virtually to abolish the defamation action. As argued above, the marketplace of ideas would be harmed, not invigorated in a useful way, by withdrawing all recourse for defamation. An effective refutation of Judge Bork's position lies in the words of Justice White:

> It might be suggested that courts, as organs of the government, cannot be trusted to discern what the truth is. But the logical consequence of that view is that the First Amendment

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[588] *Id.* at 1007.

[589] *Id.* at 1006-07.

[590] Phillips observes:

> If complexity of determination were the criterion for deciding whether or not a dispute was capable of judicial resolution, probably the majority of issues now considered by the courts would be eliminated. The New York Court of Appeals said in the context of an action for tortious injury to a fetus: "[I]t is an inadmissible concept that uncertainty of proof can ever destroy a legal right." The courts are particularly disinclined to deny plaintiff a cause of action where, as here, the difficulty of proof is attributable to the defendant's own misconduct.

Phillips, *supra* note 11, at 658 (footnotes omitted) (quoting Woods v. Lancet, 102 N.E.2d 691, 695 (N.Y. 1951)).

[591] *Cf. id.*

> forbids all libel and slander suits, for in each such suit, there will be no recovery unless the court finds the publication at issue to be factually false. Of course, no forum is perfect, but that is not a justification for leaving whole classes of defamed individuals without redress or a realistic opportunity to clear their names. We entrust to juries and the courts the responsibility of decisions affecting the life and liberty of persons. It is perverse indeed to say that these bodies are incompetent to inquire into the truth of a statement of fact in a defamation case. I can therefore discern nothing in the Constitution which forbids a plaintiff to obtain a judicial decree that a statement is false—a decree he can then use in the community to clear his name and to prevent further damage from a defamation already published.[592]

The distinction between evaluative and factual assertions necessarily is difficult in defamation law. The philosopher Alan Montefiore states:

> [There are] many primarily descriptive words which, because certain standards are widely recognised, regularly convey certain evaluative information; a word like 'cheat' is normally used both to describe and to disapprove at the same time. There is never a completely clear cut border between value terms and descriptive terms. . . . [593]

Montefiore's description of words that both describe and disapprove at the same time is a workable definition of at least some forms of defamatory fact.[594] Given that even statements of defamatory fact often are evaluative, it seems inevitable that it will often be difficult to decide whether a defamatory assertion is "purely" evaluative.

Professor A.E. Dick Howard has said that "First-Amendment-speech jurisprudence is essentially ad hoc, intuitive, episodic and oftentimes quite asymmetrical."[595] Like obscenity, the fact/opinion dilemma illustrates the point.[596] Post's theory of the "paradox of public discourse" demonstrates

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[592] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 768 n.2 (1985) (White, J., concurring).

[593] MONTEFIORE, *supra* note 515, at 61.

[594] Compare the *Restatement*'s definition of a defamatory communication: "A communication is defamatory if it tends 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) OF TORTS § 559 (1976).

[595] *The Brennan Legacy: A Roundtable Discussion*, A.B.A. J., Feb. 1991, at 57.

[596] On obscenity, see TRIBE, *supra* note 48, at 904-19.

that courts must differentiate between fact and opinion. It is clear, however, that no "bright-line" test is available for making the distinction. The courts can differentiate only by determining whether use of a judicial test of the validity of the speech in question will promote or impair public discourse.

B. *Should Deductive as well as Evaluative Opinions Be Nonactionable?*

Does a rule immunizing pure evaluative opinion, but not pure deductive opinion, strike the proper balance between free-speech interests and the interest in reputation? The *Restatement*[597] and Justice Brennan's dissent in *Milkovich*[598] draw no distinction between pure deductive and pure evaluative opinion. Both forms warrant immunization because the recipients of the communication can judge for themselves the soundness of the opinion. In this situation, arguably the values of intelligent debate are sufficiently advanced to outweigh any damage to the subject of the defamatory opinion, and the damage inflicted is only in proportion to the recipients' judgment of the soundness of the opinion, given its factual basis.[599] The *Restatement* view gives strong protection to the concept of individual autonomy reflected in First Amendment jurisprudence.[600] In the marketplace of ideas, individual autonomy and choice require the freedom to espouse ideas and to choose among those espoused by others, unencumbered by the government's enforcement of civility rules.[601] The *Restatement* opinion rules give absolute protection to such autonomy as long as the listeners to a message can make judgments about its soundness.

In contrast to this view, Judge Friendly took the position in *Cianci v. New Times Publication Co.*[602] that deductive opinions should not be immunized, because the law of libel could be circumvented too easily by the publisher's use of the words "I think," and because these are not the types of statements the validity of which can be tested only in the marketplace of ideas.[603]

Judge Friendly's is the more defensible view. As long as the plaintiff must prove both falsity and fault,[604] the appropriate balance between free speech interests and the interest in reputation is struck by immunizing only evaluative opinions, the factual bases of which are stated or available. The view that damage to reputation may be minimized by the recipients' ability

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[597] *See* discussion *supra* part III.B.1.
[598] *See* discussion *supra* part III.B.3.
[599] *See* discussion *supra* part III.B.1.
[600] *See* Post, *supra* note 43, at 734 & n.231.
[601] *See id.* at 733-34.
[602] 639 F.2d 54 (2d Cir. 1980).
[603] *See supra* text accompanying notes 132-45.
[604] *See* discussion *infra* part V.D.2.

to judge the soundness of the opinion is naive. Dean W. Page Keeton observed:

> Although people are in a position to judge for themselves whether an opinion is justified so long as the alleged facts utilized as a basis for the opinion are proven to be true and are available to them, most, if not all, people are often influenced by others, especially by the press and the media, in formulating their opinions. Moreover, the reader of a book or an article may have difficulty in assimilating all the facts set forth as the basis for an opinion; as a result, the reader is apt to be more influenced by the opinion than the facts set forth to justify it.[605]

The facts of *Milkovich* itself illustrate this point. Probably at least some readers of Diadiun's column would not have taken the trouble to read it carefully enough to judge for themselves the soundness of his conclusion that "[a]nyone who attended the [wrestling] meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."[606] Moreover, many of those who read the column carefully probably were influenced in formulating their own opinions by the authoritative status of a sports writer for a newspaper.[607] Thus, defamatory deductive opinions may be just as damaging to reputation as other defamatory facts.

This point, though, applies equally to evaluative and deductive opinions. On what basis, then, can immunity be justified for evaluative but not deductive opinions? Dean Keeton distinguishes between the two on the following bases:

> In the first place, generally speaking, a person's reputation suffers greater harm from an *opinion statement* that infers

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[605] Keeton, *supra* note 36, at 1244.

[606] Milkovich v. Lorain Journal Co., 497 U.S. 1, 5 (1990).

[607] In holding that Diadiun's charge was opinion, the Ohio Supreme Court observed that readers generally expect "cajoling, invective, and hyperbole" on the sports page and that readers probably would construe Diadiun's charge as opinion because they do not expect sports writers to be experts on legal issues such as due process and perjury. Scott v. News-Herald, 496 N.E.2d 699, 708 (Ohio 1986). It seems likely, nevertheless, that Diadiun's status as a reporter would influence many readers to believe that his point of view was valid. In support of his authoritative status, Diadiun asserted, "I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board." *Milkovich*, 497 U.S. at 6 n.2.

> specific misconduct from other proven conduct than from an opinion statement that simply purports to evaluate the rightness or wrongness of proven conduct. In the second place, it is often very difficult to decide whether those or some of those who receive a published statement will regard a charge of misconduct as an inference drawn solely from information set forth or known to both parties or drawn in part from other information not disclosed or not assumed to be known by those receiving the communication. Without this difficulty, I would be disposed to make deductive opinions nonactionable under any circumstances. Because of this practical difficulty in administration, however, all imputations of factual misconduct could well be regarded as actionable if but only if fault with respect to the truth or falsity of the matter asserted constitutes a prerequisite to recovery.[608]

Keeton's first point—that deductive opinions are more damaging to reputation than evaluative opinions—may be correct, although I know of no empirical evidence to support it. His second point—that it is difficult to decide whether an opinion would imply to the recipients facts other than those stated or otherwise available—applies equally to deductive and evaluative opinions; therefore it does not justify treating them differently.

What does warrant differential treatment, however, is the different roles that fact and opinion play in public discourse. A speaker should be immune from liability for the expression of a pure evaluative opinion on a matter of public concern because its First Amendment value is of the highest order. The requirement that a factual predicate be presented along with the opinion, or be generally available to the recipients as members of the public, provides some protection for reputation because it enables the recipients to judge for themselves the soundness of the opinion. This requirement also promotes intelligent debate on the merits of the comment. Moreover, the speaker may "libel himself rather than the subject of his remarks."[609] There is no doubt that evaluative opinions, even when supported by a factual predicate, may do great harm to a person's standing in the community. In this situation, however, the speech warrants absolute protection because its value outweighs the interest in reputation. Under Judge Friendly's analysis in *Cianci,* pure evaluative opinions are views that should be tested only in the "marketplace of ideas."[610] Under Post's analysis, if courts assume to evaluate the soundness of evaluative opinions, they impose the values of one

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[608] Keeton, *supra* note 36, at 1251.

[609] *See supra* note 123 and accompanying text.

[610] *See* discussion *supra* part III.B.2.

community upon another.[611] For these views, "public debate is the best solvent."[612] Discouraging the suppression of such views by subjecting the speaker to liability for defamation would be unacceptable in a society that values the basic tenets of the First Amendment.

In his opinion for the Court in *New York Times Co. v. Sullivan*,[613] Justice Brennan observed that there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . . "[614] The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[615] Free speech is necessary to ensure both an unfettered search for the truth and stable government. Justice Brennan noted:

> The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, . . . gave the principle its classic formulation:
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> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should

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[611] *See supra* notes 553-54 and accompanying text.

[612] *Cianci*, 639 F.2d at 62. This is Judge Friendly's phrase for the kind of speech that the Court was referring to in its *Gertz* dictum, set forth in the text *supra* note 1.

[613] 376 U.S. 254 (1964).

[614] *Id.* at 270.

[615] *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

be guaranteed.[616]

The expression of ideas should receive absolute protection, then, when the ideas cannot be proved true or false on the basis of "objective evidence," but are debatable, having no generally acceptable, objective measure by which they can be tested. In the terms of "marketplace" First Amendment analysis, the inhibition of such ideas would hamper the kind of search for truth essential to a vigorous intellectual community that cares about ultimate values. It would impede political and social change and menace stable government. There should be complete autonomy for speakers to espouse ideas and for listeners to choose among them, but speakers should not be free to mislead listeners with false statements of facts that infringe upon dignity interests with no compensating gain.

False statements of fact interfere with the truth-seeking functions of the marketplace of ideas. The courts' neutrality with regard to community mores would be compromised if the courts permitted false and defamatory statements of fact, made with fault, to go unredressed. There would be unfair competition in the marketplace of ideas. Even when the factual predicate is stated along with the opinion, a deductive comment may cause significant damage to reputation.

For example, consider a hypothetical assertion in an editorial about John Doe, a candidate for city attorney: "In my opinion, John Doe is an incompetent lawyer because he was accepted into law school under an affirmative action program and would not have been admitted under the school's standards for whites." Even if the premises of this statement are true, a false assertion that Doe is an incompetent lawyer can be very damaging, causing readers to make judgments based on false premises. In part this pure deductive opinion may be persuasive because readers are ill informed; some may assume that the writer is correct that only those who entered law school under the standards applied to "whites" can be competent lawyers. The assertion should be subject to challenge in a defamation action because it does not advance free speech values, and because it is not the type of public discourse that contributes to intelligent decision making or promotes a multicultural society that is both dynamic and durable. If such an assertion were made with actual malice, it should not enjoy protection.

C. *Should "Point of View" Opinion be Nonactionable?*

If deductive opinion should be actionable, *a fortiori* mere "point of view" opinion also should be actionable. As previously noted, the "point of view" analysis of opinion does not require the statement or accessibility of

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[616] *Id.* at 270 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (D.S.D.N.Y. 1943); Whitney v. California, 274 U.S. 357, 375-76 (1927)).

supporting facts, but rather immunizes any expression of the speaker's belief that the stated facts are true.[617] The harmful effect of false statements of fact on First Amendment objectives is not materially reduced by expressing the statement as the speaker's viewpoint; moreover, adequate leeway for false statements of fact in robust debate is provided by placing the burden on the plaintiff to show falsity and fault.

The case for treating the expression of one's point of view as nonactionable appears to derive from the proposition that the expression merely reveals the speaker's state of mind and does not represent as true or false the inference asserted. Some courts hold that such an expression implies the existence of supporting facts if they are not stated or available; others go further and hold the expression nonactionable, with or without supporting facts.[618] Under either approach, the rationale appears to be that the only issue of truth or falsity that the expression raises is whether the speaker actually holds the belief expressed. Thus, Justice Brennan stated in his *Milkovich* dissent that, at least when the factual basis for an inference is stated along with the opinion, the issue of truth or falsity turns on whether the speaker in fact has drawn the inference, and not on whether the inference itself is true or false.[619]

Martin F. Hansen, in a recent article, explores the views of language philosophers in an attempt to develop a test for nonactionable expressions.[620] Hansen explicitly rejects the immunization of expressions on the ground that they assert points of view,[621] yet he implicitly incorporates a point-of-view approach in his critical analysis of *Milkovich*.[622] An examination of the insights of some of the language philosophers indicates the flaw in Justice Brennan's analysis in *Milkovich*, and in the point-of-view approach in general.

Hansen criticizes *Milkovich* as reflecting the viewpoint of logical positivism, by which "*verifiability* divides all nonanalytic statements into two distinct and mutually exclusive categories."[623] Synthetic statements are those expressions that are verifiable on the basis of empirical observation;[624] evaluative statements are simply expressions of emotion that are neither true nor false.[625] Hansen asserts that, like logical positivism, *Milkovich* fails to consider context in determining whether a statement is

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[617] *See* discussion *supra* part IV.A.3 (discussing "point of view" analysis).

[618] *See* discussion *supra* parts IV.A.2-3.

[619] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 26-27 (1990) (Brennan, J., dissenting).

[620] *See* Hansen, *supra* note 541.

[621] *See id.* at 87 n.228.

[622] *See infra* text accompanying notes 640-48.

[623] Hansen, *supra* note 541, at 62 (footnote omitted).

[624] *Id.* at 60.

