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Rodney W. Ott

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FACT AND OPINION IN DEFAMATION: RECOGNIZING THE FORMATIVE POWER OF CONTEXT

INTRODUCTION

Despite decades of modern first amendment litigation, courts continue to struggle with the basic distinction between fact and opinion.[1] In his

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1. An extreme example of the debate can be found in Milkovich v. News-Herald, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), *cert. denied*, 474 U.S. 953 (1985), and Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986). Both cases involved the same sports column containing the statement " '[a]nyone who attended the [event] knows in his heart that [plaintiffs] lied at the hearing after each having given his solemn oath to tell the truth.' " *Scott*, 25 Ohio St. 3d at 244, 496 N.E.2d at 701 (quoting Diaduin, *Maple Beat the Law with the 'Big Lie,'* News-Herald, Jan. 8, 1975); *Milkovich*, 15 Ohio St. 3d at 293, 473 N.E.2d at 1192 (same).

In *Milkovich*, the Supreme Court of Ohio held the statement to be factual. *See* 15 Ohio St. 3d at 298-99, 473 N.E.2d at 1196-97. Two years later in *Scott*, after the composition of the court had altered, it held the statement to be opinion. *See* 25 Ohio St. 3d at 254, 496 N.E.2d at 709. Based on that later decision, the Court of Appeals of Ohio, Lake County, affirmed the trial court's grant of summary judgment for the defendants in Milkovich's case. *See* Milkovich v. News-Herald, 46 Ohio App. 3d 20, 545 N.E.2d 1320, *appeal dismissed*, 43 Ohio St. 3d 707, 540 N.E.2d 724 (1989). After sixteen years and extensive litigation, the Supreme Court has recently granted certiorari. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 863 (1990). In the words of one scholar, "[t]he libel action is an ungainly form of relief; it is neither quick, certain nor cheap." T. Emerson, The System of Freedom of Expression 538 (1970).

A flood of commentary has appeared on the fact-opinion distinction. *See generally* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 869-80 (1984) (arguing fact/opinion distinction is irrelevant because plaintiff must prove falsity); Heidig, Ollman v. Evans: *Skinning the Membrane of Fact Versus Opinion*, 23 Tort & Ins. L.J. 232, 247 (1987) (discussing each *Ollman* opinion and suggesting that four-factor test be applied only when public figure involved); Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 603, 657-66 (1990) (distinguishing between fact and opinion according to whether statement depends for its validity upon standards or conventions of particular community, with constitutional privilege for opinion justified to extent of allowing public debate about those community standards); Spellman, *Fact or Opinion: Where to Draw the Line*, 9 Comm. & Law, Dec. 1987, at 45, 61 (discussing *Janklow* and *Ollman* in casenote fashion, finding they provide "significant protection" for the media); Note, *The Fact-Opinion Distinction in Libel Law: The Second Circuit Adopts a More Comprehensive Approach*, 52 Brooklyn L. Rev. 879, 908-12 (1986) (discussing *Mr. Chow* and arguing that opinion determination should consider whether private or public plaintiff is involved); Note, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 Calif. L. Rev. 1001, 1019, 1055-56 (1986) [hereinafter Note, *Statements of Fact*] (finding *Ollman* offers "verifiability test" providing bright-line rule); Note, *The Fact-Opinion Determination in Defamation*, 1988 Colum. L. Rev. 809, 830-31 [hereinafter Note, *Fact-Opinion Determination*] (arguing that courts making distinction should look to explicitness of statement and whether it implicates "core first amendment values"); Note, *Will Words Never Hurt?*—Janklow v. Newsweek, Inc., 19 Creighton L. Rev. 1015, 1034-35 (1986) (discussing *Janklow* before en banc reversal and suggesting first amendment principles be balanced in four-factor test); Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 Geo. L.J. 1817, 1845-49 (1984) [hereinafter Note, *Need for a Bright-Line Rule*] (finding *Ollman* vague, unpredictable and leading to self-censorship); Note, *Structuring Defamation Law to Eliminate the Fact-Opinion Determination: A Critique of* Ollman v. Evans, 71 Iowa L.

