PROTECTION OF OPINION UNDER THE FIRST AMENDMENT: REFLECTIONS ON ALFRED HILL, "DEFAMATION AND PRIVACY UNDER THE FIRST AMENDMENT"

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In 1976, Alfred Hill examined the impact of then-recent Supreme Court defamation and privacy decisions. Although Hill shared widespread anticipation of continued expansive case-law development by the Court, there was surprisingly little thereafter, leaving Hill's analysis timely twenty-fours years later. Judge Sack now revisits and evaluates First Amendment protection for opinion and the Hill article's treatment of the subject.

The Article offers a context for the discussion of "opinion," then traces the history of its protection. After describing Hill's disagreement with the Second Restatement's recognition of per se immunity for statements of opinion, Sack outlines the development of case law between the Hill article and the Supreme Court's 1990 treatment of constitutional protection for opinion in Milkovich, *and the development of the law in lower courts since. The Article concludes with an appraisal of current law measured against Hill's article, the Supreme Court decisions, and the principles underlying those decisions.*

I. Introduction

A. *The Article*

Until the Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*,[1] defamatory[2] statements were generally considered to be categorically exempt from protection under constitutional safeguards for freedom of speech and of the press.[3] *Sullivan* announced a revolutionary contrary principle: "[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[4] In measuring the speech at issue in *Sullivan* against

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* Judge, United States Court of Appeals for the Second Circuit; A.B., 1960, University of Rochester; LL.B., 1963, Columbia Law School. This article reflects in part research first undertaken in connection with preparation of a brief amicus curiae submitted to the United States Supreme Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), and during the course of the preparation of Robert D. Sack and Sandra S. Baron, Libel, Slander, and Related Problems (2d ed. 1994), and Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems (3d ed. 1999) [hereinafter Sack on Defamation]. The author thanks his once and future law clerks, Jason Mazzone and S. Gale Dick, for reviewing and sharing their insights with respect to a late draft of this article. No errors, though, are theirs.

1. 376 U.S. 254 (1964).

2. Defamation includes the torts of libel, generally written defamation, and slander, generally spoken defamation. See Sack on Defamation, supra note *, § 2.3.

3. See 376 U.S. at 268–69.

4. Id. at 269.

constitutional standards, the Supreme Court established, among other things, First Amendment protection for defamatory speech about public officials.

A decade later, in *Gertz v. Robert Welch, Inc.*,[5] the Court articulated principles under which constitutional protection was to be applied to defamatory speech about people other than public officials. In the interim, the Court decided *Time, Inc. v. Hill*,[6] which applied the lessons of *Sullivan* to the tort of invasion of privacy.

Professor Alfred Hill's prodigious 1976 article, "Defamation and Privacy Under the First Amendment,"[7] examined constitutional doctrine then recently emerged from *Sullivan*, *Gertz*, and *Time, Inc.* It assessed both the case law's probable, and in his view its proper, impact on the existing body of the law of libel, slander, and invasion of privacy. Hill's encyclopedic review of the subject, based on massive and meticulous research, painstaking analysis, and plain good judgment, was a remarkable achievement. The length and comprehensiveness of the Hill Article makes doing homage to it in its entirety impossible. I therefore have undertaken to review a slice of the Hill Article—its treatment of opinion[8]—and to reflect and encourage reflection upon it.

Two aspects of the timing of the Hill Article are pertinent to an appreciation of its significance. First, at the same time that Professor Hill was doing his work, the American Law Institute was drafting what would become the defamation provisions of the 1977 *Restatement (Second) of Torts*.[9] The Hill Article appears to have been in part a response to, and at times (as we shall see) a criticism of, that effort.

Second, in light of the rapid and far-reaching changes in the law of libel wrought by the Supreme Court in a number of cases decided between *Sullivan* and *Gertz*,[10] there was every reason to anticipate that the years immediately following *Gertz* would bring further development through a continuing flow of Supreme Court decisions. Very little of that expected case law development occurred. The Supreme Court has been chary of returning to the topic, infrequently addressing itself to the law of defamation between the time of the Hill Article and 1991[11]—and not at

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5. 418 U.S. 323 (1974).

6. 385 U.S. 374 (1967).

7. 76 Colum. L. Rev. 1205 (1976) [hereinafter Hill Article].

8. Id. at 1227–45.

9. At the time of the Hill Article, Tentative Draft No. 21 of the second *Restatement* was in circulation. Hill's discussion of opinion begins with a reference to "[t]he latest version of the *Restatement*," id. at 1227, and is laced with references to it, see, e.g., id. at 1227 & n.103, 1235 & n.134, n.149, 1240 & nn.158 & 163 (each referring to Restatement (Second) of Torts (Tentative Draft No. 21, 1975)), and it was to that draft that Professor Hill was responding.

10. The case law is outlined in Sack on Defamation, supra note *, ch. 1, Constitutional Principles.

11. The year of Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).

all since. The failure of the Supreme Court—with one exception[12]—to enlarge significantly upon the meaning of its early defamation cases leaves Professor Hill's 1976 analysis highly relevant, even timely, twenty-four years later.[13]

I conclude that the doctrine established in *Philadelphia Newspapers, Inc. v. Hepps*[14] resulted in the Supreme Court's rejection of Professor Hill's views on the extent to which constitutional doctrine eclipsed common law protection for statements of opinion about matters of public concern. Despite *Hepps*, however, the common law may still provide most of the available protection for statements of opinion on private matters as the Hill Article suggested it should.

Part I.A of this article offers speculation on what we mean by "opinion," to serve as a basis for further discussion of the law's treatment of opinion.

In Part II, the article discusses the Hill Article and the legal backdrop against which Professor Hill wrote. II.A summarizes common-law protection for opinion, as the Hill Article did, to provide a platform from which to analyze constitutional developments. II.B discusses *Sullivan,*[15] the foundation for constitutional protection of allegedly defamatory speech, and its implications for protection of opinion. II.C describes *Gertz*, decided ten years after *Sullivan*, and the dictum contained in *Gertz* that gave rise to a doctrine embraced by the second Restatement according per se constitutional protection to "pure" statements of opinion.[16] II.D summarizes the views of the Hill Article and its rejection of per se immunity for opinion.

In Part III, the article discusses the history of constitutional protection for opinion following the Hill Article: III.A describes the adoption by the courts of per se constitutional protection for opinion based on the *Gertz* dictum and the second Restatement's interpretation of it (III.A.1), and the methods employed by courts to distinguish between assertions of fact and statements of opinion (III.A.2). III.B contains a brief description of Justice Rehnquist's two dissents from denial of certiorari in the early

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12. As we shall see, the Court's most important decision since *Gertz* is probably Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), although the Court did not think so at the time. Justice O'Connor, writing for the *Hepps* majority, predicted that the Court's decision would have little impact on defamation litigation. See id. at 778 and infra Part IV.

13. By contrast, one can imagine an article Professor Hill might have written in 1976 about the constitutional law applicable to, say, advertising and commercial speech—a topic upon which he merely touches in the Hill Article. Hill, supra note 7, at 1223. However brilliant or insightful, it would have long since been buried by the avalanche of Supreme Court cases subsequently decided. See generally P. Cameron DeVore and Robert D. Sack, Advertising and Commercial Speech: A First Amendment Guide, chs. 1, 3–6 (1999) (detailing history of major advertising and commercial speech cases).

14. 475 U.S. 767 (1986).

15. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

16. 418 U.S. 323 (1974). By "pure opinion," this article refers to statements of opinion that do not imply statements of fact, or at least such statements asserted to be defamatory.

1980's in which he joined Profesor Hill's rejection of per se constitutional protection for pure opinion. III.C discusses *Milkovich v. Lorain Journal Co.*,[17] in which Chief Justice Rehnquist appeared to move toward rejection of per se protection in accordance with Professor Hill's views, only to draw back in apparent recognition of the implications of the intervening *Hepps* decision. III.D describes how the doctrine of per se constitutional protection for statements of "pure" opinion prevailed after *Milkovich*. III.E addresses the possible surviving exceptions to such blanket immunity: protection for expressions of opinion by non-media defendants and for opinion about private matters.

Part IV is devoted to a brief assessment of the current state of the law in light of the views expressed in the Hill Article.

B. *Working Speculations*

It is difficult to discuss opinion without some shared notion of what statements of opinion are and how opinion differs from other forms of expression. I therefore offer the following tentative postulates:[18]

1. There is a useful distinction to be made between assertions of fact and statements of opinion, however elusive it is and however difficult it may be in many cases to make it. Because the doctrine arising out of recent case law depends upon the distinction, even were we to regard it as a "crude dichotomy,"[19] we would be bound to observe it.

2. An assertion of fact[20] is objective: inter alia, a claim of the existence or attribute of some event, person, place, or thing.

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17. 497 U.S. 1 (1990).

18. I suspect that philosophers, epistemologists, and the right sort of law professors are in a better position to expound upon them than am I. If we are to proceed, however, we cannot wait for them.

19. Ollman v. Evans, 750 F.2d 970, 994 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

> [I] do not think these simple categories, semantically defined, with their flat and barren descriptive nature, their utter lack of subtlety and resonance, are nearly sufficient to encompass the rich variety of factors that should go into analysis when there is a sense . . . that values meant to be protected by the first amendment are threatened.

Id.

20. The cases seem to treat the distinction between fact and opinion in terms of a statement's "objective" meaning, or at least its meaning to the judicial finder of fact making the evaluation. Little attention has been given to the situation where the speaker means to state an opinion but is reasonably understood to be asserting a fact.

Consider the following hypothetical adapted from a Restatement illustration. Restatement (Second) of Torts § 566, illus. 4 (1977). *A* knows that *B* from time to time has several glasses of wine with dinner. *A*, a teetotaler, says "*B* is an alcoholic" by which she means "I think *B* drinks too much," an opinion. A jury concludes that either the average person would understand, or that the people who actually heard the statement did understand, that *A* meant that *B* is dependent on alcohol, a defamatory and, for purposes of this hypothetical, false assertion of fact. Is the statement actionable? Arguably it should not be: "One should not be deterred from speaking out through the fear that what he gives as his opinion will be construed by a court as [implying], if not actually amounting to,

3. A statement of opinion (or a comment[21]) is subjective: inter alia, an assertion of the speaker's reaction to, attitude toward, or belief about a perceived fact or another opinion.[22]

4. There are many subspecies of statements of opinion. An opinion may reflect the speaker's emotional or intellectual reaction to a perceived fact or an opinion, e.g., that something is attractive or repulsive, moral or immoral, wise or foolish.

5. A single statement of opinion may consist of a variety of such subspecies of opinion. It may, for example, reflect the speaker's feeling and thought that a painting is ugly, immoral, should not be displayed in public, and should not have been paid for by government funds.

6. An epithet is a statement of opinion because it reflects the speaker's reaction to, attitude toward, or belief about a perceived fact or another opinion.

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a misstatement of fact." Ollman v. Evans, 750 F.2d 1001 n.6 (en banc) (Bork, J., concurring) (quoting Pearson v. Fairbanks Publ'g Co., 413 P.2d 711, 714 (Alaska 1966)).

Perhaps a court's answer would depend upon the nature of the person spoken about. If *B* is a public official or public figure then statements by *A* about *B* are not actionable unless *A* is subjectively aware that they are false.

A cannot be subjectively aware that her statement is false because she believes it to be an opinion, which can be neither true nor false. The fact that she does not believe that *B* is dependent on alcohol does not mean that she spoke with "actual malice" when she called *B* an alcoholic. Otherwise "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." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 513 (1984). Similarly, if *B* is not a public person, but the statement is otherwise covered by the fault requirement of Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974), plaintiff *B* might be required to establish that *A* was negligent in conveying the wrong message.

Roughly similar questions arise when a speaker means a statement to be in jest but the listener does not get the joke and therefore understands it to be an assertion of fact. See Sack on Defamation, supra note *, § 5.5.2.7.1.

Finally, the converse may be noted. A statement that one would expect to be treated by courts as a statement of opinion—e.g., that members of a particular ethnic group are "children of Satan"—may well be meant by the speaker as an assertion of fact. Should it be treated as an assertion of fact if it is meant by the speaker to be one, or treated as a statement of opinion?

21. "Opinion" and "comment" are used here interchangeably, as they are in Hill, supra note 7, at 1227. See also *Gertz*, 418 U.S. at 339–40, apparently treating the words as synonyms.

22. Cf. Walter Lippman, Public Opinion 18 (Free Press paperback ed. 1965):

> Those features of the world outside which have to do with the behavior of other human beings, in so far as that behavior crosses ours, is dependent upon us, or is interesting to us, we call roughly public affairs. The pictures inside the heads of these human beings, the pictures of themselves, of others, of their needs, purposes, and relationship, are their public opinions.