[625] *Id.* at 62.

one of fact or opinion.[626] Under both approaches, "the relationship of statements describing empirical (objective) facts to the states of affairs they purport to describe is assumed to be more or less constant."[627]

Both approaches, Hansen says, ignore the effect of context on the way in which an audience understands speech.[628] He argues that "the use to which the audience understands the speaker to be putting the statement . . . [is] [a]n important factor in deciding what truth criteria an audience is likely to associate with a statement."[629] Hansen notes that the performative theorists, who rejected logical positivism, have focused upon the functional aspects of speech.[630] J.L. Austin, a leading performative theorist, initially distinguished performative utterances from constatives, or statements.[631] Under Austin's analysis, performative utterances are those "whose truth adhere[s] in the simple act of their utterance."[632] Examples are the statements "'I do' in a wedding ceremony, and 'I accept' in contractual dealings."[633] They also include other speech acts such as bets, warnings, and advice.[634] Performatives have "felicity conditions," but not the trait of being true or false.[635] Hansen seems to imply that statements of opinion, if clearly understood as such, are performatives.[636]

Hansen recognizes that performative theorists eventually rejected the

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[626] *Id.* at 68-69.

[627] *Id.* at 65.

[628] *Id.* at 68-69.

[629] *Id.* at 70.

[630] *Id.*

[631] J.L. AUSTIN, PHILOSOPHICAL PAPERS 235 (3d. ed. 1979).

[632] Hansen, *supra* note 541, at 70.

[633] *Id.*

[634] *See* AUSTIN, *supra* note 631, at 235, 251.

[635] Hansen, *supra* note 541, at 71. "Felicity conditions" exist when statements have meaning within the context of their utterance. *See id.*

[636] Hansen recognizes that conventions of speech may cause an audience to construe a statement in the form of an opinion as an assertion of fact:

> [A]s the *Milkovich* majority correctly noted, the statements "In my opinion, Jones is a liar" and "Jones is a liar" may have virtually identical defamatory impact. Even if the audience recognizes the intent behind the former as an expression of opinion, it nevertheless might assume that one of the conditions under which it is appropriate for a person to express an opinion is if the person has good grounds for holding it. Presumably the basis for the opinion, in certain contexts, would be nearly identical to the grounds underlying the statement "Jones is a liar." Instead, one might view the explicit performative "in my opinion" more properly as the speaker's attempt to convey the type of communicative act she seeks to perform, rather than as that which *makes it the case* that the speaker is asserting an opinion.

Id. at 79-80 (footnotes omitted). The negative implication of this discussion seems to be that an expression of opinion is a performative utterance if the audience clearly understands it as opinion.

notion that constatives and performatives are distinct speech categories.[637] Austin, for example, came to the conclusion that constatives are a form of performatives, and that at least some performatives have verifiability conditions.[638] Thus, Hansen does not expressly take the position that performative utterances are unverifiable as true or false—that their truth exists in their very utterance. His position is that "a statement should be actionable only if there exists a substantial degree of consensus within the relevant community or audience over the kinds of facts that would support finding the challenged statement to be true or false."[639]

The difficulty lies with Hansen's analysis of *Milkovich*. Although he purports to be applying his test, he gives a significant amount of weight to what he sees as the conjectural nature of Diadiun's accusation that Milkovich committed perjury. Hansen argues that Diadiun's references to statements made by an athletic association commissioner that Milkovich's statements at the court hearing "sounded pretty darned unfamiliar" and "different from what they told us," are nonactionable.[640] Under Hansen's test, these statements fall "significantly short of accusing Milkovich of lying."[641] Hansen also finds nonactionable Diadiun's comment "that Milkovich and Scott, by the time of the court hearing, '*apparently* had their version of the incident *polished and reconstructed*, [so that] the judge *apparently* believed them.'"[642] Hansen says "there is likely to be relatively little consensus among readers over the verifiability criteria of the statement that Milkovich 'polished and reconstructed' his account of his actions at the meet."[643] Although Hansen believes that the perjury charge is stronger than the others, "a reader would almost certainly realize that it, too, was based upon Diadiun's conjecture about what Milkovich said at the state court hearing based on the commissioner's statements and the result of that hearing."[644] The broader context also "would have tipped off the average reader that the author's statements were not to be understood as neutral reportage or bald statements of brute fact."[645] Hansen criticizes the Court for overlooking the context that would lead a reader to these conclusions.[646]

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[637] *Id.*

[638] *Id.*

[639] *Id.* at 73; *see supra* notes 575-77 and accompanying text (discussing the difficulties inherent in this test).

[640] *Id.*

[641] *Id.* at 96.

[642] *Id.* at 96-97.

[643] *Id.* at 97.

[644] *Id.*

[645] *Id.*

[646] Hansen asserts that "the Court ignored contextual cues, such as the article's conjectural language and format, that supported the state court's conclusion that Diadiun's comments qualified as opinion." *Id.* at 56 (footnote omitted).

Hansen's conclusions about the perjury charge are problematic in two respects. First, he finds the perjury charge unverifiable because it was based on the statements of the commissioner and Diadiun's conjectural assertion that Milkovich had "polished and reconstructed" his version of the facts.[647] Hansen says there would be no reader consensus on the verifiability criteria of those statements; because the reader would know the basis for the perjury assertion, it too is unverifiable. The problem with this reasoning is that the specific charge of perjury apparently becomes unverifiable by reason of the vagueness of the other two references. The reverse of this reasoning is more plausible. Even if one accepts Hansen's test, it seems that the sounder analysis is that the very specific charge of perjury removes any ambiguity from the looser assertions. By saying Milkovich committed perjury, Diadiun demonstrated that he understood the commissioner's statements as implying perjury, and that his assertion that Milkovich had "polished and reconstructed" his version of events was an assertion that Milkovich committed perjury.

The second and more fundamental problem with Hansen's analysis lies in his emphasis on the point that readers would understand Diadiun's charge as conjecture. To the extent that he means that conjecture should be nonactionable, the flaw in his analysis is the same as the flaw in Justice Brennan's analysis that, at least when the factual basis for an inference is stated along with the opinion, the issue of truth or falsity turns on whether the speaker in fact has drawn the inference, and not on whether the inference itself is true or false.[648] The flaw is also the same as that in early performative theory—that there is a distinction between constatives and performatives.

Austin rejected the performative-constative distinction in his later writings and concluded that there is no verbal criterion for distinguishing between these categories; that at least some performatives can be invalid on bases other than infelicity; that constatives are subject to infelicity as well as falsity; and that, like performatives, constatives in fact are speech-acts.[649] He concluded, therefore, that the constative-performative antithesis had failed and that a more general theory of speech-acts was required.[650] He adopted the term "illocutionary acts" to embrace what he previously had

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In his analysis of *Milkovich*, Hansen also applies his test that "a statement should be actionable only if there exists a substantial degree of consensus within the relevant community or audience over the kinds of facts that would support finding the challenged statement to be true or false." *Id.* at 73. Indeed, his analysis is somewhat unclear because he does not explicitly use a point-of-view approach.

[647] *Id.* at 97.

[648] *See Milkovich*, 497 U.S. at 26-27 (Brennan, J., dissenting).

[649] J.L. Austin, *Performative-Constative, in* THE PHILOSOPHY OF LANGUAGE 13, 20-21 (J.R. Searle ed., 1971).

[650] *Id.* at 20.

considered separate categories of performatives and constatives, contrasting illocutionary acts with "perlocutionary acts, which produce certain effects on hearers, such as persuasion, fright, or boredom."[651]

In deciding that at least some performatives are subject to a truth-falsity or validity test, Austin presaged a rethinking of what various speech-acts require to be successful—that is, to achieve their point or goal. As an example, he determined that statements of advice can be questioned as true or false.[652] More recent writers hold that "advise" is an illocutionary verb that, depending on its use, may be an "assertive," subject to a truth-falsity test.[653] The philosophers John R. Searle and Daniel Vanderveken have developed and refined Austin's ideas, constructing a formal theory of illocutionary acts.[654] The Searle-Vanderveken theory contradicts the idea that the expression of a conjecture or hypothesis is merely performative in the sense that it is true or false only on the basis of the genuineness of the expression. Such expressions are "assertives."[655] The point or purpose of an assertive is to represent "how the world is"; the assertive has a world-to-word "direction of fit."[656] Searle and Vanderken explain that "[i]n general, the direction of fit of an illocution is the same as that of its expressed psychological state."[657] They further state:

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[651] J.R. Searle, *Introduction*, *in* THE PHILOSOPHY OF LANGUAGE, *supra* note 649, at 1, 7-8.

[652] Austin provides the following example:

> Let us suppose that I say to you 'I advise you to do it'; and let us allow that all the circumstances are appropriate [for making the utterance performative] . . . There does still arise, all the same, a little question: was the advice good or bad? Agreed, I spoke in all sincerity. I believed that to do it would be in your interest; but was I right? Was my belief, in these circumstances, justified? Or again—though perhaps this matters less—was it in fact, or as things turned out, in your interest? There is confrontation of my utterance with the situation in, and the situation with respect to which, it was issued. I was fully justified perhaps, but was I right?

J.L. Austin, *supra* note 649, at 20.

[653] *See* JOHN R. SEARLE & DANIEL VANDERVEKEN, FOUNDATIONS OF ILLOCUTIONARY LOGIC 181 (1985). See the ensuing discussion in the text for an explanation of "assertives."

[654] *See id.*

[655] Searle & Vanderveken divide illocutionary forces into five language use categories:

> One can say how things are (assertives), one can try to get other people to do things (directives), one can commit oneself to doing things (commissives), one can bring about changes in the world through one's utterances (declarations), and one can express one's feelings and attitudes (expressives).

Id. at 52.

[656] *Id.* at 53-54, 94.

[657] *Id.* at 94.

> The way in which a propositional content is related to a world of utterance we call its direction of fit. Intuitively the idea of direction of fit is the idea of responsibility for fitting. For example, in the case of a description [an "assertive"], the propositional content of the speaker's utterance is supposed to match some independently existing state of affairs and to the extent that it does so we say that the description is true or false, accurate or inaccurate. But in the case of an order [a "directive"] the propositional content is not supposed to match an independently existing reality but rather the hearer is supposed to change his behavior to match the propositional content of the order. To the extent that he does that we do not say that the order was true or accurate but rather that it was obeyed or disobeyed.[658]

Thus, to achieve a successful fit, "the propositional content of [an assertive] fits an independently existing state of affairs in the world."[659]

Included in the category of assertives are illocutions that state, argue, opine, criticize, conjecture, and hypothesize.[660] These assertives vary in their strength of point or force,[661] but all are assertions of a belief in the

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[658] *Id.* at 52.

[659] *Id.* at 53 (footnote omitted). Illocutions other than assertives also have directions of fit:

> Both the commissive and the directive illoctionary points have the world-to-word direction of fit. Part of the point of a commissive or directive illocution is to get the world to match the propositional content, and in a speech situation responsibility for bringing about success of fit can be placed on either the speaker or the hearer. In the case of a commissive illocution, responsibility for achieving success of fit rests with the speaker; in the case of a directive illocution it rests with the hearer. Speaker and hearer play such crucial roles in discourse that we distinguish between a speaker based world-to-word direction of fit (commissives) and a hearer based world-to-word direction of fit (directives). The double direction of fit is found in the declarative illocutionary point. In a declarative illocution the speaker makes the world match the propositional content simply by saying that the propositional content matches the world. Finally, utterances with the expressive illocutionary point have the null direction of fit. The point of an expressive illocution is not to say that the propositional content matches the world, nor to get the world to match the propositional content, but it is simply to express the speaker's attitude about the state of affairs represented by the propositional content.

Id. at 53-54.

[660] *Id.* at 99, 182-83.

[661] *Id.* at 14, 54.

proposition stated and thus have a "world-to-word direction of fit."[662] Thus, statements and conjectures belong to the same categories of speech acts, and differ only in their degree of strength or force.[663] For purposes of defamation law, the strength of the assertion would go to the issue of damages—the degree of harm, if any, done to the plaintiff's reputation. Conversely, whether the point of a conjecture is an assertion of the proposition stated, or merely an expression of the speaker's state of mind, goes to the question of its actionability.

The idea that a conjecture or hypothesis is an assertive is consistent with the linguistic principle that, although a statement of opinion focuses attention upon the speaker, an evaluative assertion focuses attention upon the object of the statement.[664] Thus, "when we disagree with other people's value judgments, we do not dispute them on the grounds that they are lying or mistaken about what they really approve of."[665] Professor Post explains:

> [S]tatements that merely express or describe the "private feelings" of a speaker must be distinguished from statements which make judgments about aspects of the world independent of a speaker. The first kind of statements, which I shall call "preference expressions," are a kind of report on the inner condition of a speaker, and the only possible claim to truth they might contain lies in the factual accuracy of that report. The sentence "I don't like Jerry Falwell" is an example of a preference expression. Although the sentence does claim to be true, this claim is at most limited to the validity of its factual characterization of the subject of the pronoun "I." The second kind of statements, which I shall call "judgments," do not simply make known the private feelings or attitudes of a speaker, but rather make claims about aspects of the world that are independent of the speaker and that do not appear to be merely factual in nature. The sentence "Jerry Falwell is a hypocrite" is an example of a judgment. The claim of the sentence to be true does not turn on the attributes of its speaker, and we intuitively understand the claim to involve evaluation rather than merely factual descrip-

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[662] *Id.* at 53-54.

[663] *Id.* at 20 ("The illocutionary force of a conjecture differs from assertion in that the speaker who conjectures commits himself to the truth of the propositional content with a weaker degree of strength than the degree of commitment to truth of an assertion.").

[664] *See, e.g.*, MONTEFIORE, *supra* note 515, at 67.

[665] *Id.* at 49.

tion.[666]

This distinction between preference expressions and judgments also applies to the distinction between preference expressions and expressions of belief in a state of facts. Thus, the statement "I think Jones lied" focuses attention upon Jones and whether he lied, rather than on the speaker and whether he really had drawn the inference that Jones lied.[667] Post makes this point to show that the reasons for rejecting preference expressions as actionable cannot be used to distinguish between fact and opinion.[668] His point, however, also indicates that expressing an opinion calls attention to the opinion, and not simply to the state of mind of the speaker.

Treating the expression of conjecture or point of view as an assertive makes sense in defamation law. In the context of defamation law, courts must make the fact/opinion distinction in light of the interest that the law of defamation seeks to protect and the interests of the First Amendment that are implicated. As argued in the preceding section of this Article, even a pure deductive opinion creates a significant potential for damage to reputation.[669] Hansen's analysis takes into account only one effect that the column would have on the mind of the reader—that the column expressed Diadiun's point of view—ignoring the serious potential for damage to reputation that such a charge creates. The Searle-Vanderveken notion that a hypotheses is an assertive, the point or focus of which is to express a belief in the proposition expressed, is more appropriate. Both the broad and narrow contexts of Diadiun's charge—including the captions "T.D. Says"[670] and "Diadiun says Maple told a lie,"[671] and the emotive language that anyone who attended the meet knows "in his heart" that Milkovich lied[672]—clearly signaled the reader that Diadiun believed very strongly that Milkovich committed perjury. Diadiun's column, in fact, was more than conjecture, it was argumentation.[673] The reader would understand clearly

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[666] Post, *supra* note 11, at 652-53 (footnotes omitted).