book about political and legal disputes on an Indian reservation, *In the Spirit of Crazy Horse*, Peter Matthiessen found the conclusion " 'all but inescapable' " that the plaintiff FBI agent " 'knowingly prepared [a witness] to give false testimony' " at a criminal trial.[2] The Court of Appeals for the Eighth Circuit held this to be a constitutionally protected statement of opinion.[3] In contrast, a television anchorman in Chicago, during the "Perspective" section of a newscast, criticized a cigarette company for its advertisements, concluding that " '[t]hey're not slicksters. They're liars.' "[4] The Court of Appeals for the Seventh Circuit held this accusation of dishonesty to be a defamatory statement of fact.[5]

On their face, these contradictory holdings seem odd: the milder accusation, "liar," was actionable, while a supposedly stronger allegation of criminal subornation of perjury and obstruction of justice was not. Even more striking, however, each court asserted that it distinguished fact from opinion by using the influential four-factor test formulated in *Ollman v. Evans*.[6] The *Ollman* test requires consideration of a statement's precision, verifiability, literary context and social context when separating fact from opinion.[7]

In practice, the courts have given qualitatively different emphases to *Ollman*'s four-factor analysis. These strikingly varied outcomes depend upon whether greater stress is placed on the abstract precision and verifiability of a statement, or on the literary and social context in which the statement was made. Emphasizing the non-contextual factors of preci-

Rev. 913 (1986) [hereinafter Note, *Structuring Defamation Law*] (finding fact/opinion distinction unnecessary, and arguing that *Ollman* allows judge to usurp jury's role); Note, *The Fact/Opinion Distinction: An Analysis of the Subjectivity of Language and Law*, 70 Marq. L. Rev. 673, 680-83 (1987) (arguing, perhaps unnecessarily, that words are ambiguous and fact/opinion distinction would be difficult to draw); Note, *Fact and Opinion After* Gertz v. Robert Welch, Inc.: *The Evolution of a Privilege*, 34 Rutgers L. Rev. 81, 83 (1981) [hereinafter Note, *Evolution of a Privilege*] (arguing that *Gertz* should not be read to create a privilege for opinion); Note, *Defamation—Actionable Statement of Fact Versus Privileged Opinion*: Ollman v. Evans, 34 U. Kan. L. Rev. 367, 383-85 (1985) [hereinafter Note, *Defamation*] (finding *Ollman* amounts to elaborate ad hoc judgment call, providing no clear guidance); Note, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege*, 98 Yale L.J. 1215, 1234 (1989) (arguing that satire should always be considered privileged opinion); Comment, *Allegations of Criminal Conduct: Application of the Fact-Opinion Dichotomy in Defamation Actions*, 49 Ohio St. L.J. 293, 319 (1988) (arguing that precision prong of *Ollman* test should be given "tremendous" weight so as to protect those accused of criminal conduct); Casenote, Janklow v. Newsweek: *Confusion Persists in the Distinction Between Fact and Opinion in Defamation Actions*, 54 UMKC L. Rev. 704, 717 (1986) (finding *Ollman* and *Janklow* vague and ambiguous, and hoping for Supreme Court guidance).

2. Price v. Viking Penguin, Inc, 881 F.2d 1426, 1438 (8th Cir. 1989) (quoting P. Matthiessen, In the Spirit of Crazy Horse 98 (1982)), *cert. denied*, 110 S. Ct. 757 (1990).

3. *See id.*

4. Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1123 (7th Cir. 1987) (quoting *Walter Jacobson's Perspective* (WBBM-TV (CBS) broadcast, Nov. 11, 1981)), *cert. denied*, 485 U.S. 993 (1988).

5. *See id.* at 1130-31.

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

7. *See id.* at 979.

sion and verifiability, however, ignores the formative character of context and makes context merely an external and exculpatory consideration.

The Note argues that the last two factors of the *Ollman* test, literary and social context, should receive primary emphasis. Part I analyzes the Supreme Court's treatment of the fact/opinion distinction, particularly the Court's focus on the context in which statements were made. Part II examines the *Ollman* test and its recent, divergent applications. Part III argues that literary and social contexts always determine the expectations of a reasonable audience, and concludes that any analysis of precision or verifiability must be subordinated to an examination of the context in which a statement appeared. Only by such an explicit consideration of context can speech be protected.