Id.; W. Page Keeton, Defamation and Freedom of the Press, 54 Tex. L. Rev. 1221, 1249 (1976) ("From a legal perspective, perhaps, the distinction [between facts and opinions] is best drawn by characterizing facts as things capable of objective proof and then distinguishing opinions as perceptions, thoughts, and value judgments concerning the objectively verifiable facts.").

7. A deduction—a conclusion of fact based on other facts—although frequently referred to as an opinion, is an assertion of fact inasmuch as it is a claim of the past, present, or future existence or attribute of some event, person, place, or thing.[23]

8. Some statements—commands, for example—are neither statements of fact nor assertions of opinion.

9. A statement of opinion may imply an assertion of fact. When a statement of opinion is accompanied by the assertions of fact upon which it is based, the statement of opinion is less capable of implying assertions of fact than when it is not.[24]

10. An assertion of fact may be made in the form of a statement of opinion ("In my opinion she lied under oath about her alibi."); and vice versa *(*"She's a pistol!").

11. A statement of opinion ordinarily implies the assertion of fact that the opinion is actually held by the speaker.[25]

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23. This is particularly subject to debate. The second Restatement and several commentators have treated deductions based on stated or understood facts as opinion. See Restatement (Second) of Torts § 566, illus. 4 (1977); Kathryn Dix Sowle, A Matter of Opinion: *Milkovich* Four Years Later, 3 Wm. & Mary Bill Rts. J. 467, 474 (1994) (citing Keeton, supra note 22, at 1249–59). Cf. Underwager v. Salter, 22 F.3d 730, 735–36 (7th Cir. 1994) (treating deductive scientific "opinions" as assertions of fact, holding that they were not actionable because not made with "actual malice").

The *Underwager* court said that "[s]cientific controversies must be settled by the methods of science rather than by the methods of litigation," id. at 736, perhaps suggesting special solicitude for the protection of deductive "opinions." Cf. Dilworth v. Dudley, 75 F.3d 307, 310–11 (7th Cir. 1996) (holding that one mathematician's reference to the other as a "crank" was opinion, which it clearly was, citing *Underwager*, which dealt with scientific deductions). See also Groden v. Random House, Inc., 1994 U.S. Dist. LEXIS 11794, at *19–*22 (S.D.N.Y. Aug. 22, 1994) (Kennedy assassination scholar's deduction that conspiracy theorists were "guilty of misleading the American public" was held to be nonverifiable opinion in this false advertising claim).

Is an answer to the question, "Who killed John F. Kennedy?" an assertion of fact capable of being "proven" true or false in a civil action, i.e., by a preponderance of the evidence to the satisfaction of the jury, albeit not to the satisfaction of everyone? Judge Bork's totality-of-the-circumstances approach in *Ollman*, 750 F.2d at 993, see infra note 114, would provide a satisfactory resolution of this sort of question without relying on an assessment of whether such a statement is properly classified as "fact" or "opinion." He would probably have concluded that this kind of statement is nonactionable because "the 'fact' proposed to be tried is in truth wholly unsuitable for trial," *Ollman*, 750 F.2d at 1002, or "peculiarly unsuited to a trial at law." Id. at 1008.

24. Cf. Hill, supra note 7, at 1233 ("The defendant should be on safe ground [in expressing an opinion] if he leaves no room for possible confusion as to the factual basis of the opinion expressed. . . .").

25. Cf. Stevens v. Tillman, 855 F.2d 394, 398 (7th Cir. 1988) (Easterbrook, J.) ("Even the statement 'I don't like the color blue' implies a proposition about the speaker's sensibilities.").

As we shall see in part III.D below, there is general judicial agreement that statements of opinion cannot be proven false; it is stated alternatively (but rarely) that if opinions are accurate reflections of the speaker's state of mind then they are true. In either event they are, therefore, not actionable. It would seem, nonetheless, that a statement of opinion not actually held by the speaker implies a false statement of fact—that the speaker holds the

12. An assertion of fact may be either true or false, that is, the claimed event, person, place or thing may or may not exist or have existed or may or may not have or have had the claimed attribute. Courts may and routinely do find assertions of fact to be true or false. It is unhelpful and probably meaningless to refer to an assertion of fact as right or wrong.

13. Some statements of opinion—that "ethnic cleansing" is evil, for example—may be said to be right or wrong; but they cannot be said to be true or false except as already noted that the implication that they are actually held by the speaker may be true or false and that other assertions of fact implicit in the opinion may also be true or false.

II. The Hill Article and its Context

A. *Protection for Opinion under the Common Law*

Under the common law, to recover for defamation a plaintiff was ordinarily required to prove only that a defamatory statement had been published about him or her.[26] In order to escape liability, the defendant

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proffered opinion—which, if defamatory, can indeed be false and actionable. A well-known literary critic who pans a book by a disliked competitor even though the critic actually thinks the book is worthy is implying a false and harmful fact: that, as an expert, the critic does in fact conclude that the competitor's book is a bad one. The statement is not self-expression, but a verbal act designed to inflict harm. At first blush, it should be actionable; it appears to have been unprotected by the common law fair-comment privilege. See Leers v. Green, 131 A.2d 781, 789 (N.J. 1957) (dicta, referring to English common law); Julian v. American Business Consultants, Inc., 137 N.E.2d 1, 6 (N.Y. 1956) ("A comment is fair when it is based on facts truly stated and free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticized, and *is an honest expression of the writer's real opinion*. . . ." (emphasis added) (citation and internal quotation marks omitted)); Restatement of Torts § 606(1)(b)(1938).

Professor Hill was of the tentative view, however, that the false implication that an opinion stated is actually held ought not to be the basis for recovery, at least unless the defendant expressly admits that the opinion is a lie. The process by which a jury would otherwise conclude that a statement of opinion was not actually held by the speaker would be to make an impermissible inference from the speaker's personal ill will or ulterior motive, factors that should not under the constitutional cases turn a non-actionable statement into an actionable one. Hill, supra note 7, at 1230 n.128, 1238 n.152. Thus, protecting dishonest statements of opinion would permit another hypothetical literary critic who *does* think ill of a book written by a despised competitor to be free to express her opinion honestly. She ought not to be in danger of being found by a jury to have lied about her views and, therefore, to have uttered a defamatory falsehood based entirely on an inference drawn by jurors from the very fact of the speaker's ill will and possible ulterior motive. See Moldea v. New York Times Co., 22 F.3d 310, 320 (D.C. Cir. 1994) (Edwards, J.) ("There simply is no viable way to distinguish between reviews written by those who honestly believe a book is bad, and those prompted solely by mischievous intent."); Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299, 1306 (N.Y. 1977) ("opinions [at issue] even if falsely and insincerely held, are constitutionally protected, if the facts supporting the opinion are set forth"); Marc A. Franklin and Daniel J. Bussell, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L. Rev. 825, 868 n.165 (1984) (expression of insincerely held views not actionable).

26. See Laurence H. Eldredge, The Law of Defamation § 5, at 15–16 (1978).

was obliged to establish either that the statement was true pursuant to a plea of "justification"[27] or that it fell within the protection of one of several specific privileges, most prominently "fair comment."[28] The purpose served by the common law fair-comment protection for criticism and opinion has sometimes been stated in terms similar to the Supreme Court's explanation of the necessity to establish constitutional limitations on defamation judgments: to insure that "debate on public issues [be] uninhibited, robust and wide-open."[29]

A defendant's fair-comment plea required that he or she first prove that the statement was indeed opinion.[30] A defendant relying on the common law privilege was also required to establish that his or her communication was about a matter of public concern, that it represented the speaker's actual opinion, and that it was not made solely for the purpose of causing harm to the person who might suffer as a result of the opinion's expression.[31] And the defendant was required to establish that the opinion was made upon stated facts or "upon facts otherwise known or available to the recipient as a member of the public."[32]

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27. See Clement Gatley, Gatley on Libel and Slander, ch. 12 (Patrick Milmo & Horton Rogers eds., 9th ed. The Common Law Library No. 8, 1998).

28. See id., ch. 13.

29. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). "[A]t common law, the fair comment doctrine bestowed qualified immunity from libel actions as to certain types of opinions in order that writers could express freely their views about subjects of public interest." Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984) (en banc) (footnote omitted). See also Milkovich v. Lorain Journal Co., 497 U.S. 1, 13 (1990) ("[D]ue to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of 'fair comment' was incorporated into the common law as an affirmative defense to an action for defamation."); Pearson v. Fairbanks Publ'g Co., 413 P.2d 711, 714 (Alaska 1966) (fair comment protects "freedom of debate and discussion on public issues"); Edmonds v. Delta Democrat Publ'g Co., 93 So. 2d 171, 173 (Miss. 1957) (privilege exists that "matters of a public nature may be freely discussed"); Julian v. American Bus. Consultants, Inc., 137 N.E.2d 1, 5 (N.Y. 1956) (privilege exists "[i]n furtherance of . . . the right to write freely"). See also Lyon v. Daily Telegraph, 1 K.B. 746, 753 (1943) ("[T]he right of 'fair comment' is one of the fundamental rights of free speech and writing . . . and it is of vital importance to the rule of law on which we depend for our personal freedom.") (quoted in Gatley, supra note 27, at 247); Keeton, supra note 22, at 1222–23 ("The development of a complex structure of privileges [in the common law of defamation] served in part to protect and advance the larger societal interest in the free flow of ideas.").

30. See, e.g., William Prosser, Handbook of the Law of Torts 621–22 (2d ed. 1955); Herbert W. Titus, Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment, 15 Vand. L. Rev. 1203, 1204 (1962) ("[T]he availability of the defense of fair comment oftentimes turns upon whether or not a particular statement will be placed into one cubbyhole called 'fact' or in another called 'opinion.'"); Note, 62 Harv. L. Rev. 1207, 1212 (1949) ("[T]he distinction, more often announced than defined, between comments and statements of fact is often crucial to the outcome of fair comment litigation.") (footnote omitted).

31. See Restatement of Torts § 606(1)(1938).

32. Id. The need to identify the factual basis was sometimes subsumed within the notion of fairness. "An 'essential' element of fair comment is 'that it is fair, namely that the reader can see the factual basis for the comment and draw his own conclusion." Brewer v. Hearst Publ'g Co., 185 F.2d 846, 850 (7th Cir. 1950). See also *Edmonds*, 93 So. 2d

The privilege was hedged about with caveats, conditions, and exceptions that varied from one jurisdiction to the next. Courts variously required, for example, that the communication at issue "not be 'unreasonably violent or vehement' or 'excessively vituperative'; that it . . . 'be a reasonable inference from facts truly stated'; that it . . . be presented in a 'proper manner' and be 'based upon reasonable or probable cause'; and especially that it . . . 'be fair.'"[33] Thus:

- A publisher suffered a substantial libel judgment for publishing an editorial referring to the plaintiff—who had accused the city police commissioner of incompetence—as "infamous" and harboring "a motive." The grounds: that the apparently ample facts supporting the characterization, none of which the jury was permitted to learn, were not set forth in the editorial.[34]
- A "good government" group's recommendation against a candidate for public office, "because in the last legislature he championed measures opposed to the moral interests of the community,"[35] was held to be unprotected because the facts—that the plaintiff had voted for anti-temperence legislation—were not stated. The case was remanded for trial as to the "truth" of the opinion.[36]
- Withering, persistent criticism of one Oscar Triggs, a widely known professor of English—"[w]e cannot boast of having discovered Triggs . . ., for he was born great, discovered himself early, and has a just appreciation of the value of this discovery"—was held not, as a matter of law, to be fair comment.[37] "[T]he question whether the criticism was fair and just, or willfully assailed the reputation of the plaintiff, would be for the jury."[38]
- An editorial in a newspaper aimed at a Jewish audience, mocking the conduct of a prominent Jewish lawyer affiliated with a competing newspaper for arguing against adjourning a case for the Jewish New Year, saying that his behavior made "all of us Jews look ridiculous," was held actionable subject to a jury determination as to whether an alleged "long-standing feud" between the newspapers was "sufficient to rebut the existence of the defense of fair comment."[39]

From the point of view of the speaker, the defense of fair comment was narrow, unstable, inconsistent and therefore unreliable.

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at 173 ("fair in the sense that the reader can understand the factual basis for the opinions containing the criticism"). Hill, supra note 7, at 1231.