[667] *Cf.* Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 n.2 (9th Cir. 1990) ("[T]here remains much truth in the old adage: 'You should not say it is not good. You should say you do not like it, and then, you know, you're perfectly safe.'").

[668] Post, *supra* note 11, at 653-54.

[669] *See* discussion *supra* part V.B.

[670] Hansen, *supra* note 541, at 97.

[671] *Id.*

[672] *Id.*

[673] Searle and Vanderken rank argument as considerably stronger in force than conjecture. With "P" standing for the proposition asserted, they observe: "Arguing is always either for or against a certain thesis. When one argues that P one asserts that P and gives reasons which support the proposition that P, normally with the perlocutionary intention of convincing the hearer that P." SEARLE & VANDERKEN, *supra* note 653, at 184.

that the whole point of Diadiun's article was to convince the audience that he was right. Even though Diadiun's charge informed the reader of his own state of mind, more importantly it sought to persuade the reader that he was correct. Everyday experience indicates that this kind of journalism is very effective in shaping the public's view of the person charged. The effect of the article would be to cause debate about the character of Milkovich, whether or not it caused debate about Diadiun. People with a positive view of Diadiun's reporting, and little if any acquaintance with Milkovich, no doubt would be inclined to believe Diadiun. If readers believed the charge of perjury, and it was false, their ability to make informed judgments about the behavior and qualifications of a public official would be hampered, not enhanced. If the threat of liability for this type of language makes columnists more cautious about making such charges, it is difficult to see how First Amendment interests would be harmed.

As noted above, Hansen criticizes the Court for overlooking the context that would lead a reader to understand that Diadiun's charge was conjectural.[674] It seems unlikely, however, that the Court overlooked the effect of context on the reader's impressions; rather, the Court considered it irrelevant that the reader would understand the conjectural nature of the charge.[675] Hansen's focus on context does not go far enough. It is insufficient to ask whether the context would cause readers to understand that the charge was conjectural; the crucial question is whether the context would tend to cause them to believe that the conjectural charge was true. Like other courts applying traditional defamation rules, the Supreme Court rightly viewed the conjectural nature of the charge as irrelevant in *Milkovich*.

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[674] *See* Hansen, *supra* note 541, at 56.

[675] The Court has payed close attention to context in determining whether language can be understood in a literal sense or as rhetorical hyperbole. *See, e.g.*, Letter Carriers v. Austin, 418 U.S. 264 (1974); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970). Nevertheless, Hansen opines that

> the Court seemed to suggest [in *Milkovich*] that the context surrounding a challenged statement is relevant only to determine whether it qualifies as "rhetorical hyperbole," loose or figurative language, and the like, which the court characterized as a distinct "type" of speech it had previously held entitled to full First Amendment protection.

Hansen, *supra* note 541, at 53-54. It would seem unusual for the Court to find that the meaning of language must be determined from its context when considering rhetorical hyperbole, but to blind itself to context for purposes of the fact/opinion distinction. My interpretation of *Milkovich* avoids such an improbable dichotomy by concluding that, for policy reasons, the Court viewed conjectural charges of criminal conduct as actionable.

D. *The Problems Posed by Ambiguity*

Ambiguous language poses special problems in First Amendment jurisprudence. First is the practical problem of how a plaintiff can prove falsity when the defamatory charge is broad and has multiple meanings. Some courts hold that ambiguous language cannot be proved false because to succeed, the plaintiff would have to prove false all possible meanings of the charge.[676] This position is unsound. In some cases, the plaintiff should be able to reach the jury on the issue of falsity, despite the ambiguity of the charge. The second and more significant issue involves the special risks that ambiguous language poses to First Amendment concerns, regardless of whether it is immunized. A fault requirement on the meaning the language conveys should minimize these risks.

1. *Proving the Falsity of Ambiguous Language*

In *Phantom Touring, Inc. v. Affiliated Publications,*[677] the First Circuit Court of Appeals held:

> Many of the statements cited in the complaint and appellate brief either constitute obviously protected hyperbole or are not susceptible of being proved true or false. Such, for example, is the language in "The phantom of the 'Phantom'" quoting a critic who described the Hill production as "a rip-off, a fraud, a scandal, a snake-oil job." Not only is this commentary figurative and hyperbolic, but we also can imagine no objective evidence to disprove it. Whether appellant's "Phantom" is "fake" or "phony" is similarly unprovable, since those adjectives admit of numerous interpretations.[678]

In contrast, however, in *Yetman v. English,*[679] the Arizona Supreme Court held that a charge that plaintiff was a communist was susceptible of proof of falsity. The court determined that "a reasonable fact finder could determine from evidence presented whether Yetman did, in fact, espouse and practice communist philosophy or tactics such as denying citizens the opportunity to

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[676] *See* discussion *supra* part IV.A.5.

[677] 953 F.2d 724 (1st Cir.), *cert. denied*, 112 S. Ct. 2942 (1992); *see also* notes 211-18, 367-69 and accompanying text.

[678] *Phantom*, 953 F.2d at 728.

[679] 811 P.2d 323 (Ariz. 1991) (en banc).

petition government officials."[680] At first blush, the multiple meanings of the terms "a fraud, a scandal, a snake-oil job" and "communist philosophy or tactics" would seem to defy proof of falsity. Indeed, the American Law Institute recognizes that "placing the burden on the party asserting the negative necessarily creates difficulties, and the problem is accentuated when the defamatory charge is not specific in its terms but quite general in nature."[681]

Properly understood, the pleading and proof rules of defamation law may enable the plaintiff in a *Yetman* type of case to reach the jury, despite the plaintiff's burden of proving falsity. Under common law rules, with truth as a defense, the plaintiff controls the truth/falsity issue:

> The factual allegations a truth defense requires are dictated by the way the plaintiff frames the allegation of defamation; the defense must be "as broad, and as narrow, as the defamatory imputation itself." The defendant must justify, or prove as true, the "gist" or "sting" of the libel—that is, the particular aspect of the defendant's statement that the plaintiff claims was damaging to him.[682]

Although the plaintiff has the burden of proving falsity, the plaintiff still controls the truth/falsity issue. The plaintiff must prove false the particular aspect of the defendant's statement that the plaintiff claims was damaging to him, provided that the plaintiff's claim regarding the meaning of the language is supportable.[683] When a defamatory charge is ambiguous, the plaintiff must explain the meaning of the defendant's charge.[684] Under common law defamation pleading rules, the plaintiff sets forth the alleged defamatory meaning in an allegation called the "innuendo."[685] The meaning of the charge "is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express."[686] The court determines whether the charge is capable of bearing the meaning asserted by the plaintiff, and the jury determines whether a charge capable of bearing that meaning was so understood by its recipient.[687]

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[680] *Id.* at 333 (footnote omitted).

[681] RESTATEMENT (SECOND) OF TORTS § 613 cmt. j (1977).

[682] Kathryn Dix Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469, 504 (1979) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 798 (4th ed. 1971)).

[683] RESTATEMENT (SECOND) OF TORTS § 613 cmt. c (1977).

[684] *Id.*

[685] *Id.* § 563 cmt. f.

[686] *Id.* § 563.

[687] *Id.* § 614.

In a proper case, these rules permit the plaintiff to narrow an ambiguous charge to manageable proportions on the falsity issue.[688] Thus, in *Yetman*, the plaintiff may have alleged and produced evidence that, to those attending the luncheon, the charge of communism meant that the plaintiff had refused to allow property owners a voice in attempting to influence the proposed zoning change. That or a similar allegation and proof may explain why the court held that "[a] reasonable fact-finder could determine from evidence presented whether Yetman did, in fact, espouse and practice communist philosophy or tactics such as denying citizens the opportunity to petition government officials."[689] In *Phantom*, if the only reasonable construction of the defendant's language was that it was hyperbole, the result was correct. Yet if the language was reasonably understood to charge that the plaintiff was deliberately deceiving the public to believe that the production was that of Andrew Lloyd Weber, then the charge would be susceptible of proof of falsity. If the plaintiff alleged that the word "fraud" meant such deliberate deception, then proof of falsity could be adduced.

Thus, it is untenable to deny plaintiffs the ability to reach the jury merely on the ground that the charge was ambiguous. If the plaintiff alleges a factual meaning and the defamatory charge is capable of bearing the construction alleged, the plaintiff should be entitled to reach the jury on the issue of falsity.

2. *The Risks to First Amendment Interests Posed by Ambiguity and the Need for a Fault Requirement on Meaning*

In *Milkovich*, the Supreme Court distinguished between the question "whether a reasonable factfinder could conclude that the statements in the Diadiun column impl[ied] an assertion that petitioner Milkovich perjured himself in a judicial proceeding"[690] and the question whether "the connotation that petitioner committed perjury [was] sufficiently factual to be susceptible of being proved true or false."[691] Some courts, however, have not kept these questions separate.

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[688] *See, e.g.*, Haworth v. Feigon, 623 A.2d 150, 156-57 (Me. 1993) (rejecting defendants' argument that statement "I hear you hired the drunk" had no factual content and was susceptible to varying interpretations, and holding jury could find that statement had factual connotation and bore defamatory meaning alleged by plaintiff). *Cf.* Norse v. Henry Holt & Co., 991 F.2d 563, 567 (9th Cir. 1993) (holding that in biography of poet William Burroughs, statement that Burroughs "thought of himself as 'dark-horse Norse,' ignored and unpublished," was not capable of defamatory meaning ascribed to it by plaintiff, i.e. that he was unpublished, but rather was description of plaintiff's state of mind).

[689] *Yetman*, 811 P.2d at 333 (footnote omitted).

[690] Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990).

[691] *Id.*

In particular, as discussed previously in this Article, some courts have taken the view that ambiguous language is immune as opinion.[692] Additionally, at least one proposed test for making the fact/opinion distinction would immunize ambiguity.[693] This view conflates the issues of what meaning a statement conveyed and whether a given meaning is objectively verifiable. The problem with this approach is that it may protect the clever defamer, rather than the innocent one.[694] Granting immunity for all who cast aspersions in ambiguous terms would allow easy circumvention of defamation law. Immunity for ambiguous statements would impede rather than advance First Amendment interests because of the polluting effect false statements have on public discourse, and because of the inhibiting effect the risk of defamation has on public speech. Ambiguous language may be subject to a reasonable construction as defamatory fact. If it is, and if the speaker was at fault for the damaging nature of the statement and its falsity, then there is no sound reason to deny a remedy to the person whose reputation has been damaged.

The crafty writer who deliberately couches defamatory facts in the cloak of ambiguity should not be immune from liability. At the same time, the passionate speaker should be allowed freedom in her choice of words.[695]

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[692] *See, e.g.*, Janklow v. Newsweek, Inc., 788 F.2d 1300, 1303-04 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986) (holding that statement in question was opinion, in part because it was "not precise"); Ollman v. Evans, 750 F.2d 970, 980 (D.C. Cir. 1984) ("[S]tatements that are 'loosely definable' or 'variously interpretable' cannot in most contexts support an action for defamation."), *cert. denied*, 471 U.S. 1127 (1985); Cole v. Westinghouse Broadcasting Co., 435 N.E.2d 1021, 1025, 1027 (Mass.), *cert. denied*, 459 U.S. 1037 (1982) (holding that assertions that "Cole's dismissal was due to 'sloppy and irresponsible reporting' and a 'history of bad reporting techniques'" were opinion, in part, because "[t]he meaning of these statements is imprecise and open to speculation"); *see also* discussion *supra* part IV.A.5.

[693] *See* Hansen, *supra* note 541, at 73. Hansen also argues that "extending First Amendment protection only to statements around which at least a substantial consensus exists as to their verifiability criteria ensures that defendants will not effectively be required to shoulder the expense of potentially defamatory speech that is legitimately open to varying interpretations yielding disparate truth functions." *Id.* at 75.

[694] *Cf.* MacLeod v. Tribune Publishing Co., 343 P.2d 36, 44 (Cal. 1959) (rejecting ambiguity as a test for classifying libel as per quod on the ground that such a test "protects, not the innocent defamer whose words are libelous only because of facts unknown to him, but the clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language").

[695] Professor Smolla states:

> Constitutional protection for speech is not limited to its cognitive content alone, but extends also to the emotional components of speech. Speech does not forfeit the protection that it would otherwise enjoy merely because it is laced with passion or vulgarity. The emotion principle is one of the cardinal tenets of modern First Amendment jurisprudence. Without that tenet, much of the First Amendment as we know it would unravel.

The history of the struggle for free speech rights in England includes an argument for the protection of the use of inflammatory language of persuasion as early as the 16th century.[696] Professor Schauer has observed that "the choice of language may be as much a part of the freedom protected by the First Amendment as is the choice of the underlying propositions which that language expresses."[697] Schauer notes that "the ordinary use of words is consensus, a linguistic majority rule, that is followed more for some words than for others."[698] To convey new or unconventional ideas, the speaker may need to use words in an unconventional way.[699] And to persuade others to accept her strong political views, the speaker may wish to exaggerate opposing viewpoints to appeal to the listeners' emotions.[700] Thus, "[t]he distortion of language to emphasize a point—to express or to elicit an emotion—is present in varying degrees in virtually all human dialogue."[701] Schauer argues:

> Imposition of the majority consensus [on the meaning of words] necessarily would restrict the speech of those not sharing the consensus. The degree of this problem varies inversely with the strength of a particular consensus, but in each case there would be some who suffer. In light of this danger, the first amendment may be construed to protect the

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SMOLLA, *supra* note 46, at 46.

[696] *See* Kenneth Campbell, The Origins and Development of a Philosophy for the Protection of Opinion in Defamation Law 62-63 (1990) (unpublished Ph.D. dissertation, University of North Carolina (Chapel Hill)).

[697] Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 268 (1978).

[698] *Id.* at 282.

[699] *Id.* at 283.

[700] *Id.* at 284.

> The very means of inducing another to feel strongly often involves comparing the topic at hand with another idea about which the listeners are known to have strong feelings. Because no comparison can ever be exact, this process by its very nature involves distortions of the ordinary (majoritarian) use of language. For example, a speaker wishing emphatically to denounce conservative philosophies may label them as "fascist" or "Nazi," even though the comparison does not use either of these words "properly." Similarly, a speaker may decry those ideas to the left of his own by labelling them, in increasing degree of revulsion, "socialistic," "socialist," "Socialist," "communistic," "communist," or even "Communist." The use of political or financial pressure may become a "holdup," although the actual conduct may bear no literal resemblance to an armed robbery. Comparison, although perhaps less appealing intellectually than use of pure reason, has become an accepted mode of contemporary political debate.

Id. at 284-85 (footnote omitted).

[701] *Id.* at 285.