I. CONSTITUTIONALIZING THE FACT-OPINION DISTINCTION

A. *Fair Comment and Opinion Before* Gertz

The common law often treated the fact-opinion distinction under the doctrine of fair comment, which provided a qualified privilege for certain statements of opinion.[8] A defendant could invoke the fair comment privilege by proving that (1) the statement concerned a matter of legitimate public interest, (2) the facts upon which the statement was based were either stated or known to the reader, (3) the statement was the actual opinion of the defendant, and (4) the statement was not motivated solely by the purpose of causing harm to the plaintiff.[9]

The fair comment privilege protected the defendant's right to discuss public affairs and the public's right to information on such issues.[10] The

8. *See, e.g.*, Post Publishing Co. v. Hallam, 59 F. 530, 539 (6th Cir. 1893) (criticism and comment privileged, but false allegations of facts are not); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 242, 28 N.E. 1, 4 (1891) (what is privileged is criticism, not statement of fact); Eikhoff v. Gilbert, 124 Mich. 353, 359, 83 N.W. 110, 112-13 (1900) (defendant has right to express opinion as long as only true facts are stated and inferences drawn are honest belief); Warren v. Pulitzer Publishing Co., 336 Mo. 184, 201, 78 S.W. 2d 404, 413 (1934) (comment on facts privileged as long as conclusions not stated as facts). *See generally* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 115, at 831-32 (5th ed. 1984) (discusses topics open to "fair comment"); Carman, Hutchinson v. Proxmire *and the Neglected Fair Comment Defense: An Alternative to "Actual Malice,"* 30 De Paul L. Rev. 1, 47 (1980) (argues that fair comment privilege should be emphasized instead of "actual malice" issue in order to protect libel defendants effectively); Hallen, *Fair Comment*, 8 Tex. L. Rev. 41 (1929) (long discussion of fair comment, suggesting that courts have ignored larger issues for minute attention to particular statements); Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 Vand. L. Rev. 1203, 1211-15 (1962) (argues that fact-opinion distinction should be irrelevant to fair comment defense); Note, *Fair Comment*, 62 Harv. L. Rev. 1207, 1207 (1949) (briefly discusses fair comment).

9. *See Ollman*, 750 F.2d at 974 n.5 (citing Restatement of Torts § 606 (1934)).

10. *See generally* Restatement of Torts § 606, comment c (1934) ("If the public is to be aided in forming its judgment upon matters of public interest by a free interchange of opinion, it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged."); Titus, *supra* note 8, at 1206 (fair comment protects defendant's right to speak and public's right to know about matters of legitimate public inter-

privilege, however, was fairly narrow. It protected opinions only on matters of public interest; the judge determined the exact contours of public interest.[11] Fair comment doctrine also allowed the jury considerable latitude; even if the topic was held to be of public interest, the libel plaintiff still could defeat the privilege by persuading the jury that the defendant did not honestly hold the contested opinion, or that the defendant stated the opinion out of a malicious motive.[12]

With its landmark decision in *New York Times Co. v. Sullivan*,[13] the Supreme Court redefined the area of libel litigation and turned much of the discussion away from the fact-opinion distinction. To recover libel damages after *New York Times*, public figures must prove that the defendant acted with "actual malice," that is, with the knowledge that the statement was false or with reckless disregard for whether it was true or false.[14] Rather than distinguishing between fact and opinion, libel cases focused on the status of the plaintiff as public or private figure and the degree of fault attributable to the defendant.[15]

The *New York Times* Court noted, however, that under the first and fourteenth amendments "a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact."[16] Thus, the Court recognized that fair comment did have a constitutional dimension, although its contours were not clear. The Court went on to state that such a defense would be defeasible if the public official plaintiff proved "actual malice."[17] Because the Court explicitly referred to public scrutiny of a police department, the fair comment elements of public interest, basis on stated facts, and honest belief were still in place.