33. Hill, supra note 7, at 1229–30 (footnotes omitted).
34. See A.S. Abell Co. v. Kirby, 176 A.2d 340, 341, 342, 349 (Md. 1961).
35. Eikhoff v. Gilbert, 83 N.W. 110, 111 (Mich. 1900).
36. See id. at 113.
37. See Triggs v. Sun Printing & Publ'g Ass'n, 71 N.E. 739, 740 (N.Y. 1904).
38. Id. at 742.
39. Maidman v. Jewish Publications, Inc., 355 P.2d 265, 267, 270, 271 (Cal. 1960).

B. *Opinion under* New York Times Co. v. Sullivan

New York Times Co. v. Sullivan, for reasons explored elsewhere,[40] is a great tort case, a great defamation case, a great First Amendment freedom of speech and press case, and a great civil rights case. It is not ordinarily thought of as a case about protection for opinion.[41] Yet the Supreme Court's concern for the individual's freedom to express opinions appears to lie close to the surface.

Sullivan was decided at the height of the struggle for the civil rights of African Americans in the American South. The advertisement upon which suit was brought was published in *The New York Times* by fund-raising civil rights advocates. It was distributed in substantial numbers nationwide, but only to several hundred *Times* subscribers in Alabama. Bearing the headline "Heed Their Rising Voices," taken from an earlier *Times* editorial, the advertisement purported to describe the efforts of "thousands of southern Negro students" in the cause of civil rights.[42]

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40. See generally Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991) (history of First Amendment doctrine and account of drama surrounding *Sullivan*); Sack on Defamation, supra note *, § 1.2.1 at 3–11. Professor Alexander Meiklejohn, the great First Amendment scholar, was reported to have said, upon learning of the decision, "It is an occasion for dancing in the streets." See Lewis, supra, at 154; Harry Kalven, Jr., The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 221 n.125. See also William L. Prosser, Torts, § 118, at 819 (4th ed. 1971) ("unquestionably the greatest victory won by the defendants in the modern history of the law of torts").

41. Hill, supra note 7, at 1227 n.106, relies upon the fact that the *Sullivan* court *did* make a significant observation about constitutional protection for opinion. The Court said:

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

376 U.S. 254, 292 n.30 (1964) (citations omitted). But the Court's statement was consigned to a footnote and had nothing to do with the holding of the case. It has had virtually no impact on the law, having been referred to by the Supreme Court once, in a dissent, Milkovich v. Lorain Journal Co., 497 U.S. 1, 24 (1990) (Brennan, J., dissenting) but never followed by the Court, and having been cited but three times, in passing, in United States Courts of Appeals: Ollman v. Evans, 750 F.2d 970, 1017 (D.C. Cir. 1984) (en banc) (Robinson, C.J., dissenting) (observing that "[t]he opinion privilege articulated in *Gertz* thus was foreshadowed, to some extent at least, in earlier pronouncements"); earlier by the same judge concurring in the panel opinion in the same case, *Ollman*, 713 F.2d 838, 841 (D.C. Cir. 1983) (Robinson, C.J., concurring) (noting that, in the *Sullivan* passage, the Supreme Court "hinted at limitations on governmental power to impose civil or criminal liability for statements of belief, judgment, or sentiment"); and in Cianci v. New Times Publ'g Co., 639 F.2d 54, 65 (2d Cir. 1980) (noting that fair comment was a defense in the case but that absent discovery, the issue could not be reached).

42. 376 U.S. at 256.

Portions of the advertisement referred to demonstrations in Montgomery, Alabama, alleging that repressive countermeasures had been taken by local authorities—expulsions from school, intimidation by "truckloads of police armed with shotguns and tear-gas," and the padlocking of dining rooms to "starve [demonstrators] into submission." It also asserted "intimidation and violence" directed toward the activists' leader, Dr. Martin Luther King, Jr.[43] It was published against the background of civil-rights demonstrations throughout the South, including those in Montgomery, that had been met from time to time by repression and violence, some of it by, or with the complicity of, the police.[44]

L. B. Sullivan, Commissioner of Public Affairs for the City of Montgomery, brought a libel suit against the *Times* and those who paid for the advertisement. He alleged that because he bore responsibility for the performance of the Montgomery police, the advertisement's assertions of police wrongdoing were, in effect, allegations of his dereliction. The jury awarded Sullivan $500,000 in damages, the entire amount for which he had asked.[45] The Supreme Court reversed.

Considering "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[46] the Supreme Court held that the statements in the advertisement were protected by the First Amendment. The Alabama judgment could not stand:

> [T]he constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[47]

The Court also decided that "actual malice," later defined as knowledge of probable falsity,[48] must be established not by a mere preponderance of the evidence, but with "the convincing clarity which the constitutional standard demands,"[49] and that the Court was required to review

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43. See id. at 257.

44. See, e.g., Lewis, supra note 40, at 20–22 (recounting history of civil rights abuses in Montgomery).

45. See 376 U.S. at 256.

46. Id. at 270.

47. Id. at 279–80.

48. See, e.g., Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977) ("Opinions based on false facts are actionable only against a defendant who had knowledge of the falsity or probable falsity of the underlying facts."). The Supreme Court has said that the "actual malice" test required the plaintiff to prove that the defendant published the communication in question while "in fact entertain[ing] serious doubts as to [its] truth," St. Amant v. Thompson, 390 U.S. 727, 731 (1968), or "with subjective awareness of [its] probable falsity." Gertz v. Robert Welch, Inc., 418 U.S. 323, 335 n.6 (1974).

49. 376 U.S. at 285–86.

lower courts' conclusions for itself "to make certain that [these] principles have been constitutionally applied."[50]

The holding of the case created protection for false assertions of fact about public officials, but the Court was plainly concerned about commentary on government and government officials—that is to say, opinion. Justice Brennan's first sentence for the Court establishes as much: "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against *critics* of his official conduct."[51] Criticism is, of course, quintessential opinion.[52] The opinion teems with similar references reinforcing this impression.[53] Later explaining the doctrinal basis for its conclusions, the Court quoted its own statement in *Bridges v. California*: "[I]t is a prized American privilege to *speak one's mind*, although not always with perfect good taste, on all public institutions."[54] To "speak one's mind" is to opine.

The facts as well as the language of the *Sullivan* case suggest that the Court sensed that freedom to express opinion was at stake. The advertisement giving rise to the lawsuit was an appeal for funds to promote civil rights activism. There were, indeed, factual errors in the *Times* advertisement at issue, but they were small, some trivial.[55] Had there been none,

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50. Id. at 285.

51. Id. at 256 (emphasis added).

52. See, e.g., Moldea v. N.Y. Times Co., 22 F.3d 310 (D.C. Cir. 1994) (criticism of book about sports); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985) (criticism of restaurant); Fisher v. Wash. Post Co., 212 A.2d 335 (D.C. 1965) (criticism of art). The first Restatement's fair comment provisions use the term "criticism" rather than "opinion" for the protection of opinion. Restatement of Torts § 606(1) (1938).

53. See, e.g., id. at 268 ("None of the cases [cited by the plaintiff] sustained the use of libel laws to impose sanctions upon *expression critical* of the official conduct of public officials." (emphasis added)); id. at 269 ("The constitutional safeguard, we have said, 'was fashioned to assure unfettered *interchange of ideas* for the bringing about of political and social changes desired by the people.'" (emphasis added)) (quoting Roth v. United States, 354 U.S. 476, 484); id. at 272–73 ("[T]his Court has held that concern for dignity and reputation of the courts does not justify the punishment as criminal contempt of *criticism* of the judge or his decision." (emphasis added)).

54. 376 U.S. at 269 (quoting Bridges v. California, 314 U.S. 252, 270 (1941)) (emphasis added).

55. The Court summarizes the errors as follows:

> Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary

the overall import of statements in the advertisement would have been the same.[56] The Alabama jurors who awarded Sullivan $500,000 were not likely concerned by the inconsequential false statements of fact.[57] Neither were they likely moved by any injury done to Mr. Sullivan's reputation—there was every reason to believe that it had not been hurt.[58]

At bottom, the advertisement stated an opinion: the rectitude of those fighting for civil rights for African Americans in the South. The jury of white Alabamans was surely reacting to the advertisement's point

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> meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

376 U.S. at 258–59.

56. Questions broader than the extent of the ability of a public official to bring a libel suit were at issue in *Sullivan*. The advertisement was about the civil rights movement in the South. Its target was official government policy executed by public officials. The Court saw protection of freedom of speech at least in part as protection of democratic governance: "The right of free public discussion of the stewardship of public officials [that was], in Madison's view, a fundamental principle of the American form of government." Id. at 275.

Suppose the successful plaintiff in *Sullivan* had been a food-service worker at the Alabama State College claiming that it was false and defamatory for the advertisement to imply that he or she was involved in closing the school dining hall "in an attempt to starve [the protesting student body] into submission." Id. at 257. Such a low-level employee, even if an employee of the State, would not have had sufficient standing in the public hierarchy to be a public official for purposes of the *Sullivan* rule and therefore would not have been limited by the *Sullivan* holding had he or she brought a defamation suit based on the advertisement. See, e.g., Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 895 (Iowa 1989) (fireman not a *Sullivan* public official); LeDoux v. Northwest Publ'g, Inc., 521 N.W.2d 59, 65 (Minn. Ct. App. 1994) (municipal street and traffic control maintenance officer not a *Sullivan* public official); Lambert v. Corcoran, 619 N.Y.S.2d 326, 327 (App. Div. 1994) (senior court clerk not a *Sullivan* public official). Yet the purpose of the *Sullivan* rule was to protect "debate on public issues"—the statements contained in the advertisement. 376 U.S. at 270. Thus, in order fully to succeed, the shield established by *Sullivan* would have had to be broad enough to cover lawsuits seeking damages arising out of the advertisement's publication irrespective of whether they were brought by high public officials like Sullivan or petty public employees like the hypothetical cafeteria worker. If our hypothetical worker had received a $500,000 award arising out of the New York Times advertisement, would the *Sullivan* Supreme Court have let him or her keep it because the lawsuit would not have come within the protection that the Supreme Court erected for speech about public officials? I doubt it, although the *Sullivan* rule, and therefore the subsequent history of constitutional protection for defamatory statements, would have had to be different to accomplish that end.

57. See *Sullivan*, 376 U.S. at 256.

58. The *Sullivan* Court took pains to note that only one witness had said that if he had believed the statements in the advertisement, he doubted he would want to associate himself with or employ a person party to such actions, see id. at 260, but no one had testified that he or she believed the statements in the article referred to Sullivan. See id. at 260. The Court also pointed out that only 35 copies of the subject issue of the Times were circulated in Montgomery; 394 throughout the state. See id. at 260 n.3.

of view: that the black activists were right and that the popularly elected officials of Alabama were not. The jurors' libel verdict reflected their conclusion not that the advertisement's facts were *false*, but that the opinion it contained was *wrong*. This the First Amendment would not countenance.

The Court's decision in *Sullivan* did not say so. The Court was able, in the case before it, to shield unpopular criticism by protecting innocently made false statements of fact. It is difficult to read *Sullivan*, however, without inferring the Court's view that under the First Amendment, speakers must be free to express provocatively their disagreement with a community's notion of right and wrong.[59]

The Supreme Court might then have concluded that judges and juries are not permitted by the First Amendment to decide libel cases based on their own value judgments as to whether the statements at issue are or are not right. To paraphrase a dictum the Court would not utter for another ten years,[60] the Justices might have said that there is no such thing as a false opinion—unless the implication that the opinion is held by the speaker is false, or unless some other fact implied by the opinion is false. An opinion may be *wrong*, as opposed to false,[61] but even if perniciously so,[62] under the First Amendment we depend for that conclusion not on the conscience of judges and juries, but on popular judgment based on the competition of other ideas.

C. *The* Gertz *Dictum*

Soon after the tenth anniversary of its decision in *Sullivan*, the Supreme Court decided *Gertz v. Robert Welch, Inc.*,[63] a libel suit based on an article contained in a publication affiliated with the radically conservative John Birch Society. The article falsely asserted that Elmer Gertz, a lawyer for a family that had filed a politically charged civil complaint

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59. The choice of the subjective "actual malice" test, "subjective awareness of probable falsity," Gertz v. Robert Welch, Inc., 418 U.S. 323, 334–35 n.6. (1974) (citation omitted), to protect false statements of fact is interesting. A person who believes that an assertion of fact about a public official is true may make it with impunity. As suggested in Part I.B, supra, a statement of opinion cannot be said to be false provided it is genuinely held. Thus a person who believes a statement of opinion may make it with impunity. *Sullivan*'s treatment of assertions of fact about public officials is similar to the treatment of opinions as nonactionable so long as they are sincerely held. At the heart of both is the freedom of the individual to "to speak [his or her] mind." Bridges v. California, 314 U.S. 252, 270 (1941). As Professor Hill noted, "So far as dishonesty is concerned, it is arguable that an expression of opinion not honestly held is comparable to stating as a fact what is known to be false." Hill, supra note 7, at 1238 n.152.