> use of language from majority control, for a right is virtually meaningless unless it can be exercised against the majority. This antimajoritarian concept, together with the privilege of criticizing the government, in fact may be "at the very center" of the first amendment.[702]

Ambiguity therefore presents opposing dangers to First Amendment interests in defamation law. On the one hand, protecting the deliberate defamer because she has chosen ambiguous language would allow harm to reputation without adequate First Amendment justification. On the other hand, penalizing the critic because her passionate, creative, or even mistaken use of language was misunderstood would dampen her willingness to express ideas that are central to free speech interests. Neither of these conflicting risks can be eliminated without exacerbating the other, but a fault requirement on the meaning of language would help to protect against both of these dangers.

An additional ambiguity problem arises in cases applying the *Restatement* analysis of "pure" opinion, which *Milkovich* adopted in part.[703] The determination whether a comment is based upon disclosed or undisclosed facts is a difficult question, and courts have reached inconsistent results on this issue.[704] Professor Stern states:

> In epistemic terms, a speaker cannot know (or even confidently predict) whether the court-postulated average recipient will draw "the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts." Yet, even if the recipient has misunderstood the speaker's intent, she is still responsible for that "reasonable," but incorrect, inference—a rule bordering dangerously on strict liability.[705]

A fault standard on the meaning of language should preclude this type of "strict liability."

a. *Public Official and Public Figure Plaintiffs*

In *Good Government Group v. Superior Court*,[706] the California Supreme Court imposed a fault standard on meaning in a case that showed the

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[702] *Id.* at 283 (footnotes omitted).

[703] *See* discussion *supra* part III.B.1.

[704] *See* Phillips, *supra* note 11, at 650-57; *see also* Stern, *supra* note 33, at 617-26.

[705] Stern, *supra* note 33, at 617-18 (footnotes omitted).

[706] 586 P.2d 572 (Cal. 1978), *cert. denied*, 441 U.S. 961 (1979).

importance of having such a fault standard. *Good Government* involved a heated political dispute between city councilmen and a civic organization.[707] In the course of this dispute, the defendant civic organization published a charge that the plaintiff and two other city councilmen, referred to as the "combine," had "extorted by blackmail" $100,000 from a developer.[708] The defendant maintained that the charge of "extortion by blackmail" was merely an epithet derogatory of the city council's action requiring that a developer pay $100,000 to the city in return for permission to proceed with construction of an apartment project.[709] The plaintiff argued that the public reasonably understood the statement as a charge of criminal conduct.[710] The court determined that whether the recipients reasonably could have understood the charge as a factual assertion that the plaintiff had committed blackmail or extortion was a question of fact.[711] The court, however, also held that the plaintiff could not establish knowledge of falsity merely by reason of the defendants' admission that they knew the plaintiff had not committed such acts; the plaintiff was required to show that the defendant deliberately or recklessly conveyed the alleged defamatory import to the reader.[712]

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[707] *Id.* at 573.

[708] *Id.*

[709] *Id.* at 575.

[710] *Id.*

[711] *Id.* at 578.

[712] The court reasoned:

> If we were to accept [the plaintiff's] contention, it would mean that a defendant who makes a statement which is ambiguous in the sense that it can reasonably be viewed as either fact or opinion, but who neither intends the statement to bear a factual meaning nor believes that it will be understood by the reader in that fashion, will be guilty of libel if a jury later determines that the article was understood in its factual, defamatory sense.
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> Such a holding would render a defendant liable for a defamatory statement negligently made and would create precisely the chilling effect on speech which the *New York Times* rule was designed to avoid. The Supreme Court made it clear there that the reason for its ruling requiring a showing of malice in libel actions involving the conduct of public officials is that otherwise "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." Such a rule "dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."
>
> If [the plaintiff] was to prevail in his view, the result would be a hobbling of free speech by the continuing fear of liability for the use of inexact semantics. The First Amendment protects not only the expression of a political opinion but the choice of words used to convey that opinion.
>
> It is clear that honest belief of the defendant is the touchstone of the privilege enunciated in *New York Times*, and that a statement is entitled to constitutional

The *Good Government* fault requirement applied to an ambiguous statement that could be interpreted as a literal charge of blackmail and extortion, or as an epithet derogatory of the plaintiff's actions as a city councilman. The same fault requirement should be applied to a statement that could be understood as either a factual statement or an evaluative, immune opinion. Debate on the merits of the performance of a public official would be unduly dampened if the speaker were subject to liability for mere negligence regarding the meaning that the recipients attached to his words.[713] More-

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protection if the words used are ambiguous but the defendant honestly and without recklessness believes that they constitute an opinion or idea. We hold, therefore, that in order to find the requisite malice from the publication of ambiguous words which could constitute either fact or opinion, the jury must find not only that the words were reasonably understood in their defamatory, factual sense, but also that the defendant either deliberately cast his statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact.

Id. at 577-78 (citation omitted).

[713] *See* Newton v. National Broadcasting Co., Inc., 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 192 (1991). The court required knowledge of a defamatory interpretation, or reckless disregard of that interpretation, in a case involving a public figure plaintiff, although the court did not identify this requirement as separate from that of knowledge of falsity or reckless disregard of the truth:

Even if NBC had unintentionally left the impression that organized crime had financed Newton's purchase of the Aladdin, the [trial] court concluded, it "should have been foreseen" by NBC and the failure to foresee it "shows a reckless disregard for the truth." The court also concluded that since NBC had "voluntarily edited and combined the audio with the visual portions of the broadcast in a way that created the defamatory impressions" and since those impressions were "clear and unescapable," the jury could reject as incredible the testimony of the NBC journalists that they had not intended to leave the false impression. . . . [This ruling conflicts] with the principles of *New York Times*. . . .

The district court erred in its ruling that an interpretation of the broadcast that "should have been foreseen" by the NBC journalists can give rise to liability. The district court's standard of what "should have been foreseen" is an objective negligence test while the actual malice test of *New York Times* is deliberately subjective. The relevant inquiry asks whether a journalist "realized that his statement was false" or whether he "subjectively entertained serious doubt as to the truth of his statement." Negligence, weighed against an objective standard like the one used by the district court, can never give rise to liability in a public figure defamation case. "A 'reckless disregard' for the truth . . . requires more than a departure from reasonably prudent conduct." Accordingly, the district court erred in basing liability on an objective standard.

Id. at 680 (citations omitted); *see also* Franklin & Bussel, *supra* note 56, at 837 ("The Supreme Court's concern with self-censorship cannot justifiably protect a defendant who utters a statement that he knows will hurt another's reputation, yet fail to protect a person who does not realize that his statement can be interpreted to damage another's

over, placing the risk of being misunderstood on the speaker runs the risk of "majoritarian restrictions on language becoming restrictions on conveying the ideas themselves."[714]

The defendant in *Good Government* was a civic organization, not a professional media defendant.[715] Use of the same rigorous test on meaning for professional and nonprofessional writers alike is justifiable: "A subjective test of awareness puts all critics of public officials and public figures on an equal footing with respect to First Amendment rights in a way that an objective standard cannot."[716]

Justice White has argued that a media defendant using such ambiguous language as "blackmail," knowing that a potential meaning is false, should be subject to liability under a lower standard than knowing or reckless insinuation.[717] He asserts that, in this situation, the media defendant assumed the risk of liability:

> Absent protection for the nonreckless publication of "facts" that subsequently prove to be false, the danger is that legitimate news and communication will be suppressed. But it is quite a different thing, not involving the same danger of self-censorship, to immunize professional communicators from liability for their use of ambiguous language and their failure to guard against the possibility that words known to carry two meanings, one of which imputes commission of a crime, might seriously damage the object of their comment in the eyes of the average reader. I see no reason why the members of a skilled calling should not be held to the standard of their craft and assume the risk of being misunderstood—if they are—by the ordinary reader of their publications.[718]

Justice White's argument has appeal. When a journalist chooses words, the literal meaning of which is defamatory, it seems fair that he should bear

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reputation.").

[714] Schauer, *supra* note 697, at 287.

[715] *Good Gov't*, 586 P.2d at 573.

[716] Franklin & Bussel, *supra* note 56, at 837 n.40.

[717] Greenbelt Coop. Publishing Association, Inc. v. Bresler, 398 U.S. 6, 21-24 (1970) (White, J., concurring).

[718] *Id.* at 23 (White, J., concurring). Like *Good Government*, *Bresler* involved a charge of "blackmail." In contrast to the result in *Good Government*, however, the Court in *Bresler* held that no reader could have thought that the defendants' use of the word "blackmail" constituted a charge of criminal conduct. *Id* at 14. Justice White, however, believed that the evidence supported a jury finding that an ordinary reader could have understood the defendants' statement as a criminal charge. *Id.* at 22 (White, J., concurring).

the risk that readers will understand the words in their literal sense. Arguably a jury should be allowed to find that, because the literal meaning of the language was obvious, the author must have known it could be construed literally. Yet writers frequently employ figures of speech and emotionally charged language to attract attention and to dramatize their messages. Moreover, "[r]estricting the use of language may not only constrain the speaker's choice of language; it also may prevent him from effectively communicating original ideas and arguments."[719] If the First Amendment encourages robust debate about public officials and public figures, it cannot discourage robust expression about them. If professional communicators assumed the risk of being misunderstood whenever they used language they knew was ambiguous, the rational journalist with a deep pocket would avoid ambiguity. The constitutional objective, however, is robust debate, not bland journalism.

The Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*[720] supports a requirement that a public figure plaintiff prove knowing or reckless insinuation regarding the factual connotation of ambiguous language.[721] *Bose*, which involved a public figure plaintiff and a media defendant,[722] was a product disparagement action growing out of a Consumer Reports article that evaluated the quality of a Bose loudspeaker system.[723] The trial judge, sitting as the factfinder, found that the article contained a false and disparaging fact about the speaker, namely, that "individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander about the room."[724] The judge also found that the author published this statement with actual malice because he knew that the statement was false.[725] The author testified that his statement meant that the sound moved back and forth along the wall between the two speakers.[726] The judge, however, found that the average reader would construe the words to mean that the sounds did more than simply move back and forth between the speakers, and that, as an intelligent person, the author must have known that the words "wander about the room" were not an

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[719] Schauer, *supra* note 697, at 284.

[720] 466 U.S. 485 (1984).

[721] *Id.* at 513-14.

[722] The trial judge held that the plaintiff corporation was a public figure, and the defendant did not contest this ruling before the court of appeals. *Id.* at 492. On certiorari, the Supreme Court did not consider the question of the plaintiff's status. *Id.* at 492 n.8. As to the defendant's status, the Court observed that "respondent's publication of Consumer Reports plainly would qualify it as a 'media' defendant in this action under any conceivable definition of that term." *Id.* at 492-93 n.8.

[723] *Id.* at 487-88.

[724] *Id.* at 488.

[725] *Id.* at 497.

[726] *Id.* at 495.

accurate description of what he heard.[727]

The Court held that the record did not contain clear and convincing evidence that the article was published with knowledge of falsity or reckless disregard of the truth:[728]

> Aside from Seligson's vain attempt to defend his statement as a precise description of the nature of the sound movement, the only evidence of actual malice on which the District Court relied was the fact that the statement was an inaccurate description of what Seligson had actually perceived. Seligson of course had insisted "I know what I heard." The trial court took him at his word, and reasoned that since he did know what he had heard, and he knew that the meaning of the language employed did not accurately reflect what he heard, he must have realized the statement was inaccurate at the time he wrote it. "Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account of *events that speak for themselves*." . . . Here, however, adoption of the language chosen was "one of a number of possible rational interpretations" of an event "that bristled with ambiguities" and descriptive challenges for the writer. . . . The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Under the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time.
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> The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies. . . . "Realistically, . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in *New York Times*, *Butts*, *Gertz*, and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material." . . . "[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that

[727] *Id.* at 511.

[728] *Id.* at 512.

they 'need . . . to survive.'"[729]

The Court framed the issue as whether there was adequate evidence to support a finding of knowledge of falsity or reckless disregard of the truth.[730] The holding signifies, however, that even when an author knows that a defamatory connotation of his words is false, knowledge of that falsity cannot be found merely on the basis of the factfinder's inference that the author, as an intelligent person, must have known that his words would convey that connotation. It was clear from the author's own testimony that he did not hear the sounds move away from the wall; thus, he knew the defamatory connotation was false. The proof of actual malice failed, then, because his description of the event in question was a rational interpretation of an event that presented "descriptive challenges for the writer."[731]

Bose leaves open several avenues by which a plaintiff may be able to establish actual malice regarding the defamatory connotation of an ambiguous statement. *Bose* did not involve direct evidence that the author knew or expected that his words would be construed in the defamatory sense; thus, it does not necessarily rule out liability in all cases in which the defendant's statement was a rational interpretation of the event. Moreover, in some situations, it may be permissible to infer actual malice on the ground that the speaker "must have known" that he was conveying a defamatory meaning. *Bose* suggests that a factfinder may infer actual malice regarding the defamatory meaning of the words in a very clear case—when the defamatory connotation must have been obvious to the speaker.[732] The Court in *The Santissima Trinidad*[733] stated that the falsity of a witness's statement could be regarded as deliberate "where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place. . . . "[734]

Good Government exemplifies another way in which a plaintiff may be able to show actual malice on meaning. In that case, the court remanded,

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[729] *Id.* at 512-13 (citations omitted).

[730] *Id.* at 513.

[731] *Id.* at 512

> As *Bose* demonstrates . . . constitutional malice does not flow from a finding that an "intelligent speaker" failed to describe the words he used as the finder of fact did. Nor is it permissible to uphold the jury's verdict against NBC on the ground that, because the defendants are trained journalists . . . or because the broadcast may be capable of supporting the impression Newton claims, NBC must therefore have intended to convey the defamatory impression at issue here.

Newton, 930 F.2d at 681.

[732] *See Bose*, 466 U.S. at 512-13.

[733] 20 U.S. (7 Wheat.) 283 (1822), *cited in Bose*, 466 U.S. at 512.

[734] *Id.* at 339.

holding that there was sufficient evidence to permit a finding "that the defendant either deliberately cast his statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact."[735] The evidence showed that the plaintiff had complained to a civic association about the "grossly libelous" nature of the association's charge that he had committed extortion and blackmail.[736] As a result of this complaint, the association published a retraction stating that its use of the terms "extorted" and "blackmail" were not intended to imply that any of the persons mentioned in the article had committed the crimes of blackmail or extortion.[737] After the retraction, members of the association, including the author of the original charge, distributed a flyer of the article as originally printed.[738] The court held that the "jury could conclude from this evidence that at least some of the defendants were aware that the words used in the article could be interpreted as defamatory statements of fact instead of 'allegorical language . . . voicing a vigorous political opinion, in strident tones,' as defendants claim."[739] Therefore, the court made it clear that when an author acknowledges that she is aware of the defamatory interpretation of her work, her refusal to discontinue publication constitutes actual malice.