By making fair comment defeasible by proof of actual malice, however, the Court perhaps weakened the privilege—at least in cases which involved a public official. Under the common law, the fair comment privilege could be defeated by proof of a malicious motive. The *New York Times* footnote made the privilege refutable by proof of actual malice. Proving actual malice could be much easier in some cases than prov-

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est). Lord Ellenborough provided a rationale for fair comment that stressed the necessity of free discussion to the health of society: "Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history, and the advancement of science." Tabart v. Tipper, 170 Eng. Rep. 981, 982 (1808).

11. *See* Note, *Evolution of a Privilege*, *supra* note 1, at 86-89 (discussing range of topics held to be of public interest and finding that charges of corruption leveled against public officials were often held not to be of public interest).

12. *See id.* at 86.

13. 376 U.S. 254 (1964).

14. *See id.* at 279-80.

15. *See* R. Smolla, Suing the Press 54-60 (1986); Carman, *supra* note 8, at 1; Note, *Evolution of a Privilege*, *supra* note 1, at 90-91.

16. 376 U.S. at 292 n.30.

17. *See id.*

ing a malicious motive towards the plaintiff.[18]

B. *Creation of a Constitutional Privilege for Opinion*

In *Gertz v. Robert Welch, Inc.*,[19] the Supreme Court revitalized the fact-opinion distinction:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[20]

Although this was dictum, many federal and state courts have taken it to establish an absolute constitutional privilege for statements of opinion.[21] In the words of *Ollman*, "*Gertz*'s implicit command thus imposes upon both state and federal courts the duty as a matter of constitutional adjudication to distinguish facts from opinions in order to provide opinions with the requisite, absolute First Amendment protection."[22] The Supreme Court has mentioned the *Gertz* dictum with approval.[23]

This new constitutional privilege has largely supplanted the common-law doctrine of fair comment.[24] Courts generally agree that distinction between defamatory statement of fact and protected statement of opinion is a question of law, not a question of fact for the jury.[25] Thus courts can

18. *Cf.* T. Emerson, *supra* note 1, at 540 ("The risk of incurring liability for an opinion considered by a jury to be 'unfair' or 'malicious' would surely create much greater and more widespread self-censorship than that found decisive in *New York Times*.").

19. 418 U.S. 323 (1974).

20. *Id.* at 339-40 (footnote omitted).

21. *See* Price v. Viking Penguin, Inc., 881 F.2d 1426, 1431 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990); Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1194 (9th Cir.), *cert. denied*, 110 S. Ct. 59 (1989); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986); Mr. Chow v. Ste. Jour Azur S.A., 759 F.2d 219, 223 (2d Cir. 1985); Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); Immuno AG. v. Moor-Jankowski, 74 N.Y.2d 548, 555-56, 549 N.E.2d 129, 132, 549 N.Y.S.2d 938, 941 (1989).

22. *Ollman*, 750 F.2d at 975. On the danger of courts ruling on the truth or falsity of opinions, see Time, Inc. v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part) ("Any nation which counts the *Scopes* trial [on the teaching of evolution] as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity."); *see also* Post, *supra* note 1, at 664 ("[O]pinions are in their nature debatable. To impose sanctions for 'false' opinions is to use the force of law to end this potential debate by imposing legally definitive interpretations of the cultural standards at issue.").

23. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504 (1984). *But see* Ollman v. Evans, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., dissenting from denial of certiorari) ("lower courts have seized upon the word 'opinion' in [*Gertz*] to solve with a meat axe a very subtle and difficult question"); Note, *Evolution of a Privilege*, *supra* note 1, at 83 (rejecting claim that *Gertz* established absolute opinion privilege).

24. *See Ollman*, 750 F.2d at 975; Street v. National Broadcasting Co., 645 F.2d 1227, 1233 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); Wade, *The Communicative Torts and the First Amendment*, 48 Miss. L.J. 671, 694-95 (1977).

25. *See* Price v. Viking Penguin, Inc., 881 F.2d 1426, 1432 (8th Cir. 1989), *cert. de-*

use the opinion privilege to dismiss frivolous or wasteful defamation suits before trial, and stem what Judge Bork has called the "freshening stream of libel actions."[26]

C. *Supreme Court Practice When Identifying Opinion*

Although *Gertz* involved statements that the plaintiff was a "Commu-

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nied, 110 S. Ct. 757 (1990); Secrist v. Harkin, 874 F.2d 1244, 1248 (8th Cir.), *cert. denied,* 110 S.Ct. 324 (1989); Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1194 (9th Cir.), *cert. denied,* 110 S. Ct. 59 (1989); Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), *cert. denied,* 471 U.S. 1127 (1985); Henry v. Halliburton, 690 S.W.2d 775, 787 (Mo. 1985) (en banc).