60. "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." *Gertz*, 418 U.S. at 339–40.

61. See supra Part I.B, postulate 13.

62. E.g., "'Ethnic cleansing' is good and should be encouraged." See id.

63. 418 U.S. 323 (1974).

against a Chicago police officer for the alleged murder of a family member, had ties with specified left-leaning organizations.

The Court, in an opinion by Justice Powell, rehearsed the facts and procedural history of the case[64] and the history of the Court's constitutional defamation cases, beginning with *Sullivan*.[65] It then explained the balancing of interests that had by then led the law to treat public figures like public officials but differently from other defamation plaintiffs[66] and why the plaintiff was not a public figure,[67] and it set forth the constitutional limitations on defamation suits by persons who were neither public officials nor public figures.[68] With respect to defamation suits about such private plaintiffs, the *Gertz* Court held:

1. "[S]o 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,"[69] at least where the content of the defamatory statement "makes substantial danger to reputation apparent."[70]

2. "[T]he States may not permit recovery of presumed or punitive damages [against publishers or broadcasters], at least when liability is not based on . . . knowledge of falsity or reckless disregard for the truth." Those who cannot prove such "actual malice" may be compensated only for actual injury, although that includes, in addition to out-of-pocket loss, "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[71]

The opinion in *Gertz* began: "This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."[72] The theme was thus "accommodation." Missing was rhetoric about protecting false assertions of fact about Elmer Gertz in order to protect criticism about public affairs by the John Birch Society. To the contrary, the holding of the case was that the negligent misstatements of fact in communications disseminated by a politically oriented organiza-

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64. See id. at 325–32.

65. See id. at 332–39.

66. See id. at 342–46. The decision did not define "public figure," although courts have been stretching to find a definition in the language of Justice Powell's opinion ever since. See Sack on Defamation, supra note *, § 5.3.1.

67. See 418 U.S. at 351–52.

68. See id. at 347–50.

69. Id. at 347.

70. Id. at 348 (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion)).

71. Id. at 349–50.

72. Id. at 325. There is a minor mystery here. *Gertz* was decided more than three months after the tenth anniversary of *Sullivan*.

tion could indeed give rise to liability for damages irrespective of how fervently the assertions of fact were believed by the publisher to be true.[73]

Despite the absence of discussion about opinion or the extent to which the article in question may have been protected as criticism, the Court began its discussion of the balancing of interests between personal reputation and free speech thus:

> We begin with the common ground. 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.[74] But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.[75]

The statement served as background for the Court's explanation of why, in the realm of assertions of fact, a balance of expressional interests of speakers against the reputational interests of those spoken about is permissible. As Professor Hill noted, "[t]he problem of defamatory opinion was not remotely in issue."[76] Yet this off-hand dictum was to have a startling effect on the law of constitutional protection for opinion.[77]

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73. The plaintiff Gertz was ultimately awarded a judgment of compensatory damages of $100,000 and punitive damages of $300,000 for the publication at issue in the case. See Gertz v. Robert Welch, Inc., 680 F.2d 527, 531 (7th Cir. 1982). The award of punitive damages indicates that "actual malice" was proven and that the *Gertz* defendant was thus aware that what it published was probably false.

74. As Thomas Jefferson made the point in his first Inaugural Address: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." (footnote in the original, renumbered).

75. 418 U.S. 323, 339–40 (citation omitted).

76. Hill, supra note 7, at 1239.

77. Two cases, one decided the same day as *Gertz* and one several years before it, are part of the history of the Supreme Court's treatment of the relationship among the First Amendment, defamation, and opinion. In Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970), the Court found, *as a matter of constitutional law*, that the word "blackmail," used as a description of a local real estate developer's position taken in negotiations with a city council to obtain zoning variances, was not libelous under the circumstances.

> It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant. . . . [E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable.

Id. at 14.

And on the day the Court rendered its opinion in *Gertz*, it also decided Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). The Court held that the use of vigorous epithets in the context of a labor dispute could not support a defamation judgment, basing its holding, at least in part, on the *Gertz* principle that "there is no such thing as a false idea." Id. at 284. The epithets were opinion, as such unprovable, and therefore nonactionable.

D. *Professor Hill versus the Restatement: The Issue Joined*

At the time *Gertz* was decided, the American Law Institute was drafting its way toward the second Restatement's treatment of the law of defamation.[78] The first Restatement had dealt with opinion through the common law doctrine of fair comment:[79]

> Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,
> (a) is upon,
> (i) a true or privileged statement of fact, or
> (ii) upon facts otherwise known or available to the recipient as a member of the public, and
> (b) represents the actual opinion of the critic, and
> (c) is not made solely for the purpose of causing harm to the other.[80]

By the time Professor Hill was writing his article, however, the drafters of the second Restatement were in the process of abandoning fair comment in favor of sweeping protection for expressions of opinion based on the *Gertz* dictum, supported by the Supreme Court's opinions in rhetorical hyperbole cases: *Greenbelt* and *Letter Carriers*.[81] The second Restatement, as eventually adopted in 1977, provided:

> EXPRESSIONS OF OPINION
> 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.[82]

It was this approach that Hill addressed in his article.

Professor Hill began his analysis of constitutional protection for opinion with the first Restatement's treatment of opinion, which distinguished between those statements of opinion that qualified as "comment" and those that did not. With respect to the former, he was troubled by the fact that the case law, contrary to the terms of the Restatement, abounds with assertions that unreasonable or unfair opinion is not protected.[83] Reviewing the cases, he found that some of them seemed to hold that "excessively vituperative or extravagant remarks" were evidence "of malice in fact or ulterior motive," which defeated the privilege.[84] That, Hill thought, was unlikely to survive the constitutional cases, which he read not to permit defamation liability to arise from motive alone.[85]

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78. See Restatement (Second) of Torts §§ 558–623 (1977).
79. See supra Part II.
80. Restatement of Torts § 606(1) (1938).
81. *Greenbelt*, 398 U.S. at 6 and *Old Dominion Branch*, 418 U.S. at 283–87, discussed in note 77, supra. As noted in note 9, supra, at the time of the writing of the Hill Article, tentative draft No. 21 of the second Restatement had been circulated.
82. Restatement (Second) of Torts § 566 (1977).
83. See Hill, supra note 7, at 1229–36.
84. Id. at 1230–31.
85. See id. at 1230.

Second, Professor Hill examined cases suggesting that "unreasonableness" meant that there was an insufficient relationship between the opinion and the facts upon which the opinion was based, thereby implying a false assertion of fact. If that is *not* what unreasonableness means in those cases, and unfairness or unreasonableness was a matter of unbridled jury discretion, "[s]uch an approach threatens the free expression of opinion."[86] He concluded, though, that jurors were not in fact widely permitted to render verdicts on mere findings that opinions are unreasonable or unfair: "It is doubtful that such liability has really prevailed to any significant extent at common law, and it is inconceivable that such liability would be sustained by the Supreme Court."[87]

Third, with respect to fair comment, Hill denied the viability of any distinction in the common law between criticizing a person's work (privileged) and criticizing the person (not privileged); both were, or should have been, protected.[88] Fourth and finally on this score, he noted and emphasized the first Restatement's tenet that fair comment applies only to matters of public concern.[89]

Hill then turned to defamatory opinion outside the protection of the fair comment privilege—excluded either because the facts supporting the opinion were insufficiently indicated or because it was not about a matter of public concern. Under the common law, the statement might nonetheless be protected by the principle of "justification," which provided that a statement was not actionable if insofar as it was factual it was true, and insofar as it was opinion it was "justifiable."[90] According to English law, this meant that the *opinion* in question had to be "true."[91] The notion of "true" opinion is "meaningless," Hill said, unless the opinion implies a statement of fact or is not "evaluative."[92] If what the common law cases meant was that the jury was entitled to decide for itself whether an epithet as applied to a stated or generally understood state of facts was appropriate, that was contrary to constitutional principles requiring fault for liability. If, however, a jury was permitted to base a defamation award on a finding that an opinion was both defamatory and one that a reason-

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86. Id. at 1233.
87. Id. at 1235 (footnote omitted).
88. See id. at 1235–36.
89. See id. at 1236.
90. See id. at 1236–37 (footnotes omitted).
91. See id. at 1237.
92. See id. For a discussion of what it means for an opinion to be non-evaluative, see supra Part I.B.

able person would not have applied to the facts at issue—and therefore made with "fault"—that remained[93] and should remain[94] permissible.[95]

Traditionally, Hill continued, when an opinion that was not governed by fair comment analysis because it was not about a matter of public concern was accompanied by the facts that supported it, it was treated the same as a statement of opinion without the accompanying facts—actionable if "unreasonable." It is here that the Hill Article turned explicitly to the second Restatement, then in draft, and its contrary conclusion: that an outrageous statement of opinion based on truly stated facts can never be actionable because it is pure opinion not implying a false assertion of fact—and pure opinion can never be actionable.[96] And it is here that Professor Hill made his principal attack on the second Restatement position.

> In *Gertz v. Robert Welch, Inc.*, the Court stated as follows by way of dictum: "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."
>
> The problem of defamatory opinion was not remotely in issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem.
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> Yet it is apparently solely in consequence of the *Gertz* dictum that the *Restatement (Second)* now provides that an action can never lie for an opinion *qua* opinion.[97]

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93. See Hill, supra note 7, at 1238–39.

94. See id. at 1245 ("[T]he appropriate test should be whether the opinion is one that might have been expressed by a reasonable person in light of the underlying facts, unless the circumstances are deemed to require that the defendant be afforded an even more generous margin for error.").

95. For Hill's defense of juries' ability to find fault, see id.:

> Insofar as the privilege of fair comment is unavailable, and the only defense is that of justification, the distinction between opinion and fact is not a matter of much practical importance, at least after *Sullivan* and *Gertz*, since the fault principle is applicable to expressions both of opinion and fact, and the basic issue becomes the reasonableness (or recklessness) of the defendant's behavior in the circumstances.

The common law provides substantial additional protection for these sorts of opinions. It is with respect to opinions about private matters that qualified privilege is most likely to protect both the statements of opinion and the accompanying assertions, express or implied, of underlying facts. See generally Sack on Defamation, supra note *, ch. 9. Qualified privilege for protects, for example, defamatory statements made in communications with law enforcement personnel, id. § 9.2.1, reports on employees and prospective employees, id. § 9.2.2.1, teacher evaluations of students, id. § 9.2.2.2, statements among members of a group made in their common interest, id. § 9.2.3, and intra-familial communications, id. § 9.2.4.

96. See Restatement (Second) of Torts § 566 (1977).

97. Hill, supra note 7, at 1239–40 (footnotes omitted).

He pronounced the "drafting [to be] disruptive, for sensible solutions evolved by the common law are needlessly sacrificed."[98] After a review of an involved series of hypotheticals comparing the possible treatment of varying circumstances alternatively under the common law and the second Restatement, Hill concluded:

> [T]he *Restatement* formulation purportedly eliminating liability for defamatory opinion *qua* opinion (1) rests on the thinnest of foundations; (2) has a potential for disruption in areas where sensible solutions are available under common law precedents; and (3) fails utterly, in many situations, to achieve the objective of eliminating liability for unreasonable opinion.[99]

At the heart of Hill's discussion of opinion was the statement that "[t]he problem of defamatory opinion was not remotely at issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem."[100] It became the rallying cry for opponents of the Restatement position, chief among them then-Associate Justice Rehnquist.[101]

III. Constitutional Protection For Opinion After The Hill Article

A. *Opinion after* Gertz *and the Hill Article*

1. *Per se Protection for Opinion.* — The contest between the views of the second Restatement and the Hill Article was not a close one. Court after court adopted the Restatement view, relying on the *Gertz* dictum to apply a constitutionally based rule providing immunity for all expressions of opinion unless they implied false and defamatory assertions of fact.[102] Simultaneously, the common law fair-comment privilege was all but abandoned.

Some courts held that the rule derived from *Gertz* had rendered the fair-comment privilege obsolete.[103] Some referred to the fair-comment

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98. Id. at 1240.

99. Id. at 1244–45.

100. Id. at 1239.

101. See Ollman v. Evans, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., dissenting from denial of certiorari); Miskovsky v. Okla. Publ'g Co., 459 U.S. 923, 925 (1982) (Rehnquist, J., dissenting from denial of certiorari).

102. These decisions became "the fastest-growing body of defamation law in the 1980's." David A. Anderson, Is Libel Law Worth Reforming?, 140 U. Pa. L. Rev. 487, 507 (1991) (quoted in Sowle, supra note 22, at 468).