Could actual malice regarding the factual, defamatory connotation of the publication in *Milkovich* be shown, absent an admission by Diadiun that he knew his column would be construed as a factual charge of perjury?[740] In *Milkovich* the Court observed that the statement was "not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of

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[735] *Good Gov't*, 586 P.2d at 578.

[736] *Id.* at 578.

[737] *Id.*

[738] *Id.* at 578-79.

[739] *Id.* at 579.

[740] The following statement by the Court in *Milkovich* may establish such a fault requirement:

> [W]here a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made *with knowledge of their false implications or with reckless disregard of their truth.* Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that *the false connotations were made with some level of fault as required by Gertz.*

Milkovich v. Lorain Journal Co., 497 U.S. 1, 20-21 (footnote omitted) (emphasis added). Although the opinion is not entirely clear on this point, this statement may mean that the Court intended to require fault as to the factual connotation carried by the language, as well as fault regarding its falsity.

perjury."[741] Thus, the plaintiff might be able to show Diadiun's awareness of the factual connotation from the language itself. It seems to me that there was no ambiguity in the language. The issue before the Court essentially was whether a statement is immune as opinion if, under the "four-factor" *Ollman* test, readers would understand that the charge was made, not as an assertion based on certainty, but as Diadiun's belief based on what he had observed. The Court held that a statement of Diadiun's deductive opinion carried no immunity.[742] On such facts, there is no reason why fault regarding the defamatory connotation of the column could not be found from the very clear language of the column itself, which asserted that the plaintiff lied after taking a solemn oath.[743]

In contrast, however, *Ollman v. Evans*[744] presents a classic dilemma of ambiguity: immunizing ambiguous language may protect the clever defamer, but liability for such language may inhibit the use of dramatic, hyperbolic language of persuasion that lies at the heart of First Amendment interests. The *Ollman* majority held that the defendants' statements about Professor Ollman were not actionable.[745] In my view, the majority incorrectly immunized the defamatory charges, but a fault requirement on the meaning of the language probably would have precluded liability. Under *Bose*, the court could not have allowed an inference of actual malice on meaning on the mere basis that the defendants must have known that readers could construe the language in its literal sense.

In *Ollman,* Professor Bertell Ollman alleged that he was defamed by a syndicated newspaper column written by Rowland Evans and Robert Novak.[746] A departmental search committee had nominated Professor Ollman, a political science professor at New York University, to be chairman of the Department of Government and Politics at the University of Maryland.[747] The Evans and Novak column stated that a public debate over the appointment of Ollman, a Marxist, was misdirected.[748] The column asserted that defenders of academic freedom were justified in criticizing politicians who opposed Ollman's appointment because he was a Marxist.[749] The column further noted that neither side addressed the central question of Ollman's intentions:

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[741] *Id.* at 21.

[742] *Id.* at 18-19, 21.

[743] The column stated that "[a]nyone who attended the meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." *Id.* at 5.

[744] 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

[745] *Id.* at 990.

[746] *Id.* at 971.

[747] *Id.* at 971-972.

[748] *See id.* at 972-73.

[749] *See id.* at 972.

> His candid writings avow his desire to use the classroom as an instrument for preparing what he calls "the revolution." Whether this is a form of indoctrination that could transform the real function of a university and transcend limits of academic freedom is a concern to academicians who are neither McCarthyite nor know-nothing.[750]

Ollman alleged that several passages in the column were false and defamatory. For example:

> While Ollman is described in news accounts as a "respected Marxist scholar," he is widely viewed in his profession as a political activist. Amid the increasingly popular Marxist movement in university life, he is distinct from philosophical Marxists. Rather, he is an outspoken proponent of "political Marxism."
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> He twice sought election to the council of the American Political Science Association as a candidate of the "Caucus for a New Political Science" and finished last out of 16 candidates each time. Whether or not that represents a professional judgment by his colleagues, as some critics contend, the verdict clearly rejected his campaign pledge: "If elected . . . I shall use every means at my disposal to promote the study of Marxism and Marxist approaches to politics throughout the profession."[751]

The following statement is also illustrative:

> Ollman's principal scholarly work, "Alienation: Marx's Conception of Man in Capitalist Society," is a ponderous tome in adoration of the master (Marxism "is like a magnificently rich tapestry"). Published in 1971, it does not abandon hope for the revolution forecast by Karl Marx in 1848. "The present youth rebellion," he writes, by "helping to change the workers of tomorrow" will, along with other factors, make possible "a socialist revolution."
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> Such pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. "Ollman has no status

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[750] *Id.* at 992.

[751] *Id.*

> within the profession, but is a pure and simple activist," he said. Would he say that publicly? "No chance of it. Our academic culture does not permit the raising of such questions."[752]

The Court of Appeals for the D.C. Circuit, sitting en banc, held that these statements were not actionable. The court, however, could not produce a majority opinion in the case.[753] Under its "totality-of-the-circumstances" test, the plurality held that the statements were opinion.[754] Judge Bork concurred, construing the charges as hyperbole, essentially because the plaintiff had entered a "public arena,"[755] and because the charges were not suitable for adjudication by a court.[756] The dissenters, in a sounder analysis, viewed the charge that Ollman had "no status within his profession" as a factual assertion subject to verification.[757]

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[752] *Id.* at 994.

[753] In this six to five decision, a majority agreed that the four-part test was the correct standard, but disagreed on its application to the facts, especially in reference to the "no status" statement. *Id.* Judge Starr's plurality opinion took the view that the third and fourth factors rendered the statement nonactionable. *Id.* at 989-92. Only Judges Tamm, Wilkey, and MacKinnon concurred in this portion of Judge Starr's opinion. *Id.* at 989 n.38. Judge Bork believed that a "blunt distinction" between fact and opinion was "not adequate to the task here." *Id.* at 994 (Bork, J., concurring). Reverting to "first principles," he concluded that the "no status" charge should not be actionable. *Id.* (Bork, J., concurring). He considered that the statement was "the kind of hyperbole that must be accepted in the rough and tumble of political argument," *id.* at 998 (Bork, J., concurring), noting that "[t]he individual who deliberately enters [a First Amendment] arena must expect that the debate will sometimes be rough and personal," *id.* at 1002 (Bork, J., concurring). Judges Wilkey, Ginsburg, and MacKinnon joined in Judge Bork's opinion. *Id.* at 993. In a separate concurrence, Judge MacKinnon observed that Judge Bork's concept of a First Amendment arena should be factored into Judge Starr's four-part test. *Id.* at 1016 (MacKinnon, J., concurring). Dissenting in part, Chief Judge Robinson distinguished between pure and hybrid opinions, the latter being actionable only if accompanied by supporting facts or if the omission or falsity of the supporting facts were nonculpable. *Id.* at 1027-28 (Robinson, C.J., dissenting in part). He found that the "no status" charge was a hybrid opinion, presenting an issue of fact as to whether there was a culpable error or omission of supporting facts. *Id.* at 1029-30 (Robinson, C.J., dissenting in part). Judge Wright joined in this opinion. *Id.* at 1016 (Wright, J., dissenting in part). Judges Wald, Edwards, and Scalia accepted Judge Starr's four-point test of opinion, but believed that the "no status" charge was precise and verifiable. *See id.* at 1032 (Wald, J., dissenting in part); *id.* at 1035 (Edwards, J., dissenting in part); *id.* at 1036 (Scalia, J., dissenting in part).

[754] *Id.* at 970-92.

[755] *Id.* at 1004 (Bork, J., concurring).

[756] *Id.* at 1005-06 (Bork, J., concurring).

[757] *See id.* at 1033 (Wald, J., dissenting in part) ("The statement that Ollman has no status within his profession undoubtedly admits of a sufficiently ascertainable and stable

The critical test in resolving the question of objective verifiability is whether the charge of "no status" is the type of charge the soundness of which should be tested only in the "marketplace of ideas." There is no reason to conclude that it is. Like the issue of perjury, the status of one's reputation is tried as a factual issue in many legal contexts.[758] Clearly, the Evans and Novak column addressed a matter of public interest and warranted the substantial protection afforded by the erroneous fact privilege. Immunizing the defamatory statement about Ollman's reputation, however, would not strike a proper balance between the First Amendment interest in speech and the states' interest in protecting reputation.

Judge Bork would have immunized the statement because Ollman entered "a first amendment arena."[759] He reported at length upon the heated

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core of meaning: a decisive majority of his fellow political scientists do not regard him as a good scholar."); *id.* at 1035-36 (Edwards, J., dissenting in part) ("[I]t is untenable even to suggest that [this charge] . . . is an absolutely privileged 'opinion.' Indeed, as a former member of the academic community, I am somewhat taken aback by the notion that one's reputation within the profession (which is *easily* verifiable) may be so freely and glibly libelled."); *id.* at 1036 (Scalia, J., dissenting in part) ("Evans and Novak's disparagement of Ollman's professional reputation seems to me a classic and cooly crafted libel. . . . ").

[758] *Id.* at 1032, 1034 n.1 (Wald, J., dissenting in part).

> In many areas of the law, the factual nature of statements about reputation is recognized and indeed taken for granted. Lay witnesses are generally allowed to testify as to someone's reputation in the community for veracity or violence, for example, although they cannot given their personal opinion as to those matters. Expert witnesses are often asked in the course of their testimony whether other authors, scholars or practitioners are generally regarded as authorities in the field, and their own qualifications may be established or attacked on the basis of professional reputation.
>
> Similarly, as the plurality concedes, the law of libel has long recognized the basically factual nature of attacks on reputation.

Id. at 1032 (Wald, J., dissenting in part) (citations omitted).

> [I]n assessing or mitigating damages, juries have historically been required to determine what a plaintiff's reputation was before the libel in order to determine how much the plaintiff has been injured by the libel. Indeed, the Supreme Court clearly stated in *Gertz*, that defamation plaintiffs are entitled to damages, including jury awarded damages, for "*actual injury* . . . includ[ing] impairment or reputation and standing in the community." The determination of actual injury ordinarily turns on an assessment of the status quo ante, and courts have routinely upheld jury awards predicated on a libel plaintiff's prelibel reputation. It is therefore incomprehensible to me how both the plurality and the concurrences can so glibly conclude that juries are inherently incapable of making such a determination.

Id. at 1034 n.1 (Wald, J., dissenting in part) (citations omitted).

[759] *Id.* at 1002 (Bork, J., concurring) ("Where politics and ideas about politics contend, there is a first amendment arena . . . .").

controversy generated by Ollman's nomination to a department chairmanship at the University of Maryland and correctly stated that the debate about his candidacy was of legitimate public concern.[760] The decision to immunize a defamatory statement, however, must be based upon more than the plaintiff's entry into "a first amendment arena" because that approach would immunize all defamatory statements about public figures. The question is whether the defendant's statement had such fundamental First Amendment value as to deprive the defamed person of his day in court. Would a full and robust debate about Ollman's qualifications be inhibited unduly by subjecting this type of defamatory charge to a trial of the issues of falsity, fault with regard to falsity, and fault with regard to the conveyance of a factual, defamatory meaning? Or would it be fully adequate to immunize comments about such issues as whether his scholarship had merit, whether a Marxist should hold a departmental chairmanship in a public institution, and whether one who espouses indoctrination in the classroom is acting within the legitimate protection areas of academic freedom? Does Ollman's entry into the "first amendment arena" make him fair game for false charges about his professional reputation?

Such a charge should be treated as an assertion of fact. False assertions about Ollman's reputation would not advance a useful debate about his job qualifications or about whether his published views are a threat to academic freedom; such assertions would only impair the debate. Moreover, issues concerning reputation conventionally are treated as issues of fact in litigation; consequently, there are developed measures of trying the issue. The interest in reputation, like the interest in free speech, is a "basic of our constitutional system" and warrants protection within the limits of the erroneous fact privilege.[761] The law of defamation should protect good faith defamatory charges against public figures, but should not protect mere ambiguity and insinuation, as such.

It is worth noting, as well, that the question of Ollman's reputation would be difficult for defenders of Ollman to confront as an issue for debate in the marketplace of ideas, given that Evans and Novak did not name the source of the "no status" charge. Moreover, inhibitions upon "speech that matters"[762] under the First Amendment may be caused not only by subjecting the speaker to a defamation action, but also by depriving one who enters a "first amendment arena" of any protection for his interest in reputation. Some people no doubt are reluctant to espouse their ideas—especially unpopular ones—knowing that, as a result, their reputations can be destroyed

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[760] *Id.* at 1003-04 (Bork, J., concurring).

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

[762] This term is used in Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters.").

with impunity.[763] First Amendment freedoms are important not only to the maintenance of a vigorous press, but also to the maintenance of a vigorous society. As Justice Stewart stated: "[I]f the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."[764]

Under my analysis, however, the problem remains whether the plaintiff could have reached the jury on the issue of knowledge of falsity or reckless disregard of the truth and on the issue of knowledge or recklessness regarding the factual connotation of the language. The facts of *Ollman*, like those of *Bose*, make these fault issues problematic. In one sense, it might have been easy for Ollman to establish knowledge of falsity or reckless disregard of the truth. Evans and Novak might even have admitted that they knew, from facts about Ollman that appeared in the article itself, that he possessed significant status within his academic community. Just as the author in *Bose* testified that he knew that the sounds from the speakers moved between the speakers and not forward into the room, Evans and Novak might well have testified that it was obvious to them that Ollman enjoyed respect as a scholar and teacher. As in *Bose*, however, where the author said he had described what he heard, Evans and Novak probably would have protested that they did not expect to be understood as suggesting that Ollman, literally, had no status. The very division among the judges in the *Ollman* case on the question whether the language was rhetorical hyperbole indicates that reasonable minds could differ on the connotation of the language at issue. If reasonable minds could differ, then the issue of the meaning of the language to the ordinary reader should have been a jury issue. If reasonable minds could differ on the meaning of the language, however, could the plaintiff have established fault regarding its factual connotation? On the one hand, the authors chose the wording, the literal meaning of which was "no status."

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[763] In discussing the social costs of the actual malice standard, Professor Anderson has stated:

> The actual malice rule obviously deters participation in public life. No rational person can fail to take into account the reputational consequences of this rule when deciding whether to run for public office. Though the full effect of the rule and all its accoutrements is probably understood by very few lawyers, let alone nonlawyers, virtually all potential candidates must have some awareness that it is difficult for a public official or political candidate to recover for defamation. . . . The constitutional rules also create risks for other forms of citizen participation in public matters—from the local PTA to religious controversies to the abortion controversy and other great issues of the day. Although not everyone may realize that the actual malice rule also applies to public figures, here, too, any observant person can see that those who participate in public matters seem to receive little protection from the law of defamation.

Anderson, *supra* note 4, at 531-32 (footnotes omitted).

[764] *Rosenblatt*, 383 U.S. at 94 (Stewart, J., concurring).