26. *Ollman,* 750 F.2d at 993 (Bork, J., concurring); *see also id.* at 996-97 (observing that *Sullivan* has failed to protect the marketplace of ideas and perhaps some other defense is needed, and advocating close judicial scrutiny to ensure that libel cases endangering first amendment do not reach jury); Immuno AG. v. Moor-Jankowski, 74 N.Y.2d 548, 561, 549 N.E.2d 129, 135, 549 N.Y.S.2d 938, 944 (1989) (statement held opinion only after extensive litigation and large settlements paid by other defendants, demonstrating chilling effect of libel suits and appropriateness of summary judgment); Schauer, *The Role of the People in First Amendment Theory,* 74 Calif. L. Rev. 761, 765 (1986) (suggesting that juries no longer protect speech, but rather speech must be protected from them); Note, *Statements of Fact, supra* note 1, at 1026-27 (discussing high cost of libel suits and consequent "chilling effect").

The "freshening stream" of libel suits derives from a phenomenon that has been called the "thinning of the American skin." R. Smolla, *supra* note 15, at 16. According to Professor Smolla, "everybody who's anybody has a libel suit going on the side." *Id.* at 6. Defamation suits are not only frequent but expensive, with huge claims and proportionately huge jury awards. Senator Paul Laxalt sued the *Sacramento Bee* for $250 million, William Westmoreland demanded $120 million from CBS, and Ariel Sharon claimed $50 million damages against *Time* magazine. Bestselling novelist Jackie Collins was awarded $40 million by the jury in her suit against Larry Flynt, while a former Miss Wyoming was awarded $26 million against *Penthouse. See id.* at 5-6. According to two studies made in the early 1980's, the average initial damage award in libel suits against the media was over $2 million, with an additional $2 million in punitive damages. "These awards are outrageously excessive. They are three times the average damage award in product liability and medical malpractice actions." Goodale, *Survey of Recent Media Verdicts, Their Disposition on Appeal, and Media Defense Costs,* in Practising Law Institute, Media Insurance & Risk Management 69, 78 (1985). Libel plaintiffs also tend to win before the jury more often than other tort plaintiffs, at a rate from 55 to 85 percent (compared with a rate for medical malpractice plaintiffs of 30 to 40 percent). *See* R. Smolla, *supra* note 15, at 73.

Even the truth often seems no defense against a hefty jury award. In Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.) (rehearing en banc), *cert. denied,* 484 U.S. 870 (1987), the *Washington Post* reported that plaintiff, the president of Mobil Oil, had "set up" his son in the shipping business. Tavoulareas claimed that this statement implied nepotism on his part, and sued for damages of $100 million. *See* R. Smolla, *supra* note 15, at 185. The jury awarded him over $2 million, although the trial judge granted the defendant's motion for a judgment n.o.v. The Court of Appeals for the District of Columbia Circuit initially reversed the lower court and reinstated the verdict. *Tavoulareas,* 817 F.2d at 766. In an en banc rehearing, however, the D.C. Circuit finally affirmed the trial court, holding that no reasonable jury could find the statements false. *Id.* at 786. "The *undisputed* evidence at trial, including plaintiff's own testimony, precludes any reasonable inference that the central allegation of the challenged article—that Tavoulareas 'set up' [his son]—was false." *Id.* at 783-84 (emphasis in original). "The record abounds with uncontradicted evidence of nepotism in favor of [his son]." *Id.* at 785.

nist-fronter" and possessed a criminal record,[27] the decision provided little help in distinguishing fact from opinion. *Gertz* actually held that states may define for themselves the appropriate standard of liability for defamation of private figures, as long as liability is not imposed without fault.[28] One court has interpreted that absence of discussion of opinion to imply that the statements in *Gertz* were factual in the view of the Supreme Court.[29]