103. See Koch v. Goldway, 817 F.2d 507, 509 (9th Cir. 1987); Yerkie v. Post-Newsweek Stations, 470 F. Supp. 91, 94 (D. Md. 1979); Hofmann Co. v. E.I. Du Pont de Nemours & Co., 248 Cal. Rptr. 384, 395 n.10 (Cal. Ct. App. 1988); Mittelman v. Witous, 552 N.E.2d 973, 982 (Ill. 1989); Ferguson v. Watkins, 448 So. 2d 271, 278 (Miss. 1984); Nev. Indep. Broad. Corp. v. Allen, 664 P.2d 337, 343 n.6 (Nev. 1983); Kotlikoff v. Community News, 444 A.2d 1086, 1087 (N.J. 1982); Marchiondo v. N. M. State Tribune Co., 648 P.2d 321, 334 (N.M. Ct. App. 1981); Ryan v. Herald Ass'n, Inc., 566 A.2d 1316, 1321–22 (Vt. 1989). Cf.

privilege but then decided the cases before them on the basis of *Gertz* and the Restatement.[104] Others considered the constitutional privilege first and then declared that the constitutional analysis had rendered superfluous any consideration of the defendant's claim of fair comment.[105] According to one rare court that acceded to the Supreme Court's direction that non-constitutional questions are to be resolved before constitutional doctrine is invoked,[106] "[m]uch of what we find it necessary to write in this opinion may be likened unto deciding whether or not a base runner touched third when it is clear that he was thrown out at home plate."[107] Whatever the precise path to the conclusion, courts the length and breadth of the country came unanimously to the view that because *Gertz* said that under the First Amendment "there is no such thing as a false idea"[108] and that we do not depend on judges and juries for correcting opinions that seem false, opinions are as a matter of constitutional law not actionable.[109]

Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1503 (D.D.C. 1987) (stating that the fair comment privilege is "obsolete in light of broader first amendment protections").

104. See Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1285 n.13 (4th Cir. 1987); Action Repair, Inc. v. American Broad. Cos., 776 F.2d 143, 146–47 (7th Cir. 1985); Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984) (en banc); Orr v. Argus-Press Co., 586 F.2d 1108, 1113–15 (6th Cir. 1978); Henderson v. Times Mirror Co., 669 F. Supp. 356, 358–59 (D. Colo. 1987), aff'd, 876 F.2d 108 (10th Cir. 1989); Amcor Inv. Corp. v. Cox Ariz. Publications, Inc., 764 P.2d 327, 329–30 (Ariz. Ct. App. 1988); From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 54, 57 (Fla. Dist. Ct. App. 1981); Henry v. Halliburton, 690 S.W.2d 775, 780–83 (Mo. 1985); Immuno A.G. v. Moor-Jankowski, 549 N.E.2d 129, 132 (N.Y. 1989).

105. See Hoffman v. Washington Post Co., 433 F. Supp. 600, 603 (D.D.C. 1977), aff'd, 578 F.2d 442 (D.C. Cir. 1978); Mashburn v. Collin, 355 So. 2d 879, 886 (La. 1977); Camer v. Seattle Post-Intelligencer, 723 P.2d 1195, 1202 n.3 (Wash. Ct. App. 1986).

106. See, e.g., Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 160–61 n.2 (1979) (finding that "[d]ispositive issues of statutory and local law are to be treated before reaching constitutional issues").

107. Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1241–42 n.4 (5th Cir. 1980). But cf. West v. Thomson Newspapers, 872 P.2d 999, 1004–07 (Utah 1994) (providing a carefully reasoned explanation of the value of treating state common law and constitutional protections first).

108. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

109. Each of the federal circuits so held. See, e.g., Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1016 (1st Cir. 1988); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 223 (2d Cir. 1985); Jenkins v. KYW, a Div. of Group W, Westinghouse Broad. & Cable, Inc., 829 F.2d 403, 408 (3d Cir. 1987); Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1285–86 (4th Cir. 1987); Lindsey v. Board of Regents, 607 F.2d 672, 675 (5th Cir. 1979); Falls v. Sporting News Publ'g Co., 834 F.2d 611, 615–16 (6th Cir. 1987); Woods v. Evansville Press Co., 791 F.2d 480, 483 (7th Cir. 1986); Secrist v. Harkin, 874 F.2d 1244, 1248 (8th Cir. 1989); Ault v. Hustler Magazine, Inc., 860 F.2d 877, 880–81 (9th Cir. 1988); Rinsley v. Brandt, 700 F.2d 1304, 1309–10 (10th Cir. 1983) (false-light action); Keller v. Miami Herald Publ'g Co., 778 F.2d 711, 717 (11th Cir. 1985) (Florida law); Ollman v. Evans, 750 F.2d 970, 974–76 (D.C. Cir. 1984) (en banc).

Most of the states have also so held. See Moffatt v. Brown, 751 P.2d 939, 945 (Alaska 1988); MacConnell v. Mitten, 638 P.2d 689, 692 (Ariz. 1981); Baker v. Los Angeles Herald Examiner, 721 P.2d 87, 90 (Cal. 1986); Bucher v. Roberts, 595 P.2d 239, 240–41 (Colo.

2. *Distinguishing between Assertions of Fact and Statements of Opinion.* — The *Gertz*-based principle that statements of opinion are not actionable while assertions of fact may be is simply stated. Its application is not simple, requiring a means to differentiate between the two. After the decision in *Gertz*, courts began to divine rules for doing so.

The most influential discussion of this process was provided by Judge Starr in his opinion for the en banc District of Columbia Circuit Court of Appeals in *Ollman v. Evans.*[110] The background: A column written by widely read columnists Rowland Evans and Robert Novak about the plaintiff, a Marxist political scientist slated to head the University of Maryland's department of political science, urged academics to examine his candidacy in order to determine whether he would use the position to indoctrinate rather than to teach. The column contained various derogatory statements about the plaintiff, such as a purported quotation of an anonymous source that the plaintiff had "no status within the profession."[111] The plaintiff took exception and brought suit for libel.

1979); Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317, 1323–25 (Conn. 1982); Riley v. Moyed, 529 A.2d 248, 251 (Del. 1987); Myers v. Plan Takoma, Inc., 472 A.2d 44, 47 (D.C. 1983); Palm Beach Newspapers, Inc. v. Early, 334 So. 2d 50, 52 (Fla. Dist. Ct. App. 1976); S&W Seafoods Co. v. Jacor Broad. of Atlanta, 390 S.E.2d 228, 230 (Ga. 1989); Mittelman v. Witous, 552 N.E.2d 973, 983 (Ill. 1989); Jamerson v. Anderson Newspapers, Inc., 469 N.E.2d 1243, 1252–53 (Ind. Ct. App. 1984); Yancey v. Hamilton, 786 S.W.2d 854, 856 (Ky. 1989); Mashburn v. Collin, 355 So. 2d 879, 884–85 (La. 1977); True v. Ladner, 513 A.2d 257, 261 (Me. 1986); Kapiloff v. Dunn, 343 A.2d 251, 259 (Md. Ct. Spec. App. 1975), (recognizing a constitutionally based fair-comment privilege); Friedman v. Boston Broadcasters, Inc., 522 N.E.2d 959, 962 (Mass. 1988); Hodgins v. Times Herald Co., 425 N.W.2d 522, 527 (Mich. Ct. App. 1988); Gernander v. Winona State Univ., 428 N.W.2d 473, 475 (Minn. Ct. App. 1988); Meridian Star, Inc. v. Williams, 549 So. 2d 1332, 1335 (Miss. 1989); Henry v. Halliburton, 690 S.W.2d 775, 783 (Mo. 1985); Frigon v. Morrison-Maierle, Inc., 760 P.2d 57, 62 (Mont. 1988); Turner v. Welliver, 411 N.W.2d 298, 310 (Neb. 1987); Nevada Indep. Broad. Corp. v. Allen, 664 P.2d 337, 342 (Nev. 1983); Nash v. Keene Publ'g Corp., 498 A.2d 348, 351–52 (N.H. 1985); Kotlikoff v. Community News, 444 A.2d 1086, 1089 (N.J. 1982); Marchiondo v. Brown, 649 P.2d 462, 468 (N.M. 1982); Immuno A.G. v. Moor-Jankowski, 549 N.E.2d 129, 132 (N.Y. 1989); Scott v. News-Herald, 496 N.E.2d 699, 701–02 (Ohio 1986); Miskovsky v. Tulsa Tribune Co., 678 P.2d 242, 247 (Okla. 1983); Haas v. Painter, 662 P.2d 768, 770–71 (Or. Ct. App. 1983) (finding constitutional protection for opinion about public officials); Healey v. New England Newspapers, Inc., 520 A.2d 147, 150 (R.I. 1987); Finck v. City of Tea, 443 N.W.2d 632, 636 (S.D. 1989); Stones River Motors, Inc. v. Mid-South Publ'g Co., 651 S.W.2d 713, 721 (Tenn. Ct. App. 1983); El Paso Times, Inc. v. Kerr, 706 S.W.2d 797, 798 (Tex. Ct. App. 1986); Ryan v. Herald Ass'n, 566 A.2d 1316, 1318–19 (Vt. 1989); Chaves v. Johnson, 335 S.E.2d 97, 101–02 (Va. 1985); Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 75 (W. Va. 1981). Cases in other states indicated that those states would likely have held that opinion was constitutionally protected. See, e.g., Bland v. Verser, 774 S.W.2d 124, 125 (Ark. 1989) (finding that statements were factual, not constitutionally protected opinion); Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 891 (Iowa 1989) (stating in dictum that opinion is constitutionally protected); Renwick v. News & Observer Publ'g Co., 304 S.E.2d 593, 603 (N.C. Ct. App. 1983) (finding that statements were factual, not constitutionally protected opinion).

110. 750 F.2d 970 (D.C. Cir. 1984) (en banc).

111. Id. at 971–74.

Judge Starr acknowledged the *Gertz* dictum: "By this statement, *Gertz* elevated to constitutional principle the distinction between fact and opinion, which at common law had formed the basis of the doctrine of fair comment."[112] In the course of concluding that the column was non-actionable opinion,[113] Starr set forth in considerable detail four elements that he proposed be assessed in order to determine whether an allegedly defamatory statement is an assertion of fact or expression of opinion: first, "the common usage or meaning of the specific language of the challenged statement"; second, "the statement's verifiability—is the statement capable of being objectively characterized as true or false?"; third, "the full context of the statement—the entire article or column, for example"; and fourth, "the broader context or setting in which the statement appears."[114]

Whether this listing of factors was genuinely helpful to other courts' analyses or merely gave them boilerplate to justify their own subjective reactions to the statements before them may be debated. In any event, it is indisputable that courts often rehearsed these factors[115] or similar ones[116] when deciding whether statements in the defamation cases

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112. Id. at 975 (footnote omitted).

113. As to the statement that the plaintiff had "no status within the profession," Judge Starr applied his four-part test for a plurality only. See id. at 989 n.38* and the discussion of Judge Bork's concurrence on this point infra note 23.

114. Id. at 979. Judge Starr explained, "Different types of writing have . . . widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." Id.

> Judge Bork, concurring, proposed a more nuanced approach:
>
> The only solution to the problem libel actions pose [to freedom of speech and of the press] would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury. This requires a consideration of the totality of the circumstances that provide the context in which the statement occurs and which determine both its meaning and the extent to which making it actionable would burden freedom of speech or press.

Id. at 997 (Bork, J., concurring) (citation omitted). Applying that standard to the facts of the case, Judge Bork concluded that "[i]t is the totality of these circumstances that show the statement [about the plaintiff's lack of 'status within the profession'] to be rhetorical hyperbole" nonactionable under the Supreme Court's rhetorical hyperbole cases, Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974) and Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970). Id. at 1010.

115. See, e.g., Southern Air Transp., Inc. v. ABC, 877 F.2d 1010, 1016 (D.C. Cir. 1989); Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 685 (4th Cir. 1989); Keller v. Miami Herald Publ'g Co., 778 F.2d 711, 718 n.15 (11th Cir. 1985); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 226 (2d Cir. 1985); Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348, 376 (S.D.N.Y. 1998); Coliniatis v. Dimas, 848 F. Supp. 462, 468 (S.D.N.Y. 1994); Henry v. Nat'l Ass'n of Air Traffic Specialists, Inc., 836 F. Supp. 1204, 1215 (D. Md. 1993), aff'd mem., 1994 U.S. App. LEXIS 20293 (4th Cir. 1994); Yovino v. Fish, 539 N.E.2d 548, 552 n.5 (Mass. App. Ct. 1989); Brasher v. Carr, 743 S.W.2d 674, 679 (Tex. App. 1987), rev'd on other grounds, 776 S.W.2d 567 (Tex. 1989); Dunlap v. Wayne, 716 P.2d 842, 848 (Wash. 1986).