Arguably they bore the risk that readers would understand the words in their literal sense, and a jury should have been allowed to find the authors must have known that their words could be construed literally because the literal meaning of the language they chose was obvious. On the other hand, writers frequently employ figures of speech. Authors of columns, as opposed to news reporters, often desire to make their points dramatically or memorably or pointedly. They would be inhibited from making useful commentary if they were held responsible, in all circumstances, for the literal meaning of their words.

Allowing ambiguity to confer immunity may mean that clever writers easily can avoid liability for severe harm to reputation simply by use of the double entendre. Subjecting the colorful writer to liability, however, no doubt would inhibit the very type of robust debate that the First Amendment finds essential to a system of self-government. It would seem, then, that the proper balance in actions by public officials and public figures would be met if "actual malice" regarding the factual connotation of ambiguous language could not be shown on the basis of the language alone. This approach probably is required by *Bose*, and it is a defensible result. On the facts of *Ollman*, the plaintiff could have recovered a judgment against the defendants only if he could have produced sufficient evidence to reach the jury on falsity, knowledge of falsity or reckless disregard of the truth, and knowledge or recklessness regarding the factual connotation of the defamatory charge. On the last issue, he should not have reached the jury on the basis of the language alone, but only on independent evidence of the author's state of mind.

In many cases, it is difficult if not impossible for a plaintiff to show knowledge or recklessness regarding the factual connotation of a statement. *Bose* indicates that ambiguous language, reasonably susceptible of more than one construction, presents a significant difficulty in this respect. The plaintiff confronts high hurdles, indeed, because of the requirements of proof of falsity, proof of fault regarding falsity, and proof of fault regarding the factual connotation of ambiguous language. For this reason, there is considerable appeal in Justice White's advocacy of an action in which the defamed person could obtain an adjudication of falsity without proof of fault, recovering only nominal damages or sufficient damages to cover the costs of the proceeding.[765] In such an action, the plaintiff at least could obtain some vindication of his good name.

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[765] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 771-72 (1985) (White, J., concurring). For other proposals for a declaratory judgment action allowing a determination of falsity, see generally REFORMING LIBEL LAW (John Soloski & Randall P. Bezanson eds., 1992).

b. *Private Figure Plaintiffs*

Because the Court requires that private figure plaintiffs prove only negligence regarding falsity,[766] it might seem logical for the Court to require such plaintiffs to prove only negligence regarding the meaning of a communication, as well. That position, however, is not necessarily defensible.

There are three possibilities for a fault standard on meaning for private figure plaintiffs: an ordinary negligence standard, imposing liability when the defendant *should have known* that her words might bear a defamatory, factual connotation;[767] a heightened negligence standard, imposing liability when the defendant had *reason to know* that her words might bear such a connotation;[768] and an actual malice standard, imposing liability only for knowing or reckless insinuation of such a connotation.[769]

There is dictum in *Gertz v. Robert Welch, Inc.*,[770] suggesting that the Court would establish a standard greater than ordinary negligence:

> We hold 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. . . . At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual mis-

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[766] RESTATEMENT (SECOND) OF TORTS § 613 cmt. f (1977).

[767] *See id.* § 12.

> The words "should know" are used throughout the Restatement of this Subject to denote the fact that a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists.

Id.

[768] *See id.*

> The words "reason to know" are used throughout the Restatement of this Subject to denote the fact that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.

Id.

[769] *See* Good Gov't Group v. Superior Court, 586 P.2d 572, 578 (Cal. 1978), *cert. denied*, 441 U.S. 961 (1979).

[770] 418 U.S. 323 (1974).

> statement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential.[771]

In so qualifying its holding in *Gertz*, the Court recognized that a publisher may be innocent with regard to the damaging nature of a publication. The Court implied that, in such a situation, the plaintiff would be required to establish something more than negligence with regard to falsity. The Court's subsequent citation to *Time, Inc. v. Hill.*[772] suggests that the standard might be knowledge of falsity or reckless disregard of the truth The Court's observation that in *Gertz* the damaging nature of the defamatory statement was apparent, however, may leave open the possibility of a "reason to know" standard, imposing liability if the speaker had information from which a reasonable person would conclude that the communication would be damaging.[773]

Franklin and Bussel have argued that an actual malice standard on meaning should apply to public and private figure plaintiffs alike.[774] Their discussion of the problems that a negligence standard would pose implicitly assumes an ordinary, or "should know," negligence test.[775] For example, they refer to "a duty upon a speaker to use due care to search for hidden

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[771] *Id.* at 347-48 (citing Curtis Publishing Co., v. Butts, 388 U.S. 130, 155 (1967)) (footnotes omitted).

[772] 385 U.S. 374 (1967). *Hill* was an invasion of privacy action in which the private figure plaintiffs alleged that the publisher of *Life* magazine published an article giving the false impression that a play running on Broadway portrayed the actual experiences of the plaintiffs' when they were held hostage in their home by escaped convicts. The Court held that the plaintiffs could not recover damages in such an action without proving that the defendant published the article with knowledge of falsity or reckless disregard of the truth. *Id.* at 387-88. The Court stated:

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in a news article with a person's name, picture or portrait, particularly as related to non-defamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

Id. at 389.

[773] *See supra* note 768 (quoting *Restatement* definition of "reason to know").

[774] Franklin & Bussel, *supra* note 56, at 834-51. Franklin and Bussel call their standard an "awareness requirement," *id.* at 845, under which the plaintiff would have "to establish with convincing clarity that the defendant was aware of, or blinded himself to, the allegedly defamatory meaning of the statement that he was making," *id.* at 837 (footnote omitted).

[775] *Id.* at 842-44.

ambiguities, special characteristics of the proposed audience, or significant extrinsic facts. . . . "[776] They soundly argue that such a test "would seriously dilute the protection afforded to a speaker."[777] They consider, however, only the inhibitions upon speech of a negligence standard and ignore both the interests of the defamed private figure and the damage to First Amendment interests resulting from false statements of fact. As the previous section on public figure plaintiffs pointed out, an actual malice standard on meaning appears extremely difficult to satisfy under *Bose*.[778] Private figure plaintiffs, however, are more vulnerable to reputational damage and more deserving of protection than are public figures because, unlike public figures, they presumably have not assumed the risk of criticism and do not have media access to refute false charges.[779] An actual malice standard that protects the use of ambiguous language, as long as the language is a rational interpretation of the event, would virtually immunize its use. The danger is that this standard will immunize the crafty defamer who deliberately casts her charge in double entendres. Although such a standard is warranted in public figure cases, the more compelling need of private figure plaintiffs for redress warrants a different standard.

A heightened negligence standard on meaning would strike an appropriate balance between the interest in speech and the interest in reputation for private figure plaintiffs. Under this standard, the plaintiff would have to establish that the defendant *had information* that would have led a reasonable person to conclude that his statement could be construed in a defamatory, factual sense.[780] As Franklin and Bussel have noted, multiple meaning problems apply in three types of situations: (1) when the defendant's statement on its face has multiple meanings; (2) when different segments of the potential recipient population construe the defendant's statement in different ways; and (3) when the statement is nondefamatory on its face, but has a defamatory meaning to a recipient who is aware of extrinsic facts affecting the sense of the statement.[781] Under a heightened negligence standard, in the first and second situations, the defendant would be subject to liability only if the plaintiff could prove that the defendant knew his statement was subject to a defamatory interpretation, and should have known that some of the recipients reasonably would construe the statement in the defamatory sense. For example, if a recent immigrant, unfamiliar with idiomatic English, reported in a neighborhood newspaper that "John Doe was stoned while making a speech" (intending to mean literally that stones had been thrown at

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[776] *Id.* at 843.

[777] *Id.*

[778] *See supra* notes 720-34 and accompanying text.

[779] *See Gertz*, 418 U.S. at 344-45.

[780] *See supra* note 768 (quoting *Restatement* definition of "reason to know").

[781] Franklin & Bussel, *supra* note 56, at 832-34.

Doe), the writer would not be subject to liability for the implication that Doe was drunk or high on drugs, unless the writer knew that the word "stoned" could carry that implication. Additionally, there could be no liability, even if the reporter knew of the potential defamatory meaning, unless the reporter reasonably could foresee that, given the context of the language, the word would be construed in its defamatory sense. In the third situation, the defendant would be subject to liability only if the plaintiff could prove that the defendant knew of the extrinsic facts that made the statement defamatory, and should have known that the statement would be construed in a defamatory sense. For example, a newspaper whose social editor did not know that Sally Smith and John Jones were married to Sam Smith and Jane Jones, respectively, would not be subject to liability for publishing a false announcement sent to the newspaper stating that Sally Smith and John Jones were engaged to be married.[782]

There are advantages for speakers and for defamed private figures in a heightened negligence standard. The advantage to speakers is that they do not have a duty to investigate the potential damaging nature of language or the existence of extrinsic facts. Liability based upon a duty to investigate would inhibit speech to an unacceptable degree. The advantage to defamed private figures is that they have a remedy against speakers who were on notice of potential reputational damage and acted unreasonably in using the damaging language in light of that notice.

VI. THE PRECARIOUS BALANCE—A MATTER OF OPINION

On the assumption that the Supreme Court requires fault regarding the meaning of language, the liability rules that the Court has developed[783] leave defamation law with at least two major shortcomings—even if one believes that the rules generally strike the right balance between the interests in free speech and reputation.[784] One shortcoming is that the Supreme Court's rules provide minimum protections for speech, which state courts may exceed.[785] When lower courts extend greater protection for defamatory speech than the Supreme Court has mandated, they do not necessarily

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[782] Franklin and Bussel note that "[a]t common law, the speaker was liable for such a statement, although he may not have known or had reason to have known the extrinsic fact giving rise to the statement's defamatory meaning." *Id.* at 829 (citing PROSSER, *supra* note 682, at 748).

[783] These include: immunity for pure evaluative opinion; plaintiff's burdens of showing falsity, fault as to falsity, and fault as to meaning; and rules on appellate review and damages. For a review of these rules, see Anderson, *supra* note 4, at 493-510.

[784] Of course not everyone believes that the Court's rules strike the proper balance. *See, e.g., id.* (arguing that reputational interests receive too little protection under the Court's scheme of rules).

[785] *See supra* note 96.

give greater protection to First Amendment interests; in fact, they diminish First Amendment values in the aggregate. The second shortcoming in the rules is that the fault requirements and other restrictions on recoveries by the victims of defamation leave most defamed persons with no way to vindicate their reputations. As discussed below, reform proposals under active consideration allow vindication without an adverse impact on First Amendment values. Unfortunately, strong media opposition gives these proposals little chance for adoption. Moreover, even if adopted, broad construction by the courts of what constitutes opinion would make the proposed vindication actions unavailable to many defamed persons. The Supreme Court could alleviate these difficulties somewhat by setting maximum protections for defamatory speech.

A. *Maximum Constitutional Protections for Speech*

Decisions that give greater protection to opinion than the Supreme Court extended in *Milkovich* immunize false and defamatory statements of fact. The expression of ideas must receive immunity, but, as previously observed in this Article, granting immunity to false and defamatory statements of fact erodes First Amendment values by interfering with the truth-seeking function of the marketplace of ideas, and by exposing potential speakers to the risk of severe harm.[786] A great deal of "breathing space" for false statements of fact already exists under the Supreme Court's defamation rules. To exceed the requirements of those rules by labelling fact as opinion gives First Amendment interests less protection rather than more. Protecting speakers does not always advance First Amendment goals. No one who recalls the McCarthy era can doubt that the freedom of some to defame can suppress the expression of ideas by a great many others.[787]

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[786] *See supra* text accompanying notes 549-50, 555-58.

[787] For a study of the falsity of some specific charges made by Senator Joseph McCarthy, and the reasons why libel law did not provide an effective remedy, see generally Willard H. Pedrick, *Senator McCarthy and the Law of Libel: A Study of Two Campaign Speeches*, 48 NW. U. L. REV. 135 (1953). Regarding the suppression of speech that occurred during this era, see e.g., LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 152 (1986).

> Meiklejohn was clearly aware of the reality of democratic intolerance and clearly intended the protection [of the First Amendment] to extend to subversive speech. He was writing in the immediate post-World War II years, at the beginning of the Cold War. The period bore a close parallel to the climate of severe intolerance during and immediately after World War I, when Holmes first dealt with the subject of free speech. At the very beginning of the essay, in the preface, Meiklejohn spoke to this reality of intolerance, noting that an extensive system of internal security had been devised, with widespread public support, to uncover "un-American" and "disloyal" activities and agents. Referring to Federal Bureau

State courts have exceeded the Supreme Court's protections for speech not only in defining opinion, but also in determining who is a public figure and what level of fault a private figure plaintiff must establish.[788] Although state courts may interpret their own laws and constitutions to extend greater protection to individual rights than the Federal Constitution provides,[789] such state rulings are invalid if they conflict with federal constitutional principles.[790] First Amendment interests would be advanced if the Court's defamation rules established maximum as well as minimum protections for defamers. Too much protection for false and defamatory speech interferes with First Amendment values, just as too little does.

Strong principles of judicial federalism counsel against the Court's excessive intrusion into the realm of state substantive law.[791] Contemporary

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of Investigation activities, he said:

> And that procedure reveals an attitude toward freedom of speech which is widely held in the United States. Many of us are now convinced that, under the Constitution, the government is justified in bringing pressure to bear against the holding or expressing of beliefs which are labeled dangerous. Congress, we think, may rightly abridge the freedom of such beliefs.

These were "wretched days of postwar and, it may be, of course, prewar, hysterical brutality." The question to be answered, then, was should the society refrain from employing legal coercion against these subversive ideas, against those who would say that "the Constitution is a bad document," "that [war] is not justified," "that [conscription] is immoral and unnecessary," "that the [political systems] of England or Russia or Germany are superior to ours." Even more pointedly, he asks, "Shall we listen to ideas which . . . might destroy confidence in our form of government," from those who "hate and despise freedom to those who, if they had the power, would destroy our institutions?" Should we permit the publication of Hitler's *Mein Kampf*, of Lenin's *The State and the Revolution*, or of Engels and Marx's *Communist Manifesto*?

Id. (footnotes omitted). Meiklejohn is the author of the seminal work *Free Speech and its Relation to Self-Government*. *See* BOLLINGER, *supra* at 258.

[788] *See infra* note 833; Anderson, *supra* note 4, at 549.

[789] *See supra* note 96.

[790] "[A] state constitutional ground is adequate if it is more protective of a right than an analogous provision of the federal constitution—provided, of course, that protection of the state constitutional right does not infringe a competing federal guarantee." TRIBE, *supra* note 48, at 164 n.12 (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 82-88 (1980) (holding that state constitutional right to exercise free speech and petition rights in shopping center did not violate rights of shopping center owner under Federal Constitution)).