Lower courts have consequently turned to other Supreme Court cases for guidance, particularly *Greenbelt Cooperative Publishing Association v. Bresler*[30] and *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*.[31] In both cases, the Court emphasized the social and literary context in which the statement appeared, rather than its precision or verifiability.[32]

In *Greenbelt*, a newspaper accurately reported statements made at a city council meeting, characterizing the bargaining position taken by a real estate developer as "blackmail."[33] The case could have been reversed simply on an incorrect jury instruction regarding actual malice.[34] The Court reasoned, however, that an even more serious constitutional error had been made: "as a matter of constitutional law, the word 'blackmail' *in these circumstances* was not slander when spoken, and not libel when reported in the Greenbelt News Review."[35]

The Court then turned to the social context, pointing out that the word "blackmail" was used during a heated public debate on a controversial issue.[36] The Court further noted that the newspaper performed a legitimate public function by publishing full reports of the debates.[37] The Court examined the literary context of the statement, finding that the newspaper's intention could be easily understood from the headlines, and that the reports accurately portrayed what had occurred at the

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27. *See* Gertz v. Robert Welch, Inc., 418 U.S 323, 326 (1974). *Gertz* might have been a particularly promising situation for the Supreme Court to examine the precision, verifiability and context of disputed statements. Robert Welch, defendant in *Gertz*, founded the extremely conservative John Birch Society and had accused many people, including President Dwight D. Eisenhower, of being communists. He divided the American public into four categories: " 'Communists, Communist dupes or sympathizers, the uninformed who have yet to be awakened to the Communist danger, and the ignorant.' " *See* R. Smolla, *supra* note 15, at 61. Rather than exploring how context would shape the expectations of a reasonable reader, the Supreme Court focused on Gertz's status as a private figure. *See Gertz*, 418 U.S. at 351-52.

28. *See id.* at 347.

29. *See* Cianci v. New Times Publishing Co., 639 F.2d 54, 61-62 (2d Cir. 1980).

30. 398 U.S. 6 (1970)

31. 418 U.S. 264 (1974).

32. *See* Ollman v. Evans, 750 F.2d 970, 1000 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

33. *See* Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 7-8 (1970).

34. *See id.* at 11.

35. *Id.* at 13 (emphasis added).

36. *See id.*

37. *See id.*

meetings.[38]

The Court concluded that a reasonable reader, encountering the word "blackmail" in this social and literary context, would not interpret it as alleging a criminal offense.[39] The decision did not discuss whether the word "blackmail" has a precise meaning, relegating the legal definition to a footnote.[40] On the facts of this case, "blackmail' effectively meant an "extremely unreasonable" negotiating position.[41] Similarly, the issue of verifiability did not arise and the Court did not discuss whether the charges of blackmail could be proved.

By focusing on the word in context, the Supreme Court analyzed the function of the challenged statement, rather than any abstract dictionary meaning.[42] This is particularly evident in the Court's categorization of the word "blackmail" as "rhetorical hyperbole, a vigorous epithet."[43] As

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38. *See id.* at 13-14.

39. In the words of the Court:

> No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was *no more than rhetorical hyperbole, a vigorous epithet* used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

Id. at 14 (emphasis added) (footnote omitted).

40. *See id.* at 14 n.7.

41. *Id.* at 14.

42. Dictionary meanings are quite varied and variable. The word "set," for example, occupies 25 pages in the Oxford English Dictionary. *See* 15 Oxford English Dictionary 50-75 (2d ed. 1989). The Oxford English Dictionary also provides three definitions of the noun "blackmail," including a rent reserved in labor, produce, etc., as opposed to "white rents" paid in "white money" or silver. *See* 2 Oxford English Dictionary 250. We know "blackmail" does not mean that here, *because of context.* In another context, for example, a historical work on landlord-tenant relations in medieval England, that could be the "proper" meaning of "blackmail."