116. See, e.g., Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1287–88 (4th Cir. 1987); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302–03 (8th Cir.

before them were potentially actionable assertions of fact or statements of opinion therefore constitutionally immune from suit.[117]

B. *The Road to* Milkovich

The Restatement formulation of categorical protection for pure opinion based on the Supreme Court's *Gertz* dictum took hold virtually everywhere with one stark exception: the Supreme Court itself. Not only did the Court fail to adopt the approach, but several members explicitly stated their disagreement with it. In *Miskovsky v. Oklahoma Publ'g Co.*,[118] then-Associate Justice Rehnquist, joined by Justice White, dissented from denial of certiorari. According to then-Associate Justice Rehnquist the Supreme Court of Oklahoma, in its decision below dismissing a libel suit attacking a statement of opinion, probably

> was relying on the [*Gertz*] dicta: "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." [418 U.S.] at 339–40 (footnote omitted).
>
> A respected commentator on the subject has stated with respect to this quotation that "[t]he problem of defamatory opinion was not remotely in issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem."[119]

The respected commentator was, of course, our protagonist Professor Hill, and the quoted language was borrowed from Hill's discussion of protection for opinion.[120] Justice Rehnquist concluded: "I am confident

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1986) (en banc); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 783–84 (9th Cir. 1980).

117. Because the question of whether the statement is fact or opinion is uniformly treated as a question of law, see, e.g., Dilworth v. Dudley, 75 F.3d 307 (7th Cir. 1996); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc); Lewis v. Time Inc., 710 F.2d 549 (9th Cir. 1983); Baker v. Los Angeles Herald Examiner, 721 P.2d 87 (Cal. 1986); Owen v. Carr, 497 N.E.2d 1145 (Ill. 1986); Lyons v. Globe Newspaper Co., 612 N.E.2d 1158, 1162 (Mass. 1993) ("[i]f 'the statement unambiguously constitutes either fact or opinion'") (citations omitted); Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299 (N.Y. 1977); Williams v. Garraghty, 455 S.E.2d 209 (Va. 1995), the decision was typically made at the pleading stage, prior to discovery. If the statement in question was held to be opinion, the case was dismissed.

118. 459 U.S. 923 (1982) (Rehnquist, J., joined by White, J., dissenting from denial of certiorari). The Oklahoma Supreme Court had reversed a substantial verdict with respect to news stories, editorial cartoons and an editorial. In the editorial the newspaper defendant had said that the plaintiff "has sunk to a new low in Oklahoma political rhetoric—and for him that takes some doing." Id. at 924.

119. Id. at 925.

120. See Hill, supra note 7, at 1239.

this Court did not intend to wipe out this 'rich and complex history' with the two sentences of dicta in *Gertz* quoted above."[121]

Three years later Justice Rehnquist, now joined by Chief Justice Burger, made the same point while dissenting from denial of certiorari in *Ollman v. Evans*,[122] the case that had produced the most prominent decision adopting and applying the Restatement rule based on the *Gertz* dictum.[123] To what Justice Rehnquist had said in *Miskovsky*, quoting the same passage from the Hill Article, he added:

> At the time I joined the opinion in *Gertz* . . . I regarded [the *Gertz* dictum] as an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false "idea" in the political sense, and that the test of truth for political ideas is indeed the marketplace and not the courtroom. I continue to believe that is the correct meaning of the quoted passage. But it is apparent from the cases cited by petitioner that lower courts have seized upon the word "opinion" in the second sentence to solve with a meat axe a very subtle and difficult question, totally oblivious" of the rich and complex history of the struggle of the common law to deal with this problem."[124]

Justice Rehnquist seemed eager to embrace the Hill position if only the right case would come along and he could muster a majority of justices to support his position.

C. *Milkovich v. Lorain Journal Co.*

The move to reject protection for opinion under the *Gertz* dictum begun in the Hill Article and reflected in the two Rehnquist opinions on denial of certiorari appeared to culminate in 1990 with the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*[125] A sportswriter for a small Ohio daily newspaper had witnessed a melee during the course of a high school wrestling meet. Milkovich, the coach of one of the teams, and his school superintendent, Scott, thereafter testified before a state athletic board which then placed the team on probation because of its misbehavior. But a state court later overturned the board's decision on due-process grounds. This moved the sportswriter, apparently unaware that Milkovich's victory had been based on constitutional, not factual, considerations, to include these statements in his column:

> [A] lesson was learned (or relearned) yesterday . . . .
> A lesson which, sadly, in view of the events of the past year, is well they learned early.
> It is simply this: If you get in a jam, lie your way out.

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121. 459 U.S. at 925.

122. 471 U.S. 1127 (1985) (Rehnquist, J., joined by Burger, C.J., dissenting from denial of certiorari).

123. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc).

124. 471 U.S. at 1129 (quoting Hill, supra note 7, at 1239).

125. 497 U.S. 1 (1990).

> If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
> The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.
> . . . .
> Anyone 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.
> But they got away with it.[126]

Milkovich and Scott brought separate suits for defamation, each plaintiff claiming that he had been accused in the column of committing perjury during the hearings. While Milkovich's case was bouncing up and down in the Ohio courts,[127] Scott's reached the Ohio Supreme Court on appeal from summary judgment in the defendants' favor.[128] Applying the *Ollman* test, the court held that the sportswriter's column was "constitutionally protected opinion."[129] When Milkovich's case thereafter reached the state's intermediate court of appeals, that court, bound by the state supreme court's decision in *Scott*, held the material in the column to be constitutionally immune opinion.[130] The Ohio Supreme Court would not hear an appeal,[131] but the United States Supreme Court granted Milkovich's writ of certiorari, and reversed.[132]

By-then-Chief Justice Rehnquist, who had as we have seen twice previously indicated his view that the *Gertz* dictum had not supplanted common law fair comment, wrote the opinion for the Court. After describing the facts, his opinion outlined the common law privilege of fair comment,[133] and then the Supreme Court cases establishing constitutional

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126. Id. at 4–5.

127. The United States Supreme Court twice denied certiorari during the course of the litigation. See Lorain Journal Co. v. Milkovich, 474 U.S. 953 (1985); Lorain Journal Co. v. Milkovich, 449 U.S. 966 (1980).

128. Scott v. News-Herald, 496 N.E.2d 699 (Ohio 1986).

129. Id. at 706, 709 (citing Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc)).

130. Milkovich v. News-Herald, 545 N.E.2d 1320 (Ohio Ct. App. 1989).

131. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 10 (1990).

132. See id.

133. See id. at 12–14.

The Chief Justice introduced his discussion with Iago's oft-quoted statement from Shakespeare's *Othello*:

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

Id. at 12 (quoting William Shakespeare, Othello act 3, sc. 3). There is irony in the frequent use of this quotation, here and elsewhere, to support the legitimacy and value of

protection for defamatory falsehood,[134] including the cases holding that some rhetorical hyperbole was not actionable as a matter of constitutional law.[135]

The Chief Justice turned to the *Gertz* dictum: "[T]here 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."[136] The word "opinion" in *Gertz* meant "ideas," the Chief Justice wrote:[137]

> [W]e 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.[138]

After suggesting that statements in the form of opinion may themselves *be* assertions of fact, the Chief Justice's opinion specifically rejected the *Gertz*-based notion that "in every defamation case the First Amendment mandates an inquiry into whether a statement is 'opinion' or 'fact,' and that only the latter statements may be actionable."[139] It renounced the idea that "a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the *Gertz* dictum) be considered in deciding" whether the statement in issue is fact or opinion,[140] thus explicitly rejecting, although not naming, *Ollman* and other cases that had developed multi-factor tests for distinguishing between assertions of fact and statements of opinion.

The Chief Justice concluded for the Court that without per se immunity, opinion enjoyed sufficient constitutional protection under *Hepps*, which "stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state

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the law of defamation. Iago is, after all, one of the most brilliantly evil villains in all of Shakespeare; a "demi-devil." William Shakespeare, Othello act 5, sc. 2. By this sardonic entreaty a mock-reticent Iago entices Othello into wringing out of Iago the entirely false and malicious slander that Desdemona is unfaithful to the Moor—a lie that is central to Iago's treachery. Iago earlier expressed a sharply different view of the value of one's "good name." See id. act 2, sc. 3 (Iago, in reply to Cassio's ranting about his lost reputation: "I thought you had received some bodily wound. There is more sense in that than in reputation. Reputation is an idle and most false imposition, oft got without merit and lost without deserving."). Compare Othello's concern about his own reputation. See id. act 5, sc. 2 (Othello: "When you shall these unlucky deeds relate,/Speak of me as I am. Nothing extenuate,/Nor set down aught in malice.").

134. See 497 U.S. at 14–18.

135. See id. at 16–17 (citing, inter alia, Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970), Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988), and Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284–86 (1974)).

136. Id. at 18 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974)).

137. See id. (citing Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980)).

138. Id. at 18 (citation omitted).

139. Id. at 18–19.

140. Id.

defamation law, at least in situations like the present, where a media defendant is involved,"[141] and under other constitutional shelter afforded to various "types" of speech that "cannot 'reasonably [be] interpreted as stating actual facts.'"[142] The Court also found constitutional safeguards for opinion in its cases protecting invective, speech properly characterized as "rhetorical hyperbole," a "vigorous epithet," "loose, figurative" language, or "lusty and imaginative expression"—generally, speech that although literally asserting facts actually conveys only a point of view.[143]

Conspicuously missing, though, was a specific reference to the views of Professor Hill set forth in the Hill Article or a statement comparable to those in the Rehnquist *Miskovsky* and *Ollman* dissenting opinions[144] championing the continued vitality of the common law in this area. The intervening decision in *Hepps* had apparently altered Chief Justice Rehnquist's view. Under *Hepps*, at least in cases about media statements on matter of public concern, the Constitution thrusts on plaintiffs, contrary to the common law rule, the burden of proving falsity. Therefore, irrespective of the *Gertz* dictum, opinion was not actionable as a matter of *constitutional* law because plaintiffs in cases covered by *Hepps* cannot carry their burden of proving statements of opinion to be false—statements of opinion are by their nature incapable of being proven false. Common law fair-comment protection was largely redundant.[145]

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141. 497 U.S. at 19–20 (footnote omitted) (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)). The Court noted that *Hepps* had reserved judgment on statements by nonmedia defendants, and did so itself, id. at 20 n.6 (citing *Hepps*, 475 U.S. at 779 n.4), and that the same rule respecting public-figure and public-official libel suits was already in effect prior to *Hepps*.

142. Id. at 20 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988), and citing Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970) and Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974)).

143. See id. For a good example see Weinberg v. Pollock, No. CV89-02-77-735, 1991 Conn. Super. LEXIS 1435, at *5, *12–*15 (Conn. Super. Ct. June 19, 1991) (dismissing a defamation claim by a woman who claimed that the epithet "bastard" directed at her son, a convicted murderer, was actionable by her as an assault on her chastity).

The *Milkovich* Court emphasized that merely clothing an assertion of fact in language of opinion does not render it immune from a lawsuit for defamation. 497 U.S. at 19 ("'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement 'Jones is a liar.'"). See also Swengler v. ITT Corp., 993 F.2d 1063, 1071 (4th Cir. 1993); Weller v. ABC 283 Cal. Rptr. 644, 649 (Cal. Ct. App. 1991).

144. See discussion supra at notes 120–126.

145. In reflecting on the twisting course of the *Milkovich* opinion, it may be worth noting that *Milkovich* was considered by the Supreme Court on a somewhat telescoped schedule. Certiorari was granted on January 22, 1990. Milkovich v. Lorain Journal Co., 493 U.S. 1055 (1990). Argument was held some three months later, on April 24, with the opinion of the Court handed down less than two months after argument, amid the end-of-term rush, on June 21. *Milkovich*, 497 U.S. at 1. One can speculate that the Chief Justice anticipated writing an expansion of his *Miskovsky* and *Ollman* dissents from denial of certiorari rejecting protection of opinion based on the *Gertz* dictum, see supra text at notes 64–72, only to find his way blocked by *Hepps*. The opinion therefore begins in one direction, apparently intent on scuttling the sixteen years of case-law holding that opinion is per se non-actionable under *Gertz*, only to conclude, based on *Hepps*, that "a statement of

D. *Opinion after* Milkovich

Milkovich had little impact on the law. The Court's opinion rejected a rule that opinions are protected per se by *Gertz*'s statement that the validity of opinions is not to be decided by judges and jurors. The largely indistinguishable principle derived from *Hepps*, that opinions, at least when uttered by members of the media about matters of public concern,[146] cannot be actionable because they cannot be proven false, however, continued to govern.[147]

Most courts considering opinion since *Milkovich* have therefore reached the result that they likely would have before the Supreme Court decided the case.[148] They have done so either because what was said, privileged as opinion before *Milkovich*, remains nonactionable after *Milkovich* inasmuch as it is not capable of being proved false as required by the rule of *Hepps*,[149] or because it is "rhetorical hyperbole," "vigorous

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opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." Id. at 20.