[791] Professor Tribe states:

> Many [constitutional principles regarding federal judicial power] are important to the moderation of conflict between the federal and state judiciaries and to preventing federal courts from intruding excessively on the constitutional role of the states. The evolution of these doctrines today is guided in large part by the Supreme Court's renewed emphasis on what may be termed "judicial federalism"—a view that federal courts must regard their power as tempered by a keen apprecia-

constitutional theory provides little room to argue that the Court may set maximum protections for defamatory speech. A Supreme Court mandate that the states provide adequate protection for reputation at first blush seems an impermissible intrusion into the legitimate power of the states to develop their own rules of tort and state constitutional law. Yet it seems clear that First Amendment interests are ill served by the states' ability to give excessive protection to defamation.

The Court has held that the interest in reputation is not in itself a liberty or property interest protected against deprivation by governmental officials under the Due Process Clause of the Fourteenth Amendment.[792] The Court's rationale in *Gertz*, however, provides reason to surmise that reputational interests can claim some degree of constitutional protection. In *Gertz*, the Court recognized that protection of reputational interests "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."[793] The Court further observed that, although the protection of reputation is left primarily to state law, "this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."[794] The Court also has recognized that "there is no constitutional value in false statements of fact."[795] These assertions give some support to the argument that inadequate protection of reputation by state courts violates the Due Process Clause of the Fourteenth Amendment.[796]

Although the Court has held that the interest in reputation is not a liberty or property interest protected against deprivation by governmental officials,[797] the Court also has held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."[798] The Court has recognized that rules of state tort law may not be arbitrary and must bear a rational relationship to a permissible state objective.[799] Justice Marshall elucidated the due process issues in *Pruneyard*

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tion of the essential role of the states and their judicial system in our constitutional universe.

Id. at 195-96 (footnote omitted).

[792] *See* Siegert v. Gilley, 500 U.S. 226, 234 (1991) (*Bivins* action); Paul v. Davis, 424 U.S. 693, 712 (1976) (action under 42 U.S.C. § 1983 (1988)).

[793] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

[794] *Id.*

[795] *Id.* at 340.

[796] The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . " U.S. CONST. amend. XIV, § 1.

[797] *See Siegert*, 500 U.S. at 234.

[798] Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

[799] *See* Martinez v. California, 444 U.S. 277, 282-83 (1980).

Shopping Center v. Robins:[800]

> Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State, notwithstanding the California Supreme Court's finding that state-created rights of expressive activity would be severely hindered if shopping centers were closed to expressive activities by members of the public. If accepted, that claim would represent a return to the era of *Lochner v. New York*, . . . when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result.
>
> On the other hand, I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government. The Constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect. Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[801]

Under these due process principles, the Court could establish maximum protections for false and defamatory speech on the ground that greater protections are arbitrary restrictions on the plaintiff's protected interest in the defamation action. Such restrictions are arbitrary because they do not bear a rational relationship to the state court's objective of protecting free speech interests. To the contrary, they cause pollution of the marketplace of ideas and suppression of speech. State law cannot go so far in restricting the defamation action as to infringe unduly upon both freedom of speech inter-

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[800] 447 U.S. 74 (1980).

[801] *Id.* at 93-94 (Marshall, J., concurring) (footnotes omitted).

ests in the aggregate and the interest in reputation, which "reflect[s] 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."[802] The toleration required by free speech principles is itself undermined by undue protection of false and defamatory speech.[803]

Use of the due process clause to invalidate substantive rules of state tort law has not been successful in the recent past.[804] It seems plausible, nevertheless, that the Supreme Court could prohibit state courts from granting greater protection to defamatory speech than the Court has mandated, on the

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[802] *Gertz*, 418 U.S. at 341 (quoting *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring)).

[803] Bollinger states:

> We may . . . raise one important consideration in the matter of whether to make an exception for libel [from protections for speech]. It arises from the fact that a single individual has been harmed by the speech act. When one person tends to bear the major brunt of the harm of speech activity, rather than the larger community, the central purposes of the free speech principle are not so likely to be realized by the insistence on toleration. For the tolerance function of free speech focuses primarily on the reform of those who possess *social power*, on the community as a whole or on those who because of their numbers or position effectively hold (or have a reasonable chance of holding) the reins of authority. This is the primary audience that people like Holmes and Meiklejohn, as well as so many others, were addressing as they tried to identify the intellectual character that ought to guide social interaction. Now, in the libel case, the community is actually implementing a system of coercion and punishment (unofficial, of course, but nonetheless, as we have noted before, of substantial power) against the defamed plaintiff. To then insist on toleration of the speech act as a means of mastering restraint is, to say the least, anomalous; this is especially so when, as sometimes occurs with defamatory accusations, the community's coercive response is itself excessive and when, apart from legal adjudication, there is small likelihood that the community response will be ameliorated by any other means ("the truth rarely catches up with the lie," it is frequently said of defamatory statements).

BOLLINGER, *supra* note 787, at 186.

[804] *See, e.g.*, *Martinez*, 444 U.S. at 281-83 (holding that state law granting immunity to parole officers from tort liability did not deprive plaintiffs of due process by defeating their cause of action for wrongful death of decedent, who was murdered by sex offender released from custody by defendant parole officers, and that state law had rational relationship to objective of protecting decision-making process in parole program); New York Central R.R. Co. v. White, 243 U.S. 188, 201-08 (1917) (holding that New York Workman's Compensation Law did not violate Due Process Clause by abrogating common law rules governing liability of employers to employees); *cf.* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 87-88 (1978) (holding that liability limitations in Price-Anderson Act do not violate Fifth Amendment Due Process Clause by abolishing common-law rights of recovery); Silver v. Silver, 280 U.S. 117, 122 (1929) (holding that state guest statute, denying nonpaying automobile passenger from recovering damages from owner or operator for negligence, does not violate Equal Protection Clause of Fourteenth Amendment).

ground that the state rulings do not serve free speech interests, but instead impair First and Fourteenth Amendment values. In the absence of maximum constitutional protections for speakers and minimum protections for the defamed, however, state judges should consider carefully the damage they may do to public discourse by further eroding protection for reputation.

B. *Reform Proposals*

There is widespread dissatisfaction with the current state of defamation law. Professor Anderson aptly describes a host of shortcomings: costly and protracted litigation; excessive jury awards that exact a toll on speech, even though they usually are reduced or overturned on appeal; intrusion into the editorial process of media defendants through discovery on the actual malice issue; diversion of the trial issues away from the question of truth or falsity; prejudice to media defendants that results from the trial's focus on actual malice; and substantial reputational and social costs that result from the barriers to recovery by defamed persons.[805]

In response to this general dissatisfaction, several reform proposals have emerged.[806] Most of these propose legislation authorizing a declaratory judgment action in which the plaintiff can obtain a determination of falsity. Although the proposals vary regarding the conditions for obtaining the declaratory judgment, generally they provide that a plaintiff who seeks a declaratory judgment cannot recover damages, and if the plaintiff elects to seek damages, those available are more limited than the damages allowed by the Supreme Court.[807] It should be noted that adoption of vindication ac-

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[805] Anderson, *supra* note 4, at 510-36.

[806] For a compilation of reform proposals, see generally REFORMING LIBEL LAW, *supra* note 765.

[807] The proposal of Professor Franklin requires the plaintiff to prove that the charge was false and defamatory by clear and convincing evidence, and the defendant may assert common-law privileges. *See* Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, *in* REFORMING LIBEL LAW, *supra* note 765, at 70-72. To recover damages, all plaintiffs must prove falsity and actual malice by clear and convincing evidence. *Id.* Under certain conditions, the court is to award attorney's fees to the prevailing party. *Id.* at 68, 70-72. The Annenberg Libel Reform Proposal is similar to Professor Franklin's, but in addition it prevents the plaintiff from pursuing an action for damages if the defendant elects to convert it to a declaratory judgment action, and, in the unlikely event that the damages action proceeded, the plaintiff could recover only for actual injuries. *See* Rodney A. Smolla, *The Annenberg Libel Reform Proposal*, *in* REFORMING LIBEL LAW, *supra* note 765, at 229, 230-36. The December 6, 1991, Committee Draft of the Uniform Defamation Act would allow the plaintiff to obtain a declaratory judgment on proof by a preponderance of the evidence that the defendant published a false and defamatory statement that harmed the plaintiff's reputation. National Conference of Commissioners on Uniform State Laws, *Uniform Defamation Act*, *in* REFORMING LIBEL LAW, *supra* note 765, at 328. The defendant may not claim a con-

tions would not solve the problem of courts' using overly broad definitions of opinion. All proposals for declaratory judgments of falsity properly require that the defamatory charge at issue be one of fact.[808] Lower courts that define opinion more broadly than does the Supreme Court would deprive deserving plaintiffs of vindication in a declaratory judgment action.

Whatever merit these proposals may have, there is no constituency to promote them and, consequently, they have virtually no chance of adoption.[809] Until recently, it seemed that a Uniform Defamation Act under consideration by a drafting committee of the National Conference of Commissioners on State Laws might hold some promise as the product of an organization of prestige.[810] In March 1993, however, the drafting committee decided to recommend to the National Conference that the Act be withdrawn and that the Conference consider instead a proposed "uniform correction and clarification of defamation" act.[811] Given the media's opposition

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ditional privilege. *Id.* at 342. If the plaintiff elects to bring an action for damages, the plaintiff cannot recover presumed damages. *Id.* at 334. An alternative committee proposal prohibits the award of punitive damages. *Id.* The defendant may terminate the damages action by offering to stipulate that it does not assert the truth of the charge in question, to pay reasonable attorneys' fees, and to publish a retraction. *Id.* at 334-40. A plaintiff who does not accept an offer to terminate can recover only pecuniary damages. Under certain conditions, in both the declaratory judgment and damages actions, the prevailing party may be awarded attorneys' fees. *See id.* at 323, 324-35.

[808] *See, e.g.*, Smolla, *supra* note 807, at 229, 230-31; National Conference of Commissioners on Uniform State Laws, *supra* note 807, at 323, 326-27.

[809] Professor Anderson states:

> The principal interest groups affected by libel law are the media and their lawyers and insurers. Nonmedia defendants and plaintiffs are too randomly distributed to have a collective voice, and there is no organized plaintiffs' bar. Libel law reform therefore has no political constituency unless the media and their allies support it. So far they have not done so.

Anderson, *supra* note 4, at 546 (footnote omitted). Anderson concludes that the media prefer the status quo to reform because "[t]he present law, for all its shortcomings, gives media considerable control over the risks they fear most: high litigation costs and windfall verdicts. Reform offers uncertain benefits and guaranteed uncertainty." *Id.* at 546-50.

[810] Professor Anderson observes that "[i]ndependent law reform entities such as the American Law Institute and the National Conference of Commissioners on Uniform State Laws have continuity and credibility, but whether legislators will embrace their recommendations in the absence of any political impetus is questionable." *Id.* at 549.

[811] *Uniform Act Withdrawn, Correction Act is Possibility*, 21 Media L. Rep. (BNA) (June 8, 1993). This article states:

> In a May 18 letter to Dwight A. Hamilton, president of the conference, and Richard C. Hite, chair of the executive committee, Dean Harvey Perlman of the University of Nebraska College of Law said that the drafting committee's "efforts at compromise and consensus" in creating a uniform defamation act "are unavailing."

to any form of vindication action, the committee could not find a proposal satisfactory to defamation victims and to the press.[812]

If the state courts defined opinion in a reasonable manner, federal and state courts together could provide a fairly effective vindication action without legislation.[813] Where declaratory judgment actions are available, courts probably could permit them in defamation actions, allowing plaintiffs to prevail on proof of falsity by a preponderance of the evidence.[814] If such actions were heard promptly, they could provide vindication and minimize injury to reputation.[815]

A truly effective vindication action, however, would require legislation to expedite such actions.[816] In addition, courts would need legislative au-

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"Our efforts over the past year have been directed toward forging a compromise that would be acceptable to both victims of defamation and the press," Perlman said in his letter, adding that "the media, particularly, are stridently opposed to our provisions relating to a vindication action and are unalterably opposed to broad defamation legislation of any kind."

[812] *Id.*

[813] *See* James H. Hulme & Steven M. Sprenger, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, *in* REFORMING LIBEL LAW, *supra* note 765, at 152, 159 ("By adopting a liberal interpretation of the [federal and state declaratory judgment acts], the courts could create a new defamation remedy and avoid the need for legislation establishing such a remedy."); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *in Its Proper Place*, *in* REFORMING LIBEL LAW, *supra* note 765, at 211, 212 ("[A no-damages] action exists within the current legal framework without the need for legislation.").

[814] *See* Hulme & Sprenger, *supra* note 813, at 152, 162-64 (arguing, plausibly, that *Sullivan* and *Gertz* were concerned with the chilling effect of damages on First Amendment interests and that those cases do not prohibit a vindication action).

[815]

> In a libel case . . . where the loss is an injury to reputation caused by the defendant's false statement, the court repairs the damaged reputation to some degree by the mere act of finding that the defamatory statement was false. In fact, were it not for the lapse of time between the publication of the libel and the finding of falsity (during which time the plaintiff's reputation suffers) and the possible failure of the court's finding to reach all the people whose opinion was influenced by the false libel, the finding of falsity would undo the harm and render an award of money damages superfluous. One can well imagine a respectable legal system that would not award money damages for libel—unless, perhaps, a monetary loss was proven (such as a loss of employment)—but would restrict the plaintiff's available relief for intangible harm to a declaration of falsity of the libel.

Leval, *supra* note 813, at 215-16 (footnotes omitted).

[816] In their proposed "Alternative Defamation Action," Hulme and Sprenger provide:

> Vindication Actions shall be granted docket priority and, absent consent of the parties, shall be adjudicated in a court or court-annexed proceeding not more than one hundred twenty (120) days after the filing of the complaint, unless the court makes a finding on the record that such an expedited trial is impracticable under the circumstances.

thority to order defendants either to publish declaratory judgments in favor of plaintiffs or pay the costs of such publication, and to order the payment of attorneys' fees to the prevailing party. Without such authority, there would be little incentive for defamed persons to bring declaratory judgment actions or for lawyers to take their cases.[817] Unfortunately, there is no lobby for such legislation. Although the plaintiffs' bar might recognize the benefits of the action and form such a lobby, the media opposition to vindication actions may be too strong to allow the plaintiffs' bar to make much headway.

Professor Anderson argues that only the Supreme Court can reform defamation law.[818] Given the lack of promise of the reform proposals, his conclusion seems correct. Although Anderson does not recommend a detailed set of reforms that the Court should implement, he does make several suggestions.[819] Some would give greater protection to defendants than presently exists, including the provision of greater authority to judges to grant summary judgment and to limit damages.[820] Others would give greater protection to plaintiffs, including a decree that plaintiffs could obtain a declaration of falsity without showing fault, and a reduction in plaintiffs'

Hulme & Sprenger, *supra* note 813, at 174-75.