The dangers of relying upon an abstract dictionary definition are exemplified in Stewart v. Chicago Title Insurance Co., 151 Ill. App. 3d 888, 503 N.E.2d 580 (1987), where defendant speculated that plaintiff belonged to Posse Comitatus, or a similar extremist group. *See id.* at 890, 503 N.E.2d at 581. On the Posse Comitatus, see Foxman & Finger, *Terrorism in the United States: 1986*, in The 1986 Annual on Terrorism 67 (Y. Alexander ed.), which links the group to far-right white supremacists and describes it as "a violence-prone anti-Semitic organization which believes that all government power is rooted at the county level."

The trial judge, uncertain about the "present-day meaning of the phrase," *Stewart,* 151 Ill. App. 3d at 894, 503 N.E.2d at 583, consulted his legal dictionary and found it defined as the "portion of the population of the county which the sheriff may call upon for aid." *Id.* at 893, 503 N.E.2d at 583 (citing Black's Law Dictionary 1046 (5th ed. 1979)). The appellate court agreed with plaintiff that such a definition in this context was "obviously" wrong, but it still held the statement opinion. *Id.* at 893, 503 N.E.2d at 583.

Dictionaries are assembled for particular audiences and purposes. Selecting a dictionary and then relying upon its definitions are themselves interpretive choices, and lead to further questions of whether the correct dictionary was chosen and whether the definition is still accurate.

43. Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970).

rhetoric, the statement was not meant to report a factual situation, but to persuade an audience to the speaker's point of view. Such an analysis of function requires that the statement be considered in context.[44]

In *Letter Carriers*, decided the same day as *Gertz*, the Supreme Court also made context the crucial consideration. The case involved a union newsletter that listed the plaintiff non-members as "scabs" and offered this definition of the term: " 'a SCAB is a traitor to his God, his country, his family and his class.' "[45] The Court noted the strong disagreement between the union and workers opposing unionization.[46] In such a context, the Court found it "impossible to believe that any reader . . . would have understood the newsletter to be charging the [plaintiffs] with committing the criminal offense of treason."[47]

As in *Greenbelt*, the Court did not consider the precision or verifiability of the newsletter's use of the word "traitor." Instead, it looked to the social context and newsletter medium in which the statement appeared, and inferred from that context that the words were "figurative" and "rhetorical."[48] The context delimited the meaning assigned to the statement, so that "no such factual representation [could] reasonably be inferred."[49] The Court explicitly noted that identical or similar language could be actionable in a different case with a differing set of contexts.[50] Finally, the meaning of the statement was specifically analyzed in terms of what "any reader" would understand, not the interpretation of the actual readers of this case.[51]

D. *Problematic Attempts by Lower Courts to Identify Opinion*

Courts have stressed repeatedly the difficulty of drawing a firm distinction between fact and opinion.[52] Application of the distinction has re-

44. *See* Ollman v. Evans, 750 F.2d 970, 1002 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

45. Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 268 (1974) (quoting "The Scab," attributed to Jack London, as quoted in Carrier's Corner, June, 1970) (Court's emphasis omitted).

46. *See id.* at 284.

47. *Id.* at 285 (footnote omitted).

48. *Id.* at 284, 286.

49. *Id.* at 286.

50. *See id.*

51. *See id.* at 285. However, Justice Powell, the author of the *Gertz* opinion, dissented from *Letter Carriers*, suggesting that the statements were not hyperbole, but evidently factual. *See id.* at 296 (Powell, J., dissenting).

Statements in union newsletters are not always considered opinion. For example, in Judge Bork's dissent in American Postal Workers Union v. United States Postal Service, 830 F.2d 294, 326 (D.C. Cir. 1987), he applied the *Ollman* test and argued that a statement by the author of a newsletter column that he has opened and read mail was factual. *See also* Steinhilber v. Alphonse, 68 N.Y.2d 283, 287, 501 N.E.2d 550, 551, 508 N.Y.S.2d 901, 902 (1986) (plaintiff targeted with "scab" as well as "[w]hen she comes into a room, the mice jump up on chairs"; statements held nonactionable opinion).

52. According to the Seventh Circuit, "[c]ourts trying to find one formula to separate 'fact' from 'opinion' . . . are engaged in a snipe hunt . . . ." Stevens v. Tillman, 855 F.2d

sulted in implausible and even recondite discriminations,[53] leading commentators to demand a bright-line test.[54] Problematic attempts to distinguish fact from opinion have appeared, including a bright-line emphasis on verifiability, an "undisclosed defamatory facts" test, and a "totality of the circumstances" test.