146. *Hepps* thus seems to give rise to a privilege for opinion based on whether the Court decides that the statement at issue is about a matter of public concern. In so doing, it turned its back on the fact that the Court has specifically eschewed such inquiries by courts in *Gertz* and elsewhere. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) ("We doubt the wisdom of committing th[e] task [of deciding on an ad hoc basis which publications address issues of 'general or public interest'] to the conscience of judges."); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974). See also Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 561 (1985) (quoting Judge Meskill's dissenting opinion in the court below, 723 F.2d 195, 215 (2d Cir. 1983), commenting in a copyright case that "'[courts] should be chary of deciding what is and what is not news.'").

147. See, e.g., Andrews v. Stallings, 892 P.2d 611, 619 (N.M. Ct. App. 1995); Brian v. Richardson, 660 N.E.2d 1126, 1129 (N.Y. 1995).

148. See, e.g., Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 728 (1st Cir. 1992); Turner v. Devlin, 848 P.2d 286, 290 n.8 (Ariz. 1993); Dodson v. Dicker, 812 S.W.2d 97, 99 (Ark. 1991); Morningstar, Inc. v. Los Angeles Superior Court, 29 Cal. Rptr. 2d 547, 556 (Cal. Ct. App. 1994) ("Before *Milkovich* and after, California courts have applied a 'totality of the circumstances' test to review the meaning of the language in context and its susceptibility to being proved true or false.") (quoting Moyer v. Amador Valley Joint Union High School Dist., 275 Cal. Rptr. 494, 497 (Cal. Ct. App. 1990)); *Moyer*, 275 Cal. Rptr. at 497 ("Before *Milkovich*, the California courts had employed a 'totality of the circumstances' test to differentiate between fact and opinion . . . . *Milkovich* did not substantially change [this] principle[ ]"); NBC Subsidiary, Inc. v. Living Will Ctr., 879 P.2d 6, 10 (Colo. 1994); Piersall v. Sportsvision of Chicago, 595 N.E.2d 103, 107 (Ill. App. Ct. 1992) (no facts capable of verification); Starnes v. Capital Cities Media, Inc., 19 Media L. Rep. (BNA) 2115, 2120 (Ill. App. Ct. 1992); Hunt v. University of Minn., 465 N.W.2d 88, 93–94 (Minn. Ct. App. 1991); K Corp. v. Stewart, 526 N.W.2d 429, 434–35 (Neb. 1995); Wheeler v. Nebraska State Bar Ass'n, 508 N.W.2d 917, 921 (Neb. 1993) (in "plac[ing] emphasis on the objectivity and verifiability of a statement" *Milkovich* itself used an approach similar to pre-*Milkovich* cases depending on a fact/opinion dichotomy); Maynard v. Daily Gazette Co., 447 S.E. 2d 293, 295 (W. Va. 1994).

149. See *Milkovich*, 497 U.S. at 17. "Pure" opinions "'do not imply facts capable of being proved true or false,'" Partington v. Bugliosi, 56 F.3d 1147, 1153 n.10 (9th Cir. 1995) (quoting Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 n.2 (9th Cir. 1990)), and are therefore fully protected under *Hepps* as they were under the pre-*Milkovich* case law. See also Groden v. Random House, Inc., 1994 U.S. Dist. LEXIS 11794, at *21 (S.D.N.Y. August

epithet," "loose, figurative" language, or "lusty and imaginative expression."[150] As Judge Posner summed it up in 1993, citing *Milkovich*: "[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."[151]

22, 1994), aff'd, 61 F.3d 1045 (2d Cir. 1995) (false advertising case; statement as to assassination of President Kennedy, ostensibly factual, treated as protected opinion because of inability to establish facts about the event); *Maynard*, 447 S.E.2d at 297 (suggestion that a person involved in college basketball used position to obtain scholarship for his son is nonactionable because "[c]harges of favoritism and nepotism flourish in environments where people compete for positions, and no amount of independent or objective evidence is likely to appease those who make an issue of this incident and whose minds are already made up").

150. See, e.g., Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1093–99 (4th Cir. 1993) (finding that none of the statements made in a newspaper article, either singly or in combination, were defamatory under the *Milkovich* standard); Wellman v. Fox, 825 P.2d 208, 210–11 (Nev. 1992) (rhetorical hyperbole); Haueter v. Cowles Publ'g Co., 811 P.2d 231, 239 (Wash. Ct. App. 1991) (quoting *Milkovich* reference to protection for "rhetorical hyperbole").

The Ninth Circuit set forth three factors to be weighed in deciding whether a statement is actionable: (1) whether the use of figurative or hyperbolic language negates the impression that facts were being asserted, (2) whether the general tenor of the publication negates the impression, and (3) whether the assertion is capable of being proved true or false. See Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990); accord Dodson v. Dicker, 812 S.W.2d 97, 98 (Ark. 1991) (citing *Unelko*); Edwards v. Hall, 285 Cal. Rptr. 810, 819–20 (Cal. Ct. App. 1991); Keohane v. Stewart, 882 P.2d 1293 (Colo. 1994); Dulgarian v. Stone, 652 N.E.2d 603 (Mass. 1995).

To be sure, a few cases dealing with statements about matters of public concern have been and will be decided differently after *Milkovich* than they would have been before. See, e.g., *Unelko*, 912 F.2d at 1057 (holding that criticism of consumer product statement held to be non-actionable opinion by the district court pre-*Milkovich* contained potentially actionable statements of fact but affirming nonetheless on the ground that there was insufficient evidence that the statements of fact were false to require trial). See also Scheidler v. NOW, Inc., 751 F. Supp. 743, 745 (N.D. Ill. 1990) (reversing, in light of *Milkovich*, earlier ruling that statements are insulated from a defamation claim as "opinion"). Courts may also now be more likely to examine closely what is ostensibly an opinion to discern whether it implies provable facts. See, e.g., *Unelko*, 912 F.2d at 1053; White v. Fraternal Order of Police, 909 F.2d 512, 522–23 (D.C. Cir. 1990); Chapin v. Greve, 787 F. Supp. 557, 563–68 (E.D. Va. 1992), aff'd, 993 F.2d 1087 (4th Cir. 1993); *Scheidler*, 751 F. Supp. at 745; Don King Prods., Inc. v. Douglas, 742 F. Supp. 778, 784–85 (S.D.N.Y. 1990); Yetman v. English, 811 P.2d 323, 327–33 (Ariz. 1991); Gill v. Hughes, 278 Cal. Rptr. 306, 311 (Cal. Ct. App. 1991); Florida Med. Ctr., Inc. v. New York Post Co., 568 So. 2d 454, 456–59 (Fla. Ct. App. 1990); Beasley v. St. Mary's Hosp., 558 N.E.2d 677, 683 (Ill. App. Ct. 1990); In re Westfall, 808 S.W.2d 829, 833 (Mo. 1991) (en banc); Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 920 (Tex. App. 1991).

151. Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993). The *Haynes* dictum has been quoted with approval in Levinsky's Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997); Partington v. Bugliosi, 56 F.3d 1147, 1156 (9th Cir. 1995); Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1441 (9th Cir. 1995); Quigley v. Rosenthal, 43 F. Supp. 2d 1163, 1174 (D. Col. 1999); Marshall v. Planz, 13 F. Supp. 2d 1246, 1259 (D. Ala. 1998); Russell v. ABC, No. 94C5768, 1997 U.S. Dist. LEXIS 14589, at *9 (N.D. Ill. Sept. 12, 1997); Moore v. University of Notre Dame, 968 F. Supp. 1330, 1334 (N.D. Ind. 1997); Boese v. Paramount Pictures Corp., 952 F. Supp. 550, 555 (N.D. Ill.

Even the *Ollman*-type factors used to identify statements of opinion survived *Milkovich* despite *Milkovich*'s explicit disapproval of them.[152] Consider the recent Ninth Circuit case of *Gilbrook v. City of Westminster*.[153] In the course of a labor conflict, a union official was referred to as a "Jimmy Hoffa." He brought suit asserting that the statement was slanderous. The Ninth Circuit, citing and quoting *Milkovich*, held that it was not actionable, observing that First Amendment "protection extends to statements of opinion, addressing matters of public concern, that do not 'contain a provably false factual connotation,' and to statements that cannot 'reasonably [be] interpreted as stating actual facts.'"[154]

The court then turned to its own previously adopted three-pronged counterpart to the *Ollman* test:

> First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.[155]

The court applied the three-factor analysis concluding that the "'Jimmy Hoffa' statement was protected by the First Amendment and, therefore, was not the type of speech that may be the subject of a state-law defamation action."[156] The *City of Westminster* court wrote as though

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1996); Silk v. City of Chicago, No. 95C0143, 1996 U.S. Dist. LEXIS 8334, at *110 (N.D. Ill. Jun. 4, 1996); Gosling v. Conagra, Inc., No. 95C6745, 1996 U.S. Dist. LEXIS 5356, at *11 (N.D. Ill. Apr. 22, 1996); Washington v. Smith, 893 F. Supp. 60, 62 (D.D.C. 1995); Libbra v. City of Litchfield, 893 F. Supp. 1370, 1378 (C.D. Ill. 1995); Pope v. Chronicle Publ'g Co., 891 F. Supp. 469, 475 (C.D. Ill. 1995); Lane v. Random House, 985 F. Supp. 141, 150 (D.D.C. 1995).

Justice Brennan had foretold as much: that courts in the wake of *Milkovich* might well use the same indicia that lower courts had been relying on to differentiate between actionable statements of fact and nonactionable statements of opinion to distinguish between actionable statements that are provably false and nonactionable statements that are not. See 497 U.S. 1, 24 (1990) (Brennan, J., dissenting). Justice Brennan specified three prominent cases from the pre-*Milkovich* era: Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir. 1986) (en banc); and Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), thus indicating their continuing viability.

152. See Lyons v. Globe Newspaper Co., 612 N.E.2d 1158, 1164 (1993) (citing The Supreme Court—Leading Cases, 104 Harv. L. Rev. 129, 219, 223–24 (1990)) ("Because the criteria used by lower courts to distinguish facts from opinion are consistent with *Milkovich*, the law of defamation will remain essentially unchanged.") Cf. Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1996) (disproving *Ollman*-type factors).

153. 177 F.3d 839 (9th Cir. 1999).

154. Id. at 861 (citing and quoting *Milkovich*, 497 U.S. at 20; alteration in original).

155. Id. at 862 (quoting Underwager v. Channel 9 Australia, 69 F.3d 361, 366 (9th Cir. 1995)).

156. Id. The court later observed:

Ollman, rejected by *Milkovich* nine years before, was still the law, and as though *Milkovich*, which *City of Westminster* quoted, had endorsed it.[157]

To summarize: *Milkovich* rejected the notion that the second part of the *Gertz* dictum, "[h]owever 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,"[158] established a privilege for defamatory opinion. But the decision left the first part of the *Gertz* dictum, "[u]nder the First Amendment there is no such thing as a false idea,"[159] reduced to the even simpler proposition that there is no such thing as false pure opinion,[160] alive and vibrant. With *Hepps* holding that, at least in a media case about a statement of public concern, the plaintiff must prove falsity to prevail in a defamation case,[161] the resulting syllogism appears to have become irresistible:

A statement[162] must be proved false to be actionable.

An opinion is not capable of being proved false.

An opinion therefore cannot be actionable.

The conclusion of the first syllogism led court after court to indulge in a second:

An opinion cannot be actionable.

Employing the *Ollman*-type factors to make the determination, the statement before this court is an opinion.

The statement therefore is not actionable.

> In the final analysis, [the] reference to Jimmy Hoffa was the type of rhetorical hyperbole or caustic attack that a reasonable person would expect to hear in a rancorous public debate involving money, unions, and politics. Therefore, the statement could not give rise to a cognizable claim of defamation.

Id. at 863.