[817] A vindication action must provide attorneys' fees for the plaintiff who has been the victim of a false statement and for the defendant who is determined to have published the truth. . . . Because the prevailing plaintiff receives no damage award by which to pay his attorney, the attorneys' fees provision is an essential part of the action. Similarly, a potential award of attorneys' fees against a plaintiff will discourage frivolous claims.

Id. at 172 (footnote omitted).

Professor Anderson opposes the award of attorneys' fees to the prevailing party on the ground that "[s]uch a rule increases the stakes for both sides, when the objective should be to reduce them." Anderson, *supra* note 4, at 544. He believes that plaintiffs' lawyers often overestimate their chance of prevailing, and that media defendants "may overspend in particular cases to achieve long term benefits in other cases." *Id.* He observes, however, that if only plaintiffs could receive attorneys' fees, a plaintiff's libel bar would develop, "which would make the level of expertise more nearly equal on each side and thus make the system work more aesthetically and perhaps more justly." *Id.* He also argues, however, that a one-way rule on fees could encourage press harassment. *Id.* This view, however, is misguided. The better view is that, with the award of fees to the prevailing party, harassment would be avoided, and plaintiffs' attorneys would be more cautious in estimating their chances of prevailing. Under current rules, a plaintiff's lawyer may be willing to take considerable risk for a contingent fee from a very large award; under the vindication action, the plaintiff's lawyer should not be so tempted to gamble because the only award available is reasonable attorneys' fees.

[818] Anderson, *supra* note 4, at 552-54.

[819] *Id.* at 537-41, 552-54.

[820] *Id.* at 554.

burdens with corresponding restrictions on damages.[821]

In most respects, Anderson's proposals are sound. Two bear closer examination, however. The first concerns the public figure category, and the second concerns the courts' pretrial screening of nonfactual statements. Anderson believes that the public figure category is too broad.[822] He would restrict it to persons analogous to public officials.[823] He is critical of the self-help and assumption of risk rationales the Court used in *Gertz* to justify the requirement that public figures prove actual malice.[824] Like Anderson, I believe that the public figure category is too broad, but I would not restrict it to those analogous to public officials. More convincing than the self-help and assumption of risk rationales in *Gertz* is the justification for the public figure category expressed by Chief Justice Warren in *Curtis Publishing Co. v. Butts*.[825] He justified the requirement that public figures prove actual malice on the ground that they "often play an influential role in ordering society."[826] Because of their power, uninhibited debate about their conduct and views is as important as is debate about public officials, and even more so because they are not subject to the restraints of the political process.[827] In reference to the self-help and assumption of risk rationales, the Court in *Gertz* explained that "[e]ven if the foregoing generalities do not obtain in every instance, the communications media are *entitled to act on the assumption* that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood

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[821] *Id.*

[822] *See id.* at 500, 524.

[823] *Id.* at 526-30, 538.

[824] *Id.* at 527-30.

[825] 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

[826] *Id.* (Warren, C.J., concurring).

> [M]any who do not hold public office . . . are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.
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> Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials." The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

Id. (Warren, C.J., concurring).

[827] *Id.*

concerning them."[828]

In my view, the overly broad treatment of public figures derives, not from the Supreme Court's definition thereof, but from lower courts' exceeding that definition. There are three strands to the public figure discussion in *Gertz*. One is the rationale for treating public figures and private figures differently—the rationale of self-help and assumption of risk.[829] The second is a restrictive definition of public figures.[830] The third is a loose definition of public figures that is too inclusive in light of the holding in *Gertz* itself.[831] In its subsequent decisions, the Court has employed its restrictive definition of public figures.[832] In contrast, many lower courts have not fol-

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[828] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (emphasis added).

[829] *Id.* at 344-45.

[830] *Id.* at 345.

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Id.

[831] *Id.* at 351.

> [The designation of public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself *or is drawn into a particular public controversy* and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Id. (emphasis added). In holding that Gertz was not a public figure, the Court relied upon its restrictive definition, rather than the looser one, stating:

> [Gertz] played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. *He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.*

Id. at 352 (emphasis added).

[832] *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166 (1979) (holding that plaintiff's failure to respond to grand jury subpoena and subsequent citation for contempt did not render him public figure for purposes of defendant's book naming him as a Soviet agent because plaintiff did not "'voluntarily thrust' or ['inject'] himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States"); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (holding that plaintiff, who had received public funds to support his research, was not a public figure

lowed the restrictive definition, but instead have employed the self-help and assumption of risk rationales, or the loose definition, finding plaintiffs to be public figures who would not qualify under the Court's restrictive approach.[833] Anderson correctly observes that "[t]he lower courts have tend-

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for purposes of Senator Proxmire's "Golden Fleece" award because he "did not thrust himself or his views into public controversy to influence others"); Time, Inc. v. Firestone, 424 U.S. 448, 453-54 (1976) (holding that plaintiff, who had received a great deal of media attention incident to divorce proceeding, was not public figure because she "did not assume any role of especial prominence in the affairs of society . . . and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved . . . " and that plaintiff's filing of complaint for separate maintenance did not make her public figure, as "[s]he was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony").

[833] *See, e.g.*, Dameron v. Washington Magazine, Inc., 779 F.2d 736, 742 (D.C. Cir. 1985) (holding that air-traffic controller was involuntary public figure for purposes of discussion of airplane crash that occurred while he was on duty), *cert. denied*, 476 U.S. 1141 (1986); Brewer v. Memphis Publishing Co., 626 F.2d 1239, 1253-55 (5th Cir. 1980) (determining that husband and wife plaintiffs with careers in sports and entertainment, respectively, may not have been either "all-purpose" or "limited purpose" public figures under Court's definition of those categories, but were public figures because their activities had invited public attention), *cert. denied*, 452 U.S. 962 (1981); Holt v. Cox Enterprises, 590 F. Supp. 408, 412 (N.D. Ga. 1984) (holding that college football player was public figure for purposes of statements about his performance as a player); White v. Mobile Press Register, Inc., 514 So. 2d 902, 904 (Ala. 1987) ("White's prior association with E.P.A., and his choice of a career as a high level executive in an industry that is the subject of much public interest and concern show a voluntary decision to place himself in a situation where there was a likelihood of public controversy."); Lewis v. McGraw-Hill Broadcasting Co., 832 P.2d 1118, 1122 (Colo. Ct. App. 1992) (holding that plaintiff became public figure not only by filing civil suit against the store, but also by her attorney's attendance at public meeting where he spoke on her behalf); Ruebke v. Globe Communications Corp., 738 P.2d 1246, 1252 (Kan. 1987) ("An individual may not choose whether or not to be a public figure. Public figure status is rather the result of acts or events which by their nature are bound to invite comment."); Elm Medical Laboratory, Inc. v. RKO General, Inc., 532 N.E.2d 675, 679, 680 (Mass. 1989) (holding that plaintiff medical laboratory was public figure in its action based on defendant's partially erroneous reports on governmental news release warning that plaintiff had misread large number of laboratory tests); Warner v. Kansas City Star Co., 726 S.W.2d 384, 385-86 (Mo. Ct. App. 1987) (holding, on basis of assumption of risk and self help, that fired outdoor writer for newspaper was public figure in his libel action for charges that he had violated newspaper's code of ethics by accepting free use of vehicle and misrepresenting arrangement by which he had obtained it); Gomez v. Murdoch, 475 A.2d 622, 625 (N.J. Super. Ct. App. Div. 1984) (holding that assumption of risk and media access made professional jockey public figure for purposes of charge that he deliberately had prevented his horse from giving its best effort in race); *cf.* Sisler v. Gannett Co., 516 A.2d 1083, 1090, 1093-95 (N.J. 1986) (holding that former bank official had to prove actual malice in action for newspaper's charge that he had obtained undercollateralized loans from bank because although plaintiff was not public

ed to view both the public official and public figure categories expansively."[834] The Court could correct much of the problem that Anderson identifies, not by a redefinition of public figures, but by prohibiting lower courts from exceeding the protections it has extended to this category of plaintiffs.[835]

Anderson also suggests that the Court "might explicitly authorize trial judges to decide at the outset whether the challenged statement was sufficiently factual, harmful, and remote from truth to be justifiably burdened by further litigation."[836] This suggestion is sound, but only if trial courts define opinion in a reasonable way. Many recent lower court decisions define opinion too broadly, removing from jury consideration factual issues regarding the meaning of the defendant's charges.[837] In this state of adjudication, explicit authorization to screen nonfactual statements might only encourage further unwarranted restrictions on legitimate causes of action.

VII. CONCLUSION

A satisfactory balance between the fundamental interests in reputation and freedom of speech seems impossible to achieve. One interest or the other must give way with every publication of defamatory speech. I believe, however, that the Supreme Court achieved an appropriate balance in *Milkovich v. Lorain Journal Co.* in holding, by implication at least, that pure deductive opinion is actionable, but that pure evaluative opinion is not.[838] This holding serves a central goal of First Amendment jurisprudence—judicial neutrality regarding community values.[839]

Milkovich, however, has not engendered a consensus among lower courts as to the appropriate treatment of defamatory opinion. To the con-

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figure under Supreme Court decisions, state common-law rules required plaintiff to show actual malice because plaintiff had assumed risk of publicity on matter of legitimate public interest).

[834] Anderson, *supra* note 4, at 500.

[835] Such a ruling by the Court would not solve one of the problems that troubles Anderson—the treatment of celebrities as public figures and the "politics of scandal" that the actual malice standard promotes. *See id.* at 533-34. Many celebrities do use the power of their status to influence issues, and without doubt they seek the public's attention; hence, they should be held to the actual malice standard. The only way in which defamation law might diminish the politics of scandal is by allowing a declaratory judgment of falsity without proof of fault. If courts, on their own authority, allowed such declaratory judgments, many celebrities could obtain vindication without legislation authorizing an order to pay the costs of publication of the judgment, court costs, and attorneys' fees.

[836] *Id.* at 554.

[837] *See* discussion *supra* parts IV.A.3-5.

[838] *See* discussion *supra* part III.B.

[839] *See* discussion *supra* part V.B.

trary, lower court decisions reflect widely divergent approaches to what constitutes immune opinion. This disparate treatment makes outcomes unpredictable and may induce the national media and others to conform to the standards of those courts that give inadequate protection to nonfactual speech.[840] Equally troubling to First Amendment interests are lower court decisions that grant greater protection to opinion than the Supreme Court extended in *Milkovich*. Such decisions impair First Amendment interests. They immunize false and defamatory statements of fact, which impair the truth-seeking functions of public discourse,[841] and they unnecessarily discourage participation in public debate by denying any recourse to persons falsely maligned.[842] Decisions that extend overly broad protection include those that immunize pure deductive opinion, expressions of points of view on factual matters, and ambiguous charges.

Pure deductive opinions that are false are not entitled to immunity because they may be as damaging to public discourse and to the persons defamed as any other false factual charges.[843] The same is true of expressions of points of view on factual matters; additionally, immunizing points of view enables speakers to defame with impunity merely by prefacing false charges with such words as "in my opinion."[844] The treatment of ambiguous statements as opinion also is unjustified.[845] If an ambiguous charge is reasonably understood in the alleged defamatory and factual sense, and if the speaker was at fault in conveying that false connotation, then the speaker should bear responsibility.[846] Like protection of points of view on factual matters, immunization of ambiguity gives the deliberate defamer a license to harm.[847] Considerable leeway for imaginative and colorful language is necessary to protect First Amendment values, but the requirement that plaintiffs prove fault as to the factual meaning conveyed sufficiently protects the use of such language.[848] Immunization of speech merely because it is ambiguous deprives defamed persons of a remedy for harm to reputation without advancing First Amendment interests.

Lower court decisions that extend protection to these categories of defamatory speech fail to recognize that the basis for distinguishing between fact and opinion in defamation law must rest on a recognition that First Amendment interests can be harmed by both too little and too much protection of speakers. Both courses threaten the existence of judicial neutrality

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[840] *See supra* notes 512-13 and accompanying text.
[841] *See supra* notes 550-51 and accompanying text.
[842] *See supra* notes 555-56 and accompanying text.
[843] *See* discussion *supra* part V.B.
[844] *See* discussion *supra* part V.C.
[845] *See* discussion *supra* part V.D.
[846] *See* discussion *supra* part V.B.2 (concerning the applicable fault standards).
[847] *See supra* note 694 and accompanying text.
[848] *See* discussion *supra* part V.D.2.

among competing community values.[849] Although the distinction between fact and opinion is elusive, to protect the neutrality of public discourse, it is appropriate to define defamatory opinions as normative claims that do not imply the existence of supporting defamatory facts. Such claims should not be subject to a judicial validity test because they advance public discourse. Use of a judicial validity test would impose the norms of one community on another. Defamatory facts, however, are claims that should be subject to a judicial validity test because they impede the search for truth. Immunizing such claims does not provide a level playing field for competition for allegiance to a community; instead it allows oppressive behavior by those with the greater power of speech or greater popularity. Immunization of factual claims unnecessarily inhibits speech by those who fear defamatory attack without any recourse. Thus, excessive protection of defamatory factual claims harms rather than advances First Amendment goals.[850]

The highly disparate lower court approaches to defamatory opinion too often are inimical to First Amendment interests. A viable solution is for the Supreme Court to prescribe maximum as well as minimum protections for defamatory speech.[851] Although some will respond that such a step would constitute a forbidden federal intrusion into the realm of state substantive law, in fact expansive lower court holdings are intrusions into the realm of federal constitutional law that impair First Amendment interests. Fourteenth Amendment jurisprudence would allow the Supreme Court to prescribe maximum protections for defamatory speech. The Court has recognized that the states' interest in providing a remedy for harm to reputation "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."[852] It also has recognized that common law claims are a species of property interest and that there are some limits under the Fourteenth Amendment to the states' power to deprive persons of those claims.[853] Excessive protection of defamation is an arbitrary restriction on the defamed person's interest in a remedy. An inadequate remedy ignores "the essential dignity and worth of every human being," and bears no rational relationship to the goal of protecting freedom of speech. When the deprivation of the remedy in fact harms those interests, it seems incontrovertibly arbitrary. Absent maximum protections for speech, and without any realistic hope of reform that would provide a vindication remedy for defamed persons,[854] lower courts should reconsider their approaches to the protection of opinion.

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[849] *See* discussion *supra* part V.A.2.b.

[850] *Id.*

[851] *See* discussion *supra* part VI.A.

[852] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J. concurring)).

[853] *See supra* notes 778-801 and accompanying text.

[854] *See* discussion *supra* part VI.B.

There is a threat to freedom of speech itself when, under a free speech banner, the courts ignore the insidious effects of false and defamatory speech on the kind of public discourse required to foster a self-governing and multi-cultural society.