157. There does appear to be a thread of inconsistency in all of this. One of the several factors in determining whether a statement is non-actionable opinion using one of the multi-factor tests is "verifiability." See, e.g, Underwager v. Channel 9 Australia, 69 F.3d 361, 366 (9th Cir. 1995); Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc). Yet once it is determined that a statement is opinion it becomes non-actionable *solely* because it is not verifiable, irrespective of the other factors—it is not provably false and therefore not actionable under *Hepps*. Why not use a one-factor test—verifiability? Perhaps what is meant by verifiability as a factor in the multi-factor test is that the *appearance* of verifiability combined with other factors helps determine whether the statement in question *is* verifiable. In any event, this mechanism for deciding which statements are non-actionable opinions seems to have chugged along without courts addressing the issue.

158. 418 U.S. at 339–40 (1974).

159. Id. at 339.

160. Perhaps it is better, albeit rarely, said that genuinely held opinions are necessarily true inasmuch as they accurately describe the speaker's state of mind.

161. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986).

162. At least if it is by a member of the media and about a matter of public concern.

E. *Protection for Nonmedia Statements and Opinions on Private Matters*

The *Hepps* principle holding that plaintiffs must prove falsity[163] leads to the conclusion that opinion, which cannot be proved false, cannot be actionable. But the *Hepps* rule explicitly applies only to speech by media defendants about matters of public concern.[164] The residual question is: Is speech either by non-media defendants or about matters not of public concern covered by the *Hepps* principle and, if not, does blanket protection for statements of opinion prevail?

With respect to non-media defendants where the speech is about a matter of public concern, the answer seems relatively clear. As in other areas of defamation law,[165] courts have tended to shy away from a press/non-press distinction. They apply *Hepps*—and therefore the *Hepps*-based protection for opinion—to non-media defendants.[166]

The answer is not at all so clear with respect to opinion about non-public matters. Authority is sparse. It is possible that *Hepps* does not apply and the burden of proof as to truth remains where it was under the common law—with the defendant.[167] It may be, then, that falsity is not

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163. See 475 U.S. at 767 (1986).

164. See id. at 776–77 ("To ensure that true speech on matters of public concern is not deterred, we hold 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.").

165. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), which established that "fault" was required for liability in a case against the media. This principle has been interpreted by a majority of courts to apply to nonmedia cases too. See Sack on Defamation, supra note *, §§ 6.5.1–2.

166. See, e.g., Burroughs v. FFP Operating Partners, L.P., 28 F.3d 543, 549 (5th Cir. 1994); In re IBP Confidential Business Documents Litig., 797 F.2d 632, 644 (8th Cir. 1986); Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1511 (D.D.C. 1987); Nizam-Aldine v. City of Oakland, 54 Cal. Rptr. 2d 781, 786 (Cal. Ct. App. 1996); Kahn v. Bower, 284 Cal. Rptr. 244, 249 (Cal. Ct. App. 1991); Ayala v. Washington, 679 A.2d 1057, 1062–63 (D.C. Ct. App. 1996); Wheeler v. Nebraska State Bar Ass'n, 508 N.W.2d 917, 921 (Neb. 1993) (citing Don King Prods., Inc. v. Douglas, 742 F. Supp. 778, 784 (S.D.N.Y. 1990)). See also Jeffries v. Metro-Mark, Inc., 45 F.3d 258, 261 (8th Cir. 1995) (citing Minnesota case law, but not *Hepps*, to the effect that falsity is one of the elements of defamation that the plaintiff is required to prove); Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp, 878 F. Supp. 804, 819 (D. Md. 1995) (similar; Maryland law).

Justice Brennan, joined by Justice Blackmun, concurred in *Hepps* specifically to reject the viability of any possible press/non-press distinction reserved by the *Hepps* majority opinion. *Hepps*, 475 U.S. at 779–80 n.6. And in describing *Hepps* in *Milkovich*, Chief Justice Rehnquist referred to its limitation to "matters of public concern" but ignored the possibility that it applied to cases involving press defendants alone. Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).

167. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (holding that the *Gertz* requirement that actual malice be established as a prerequisite to the imposition of punitive damages in a defamation suit does not apply to awards arising out of communications about private matters). Similarly, the few lower courts that have addressed the issue seem to have held that the *Gertz* fault requirement does not apply to speech on private matters either. See Sack on Defamation, supra note *, § 6.6, at 22–23.

constitutionally required for liability to be imposed and that the syllogism that underlies per se protection for opinion therefore fails here.

IV. Retrospective

Having attempted to describe the development of the law of opinion using the Hill Article as a lens through which to view it, we are left with the overarching issue of whether constitutional protection for opinion as it now stands fulfils the First Amendment goals set out by the Supreme Court at the point of embarkation: Does it insure that "debate on public issues [will] be uninhibited, robust, and wide-open"?[168] Does there remain "a prized American privilege to speak one's mind"?[169] At the same time, is it consistent with what Justice Stewart called "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt [which] 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"?[170] These are fundamental questions; we can scarcely begin to consider them here.

This much seems plain: Reversion to reliance solely on the common law protection, particularly fair comment, would be ill-advised and is unlikely. Professor Hill spoke of the "rich and complex history" of the common law fair-comment privilege[171]—richness and complexity were a large part of the problem. Under the common law regime, a person's decision to speak required a prediction as to which State's law would govern any ensuing litigation, then a guess as to how a jury would determine gossamer issues such as whether an opinion was "unreasonably violent or vehement," "excessively vituperative," presented in a "proper manner" and, most generally, was "fair."[172] Those imprecise and subjective criteria stood as open invitations to judges and juries to ask themselves whether they thought the opinions to be right or wrong, and to decide the cases before them accordingly. With present-day media and non-media commentary as likely to be spread nationwide as shouted across a back fence, a common law regimen would threaten six-, seven-, and even eight-figure libel judgments resting on findings by far-away, sometimes hostile, juries as to what is "fair" or "reasonable," transmogrified, one might rightly fear, into conclusions as to whether the opinion of the outsider/publisher about local people and affairs is wrong or offensive.[173] The "uninhibited,

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168. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
169. Bridges v. California, 314 U.S. 252, 270 (1941).
170. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966)(Stewart, J., concurring).
171. Hill, supra note 7, at 1239–40.
172. Id. at 1229–30 (footnotes omitted).
173. With respect to wire copy or syndicated material, for example, an aggrieved person could bring separate actions in many jurisdictions, each applying its own common law standards. See, e.g., Seth A. Kaplan, Note, Fact and Opinion After *Gertz v. Robert Welch, Inc.*: The Evolution of a Privilege, 34 Rutgers L. Rev. 81, 87–88 (1981) (describing a series of suits brought by a Congressman against newspapers carrying a syndicated column that allegedly accused him of anti-Semitic behavior. Most of the courts held the column to be

robust, and wide-open" debate[174] that *Sullivan* sought to ensure would be seriously at risk. The need for its replacement by a simpler and broader constitutionally based immunity was compelling and the ascendancy of that immunity seems in retrospect to have been inevitable.

By contrast with fair comment, the modern categorical constitutional protection for statements of opinion by and large protects debate while leaving some room for protection of reputational interests:

• Even though difficult to apply in some cases, it is simple, derived from an easily understood logical framework, can be applied with some consistency, and is therefore reasonably predictable. For example, however difficult the fact/opinion distinction may be as a practical matter or troubling as a theoretical one,[175] I am convinced that the average publisher or broadcaster editorializes widely and freely because he or she does so with predictably minimal risk of a libel judgment.[176]

• It is a single national standard that should operate with a significant degree of uniformity irrespective of where in the nation a statement is judged, how provocative it may be there and what frame of mind a local jury might be in—thus addressing the problem of *Sullivan*-like verdicts based on a jury's judgment that an outsider's statement is wrong rather than false.[177]

• It is applied as a matter of law by judges less likely to be moved by such sentiments in any event.

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non-libelous; one held it to be actionable and unprotected by the doctrine of fair comment.) See Sweeney v. Schenectady Union Publ'g Co., 122 F.2d 288 (2d Cir. 1941), aff'd, 316 U.S. 642 (1942). See also Curtis Publ'g Co. v. Butts, 388 U.S. 130, 158–59 (1967) (holding no liability for a report on a "public figure" if standard of responsible reporting and investigation is met). The Associated Press dispatch in *Curtis* resulted in at least 15 different lawsuits by the plaintiff against various defendants throughout the United States. See Walker v. Pulitzer Publ'g Co., 394 F.2d 800, 806–07 (8th Cir. 1968) (collecting cases).

174. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

175. See generally Ollman v. Evans, 750 F.2d 970, 993 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), discussed at note 18, supra.

176. This statement is based largely on the writer's experience as a practitioner representing the press. Decided cases involving what is clearly commentary are rare. The author can recall personal involvement in but two American cases, over more than thirty years, that arose from editorials. One was decided in large part on the basis of the especially broad current protection for opinion conferred by New York constitutional law. See Millus v. Newsday, Inc., 675 N.E.2d 461, 462–63 (N.Y. 1996). The other was based on a statement of fact in an editorial held not to have been published with "actual malice." See Speer v. Ottaway Newspapers, Inc., 828 F.2d 475, 478 (8th Cir. 1987). The defendants won both. Newspaper publishers' lawyers of the writer's acquaintance spend infinitely more pre-publication time with reporters than they do with even the most provocative editorial writers. Cause and effect would be difficult to establish, but the writer doubts that the same state of affairs would prevail if editorials were governed by the common law and had to be defended by demonstrating that they were "not . . . 'unreasonably violent or vehement' or 'excessively vituperative'; that [they were] . . . 'reasonable inference[s] from facts truly stated'; that [they were] presented in a 'proper manner' and [were] 'based upon reasonable or probable cause'; and especially that [they were] 'fair.'" Hill, supra note 7, at 1229–30 (describing common law fair comment) (footnotes omitted).

177. See supra note 59 and accompanying text.

• It operates at the earliest stages of the proceeding, on motion to dismiss,[178] thereby avoiding most of the expense of litigation when successfully applied, encouraging speech free from the fear of such expense.[179]

• It continues to reflect the common law's understanding that assertions of fact are more likely to injure reputation than are statements of opinion, which tend to reflect as much on the person speaking as on the person spoken about.

• It continues to allow liability to be imposed for false express or implied defamatory assertions of fact.

The resulting state of the law with respect to communications about matters of public concern is consistent with the postulates with which we began this discussion. The distinction between fact and opinion is observed.[180] Purely subjective statements are considered opinions, not provably false and therefore not actionable.[181] Epithets remain non-actionable.[182] Statements that are assertions of fact or imply assertions of fact may give rise to liability.[183] A statement of opinion may not become actionable by being judged to be wrong.[184] And whether an opinion may be held to be false if it is not genuinely held by the speaker remains an open question because, while it is in a sense false, there are reasons of policy that may militate against allowing courts to make that inquiry.[185]

The state of the law with respect to opinions expressed on private subjects, though, remains unsettled. *Hepps* expressly exempted suits based on statements about private matters from its holding that the plaintiff must prove falsity to recover;[186] even if such an opinion is neither true nor false, it at least arguably may be actionable despite the First Amendment.

Here, then, the tension between the Restatement and the Hill Article remains unresolved. Under the Restatement, *no* opinion that did not imply a false defamatory assertion of fact was actionable.[187] Not so, accord-

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178. See supra note 117.

179. Cf. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964), where the Court indicated that:

> Under . . . a rule [protecting only the truth], 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.*

(emphasis added).

180. See supra Part I.B, postulates 1 and 10.

181. See supra Part I.B, postulates 3, 4, 5, and 12.

182. See supra Part I.B, postulate 6.

183. See supra Part I.B, postulates 2, 9, and 12.

184. See supra Part I.B, postulate 13.

185. See supra Part I.B, postulate 11.

186. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775–77 (1986) (noting that when both speech and plaintiff are private, "the constitutional requirements do not necessarily force any change in . . . the common law landscape").

187. See Restatement (Second) of Torts § 566 (1977).

ing to the Hill Article. Expressions of opinion as to private affairs may be actionable under the common law, which applies still. The common-law fair-comment privilege is not available because of the absence of "public concern,"[188] so "the appropriate test should be whether the opinion is one that might have been expressed by a reasonable person in light of the underlying facts. . . ."[189] In his dispute with the drafters of the Restatement, to this extent, Professor Hill may yet prevail.[190]

188. See Restatement of Torts § 606(1) (1938).

189. Hill, supra note 7, at 1245. As already noted, supra note 95, common law protection for opinion is augmented by various common law privileges when the opinion is spoken on a privileged occasion.

190. Whether this view *should* prevail, whether the common law provides sufficient protection even for statements about private matters, remains an open question. Perhaps in the age of instant, world-wide communications about the personal, the familial, and the trivial, in light of the expenses of modern litigation and the danger of large jury awards that would be based on a jury's view of the opinion's reasonableness, the classic common law approach undervalues this species of communication.