1. Suggested Bright-Line Verifiability Test

Many decisions make verifiability the primary criterion that distinguishes fact from opinion.[55] A statement that could be proven true or

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394, 399 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1339 (1989); *see also* Ollman v. Evans, 750 F.2d 970, 977-78 (D.C. Cir. 1984) (en banc) ("Because of the richness and diversity of language, as evidenced by the capacity of the same words to convey different meanings in different contexts, it is quite impossible to lay down a bright-line or mechanical distinction."), *cert. denied*, 471 U.S. 1127 (1985); Steinhilber v. Alphonse, 68 N.Y.2d 283, 291, 501 N.E.2d 550, 554, 508 N.Y.S.2d 901, 905 (1986) ("The infinite variety of meanings conveyed by words—depending on the words themselves and their purpose, the circumstances surrounding their use, and the manner, tone and style with which they are used—rules out, in our view, a formulistic approach.").

53. For example, Mr. Chow v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985), involved a harsh restaurant review including statements such as " 'the sweet and sour pork contained more dough (badly cooked) than meat,' " and " 'the Peking lacquered duck . . . was made up of only one dish (instead of the three traditional ones) . . . .' " *Id.* at 221-22 (quoting an English translation from the French Gault/Millau Guide to New York (1981)). The court held that the statement about the sweet and sour pork was a hyperbolic expression of opinion. *See id.* at 229. The Peking duck statement, however, raised the issue of what was traditional in Chinese cooking. *See id.* at 230. The court held it was "clearly laden with factual content" and contained "allegations that are seemingly capable of being proved true or false." *Id.* at 229.

Buckley v. Littell, 539 F.2d 882, 894 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), distinguished between the accusations "fascist" (an unverifiable opinion) and "member of Communist Party" (a precise fact). Somewhat baffling here is that the "sting" of the accusation is that the plaintiff held particular political views. An undercover FBI agent, now revealed to the light of day, would be more defamed by the accusation that he once held fascist political views than by the accusation that he was once a member of the Communist party.

54. *See, e.g.*, Note, *Statements of Fact*, *supra* note 1, at 1029-31 (arguing that bright-line verifiablity test best comports with first amendment); Note, *Need for a Bright-Line Rule*, *supra* note 1, at 1854 ("essential that courts develop a bright-line test"); Note, *Evolution of a Privilege*, *supra* note 1, at 127 ("[s]pecific rules need to be formulated"); Note, *Defamation*, *supra* note 1, at 368 ("some methodology must be devised"); Comment, *supra* note 1, at 320 (suggests that specific charges of criminal conduct be presumed factual); Casenote, *supra* note 1, at 717 (urging Supreme Court to formulate specific rules).

55. *See, e.g.*, Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1572 (D.C. Cir. 1984) ("Since opinions cannot be false, they cannot be the basis of a defamation action."), *vacated on other grounds*, 477 U.S. 242 (1986); Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983) (statement that doctors had "theory to which they were willing to sacrifice a child's life" was unverifiable, therefore an opinion); Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 443 (10th Cir. 1982) (since it is physically impossible for fellatio to cause levitation, statement alleging such events cannot be defamatory fact), *cert. denied*, 462 U.S. 1132 (1983); Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.) ("assertion that cannot be proved false cannot be held libellous"), *cert. denied*, 434 U.S. 834 (1977); Buckley v. Littell, 539 F.2d 882, 894 (2d Cir. 1976) (statements "so debatable, loose and varying, that they are insusceptible to proof of truth or falsity"), *cert. denied*, 429 U.S. 1062 (1977).

false is automatically considered factual, while statements of more questionable verifiability are routinely placed in the opinion category.

This approach has some Supreme Court authority behind it, since the *Gertz* dictum specifically contrasted opinions with "false statements of fact."[56] *Greenbelt* and *Letter Carriers*, however, made no reference to verifiability. What mattered was not whether a statement was verifiable in the abstract, but how a reasonable reader would interpret the statement in the particular context of the case. Asking whether a disputed statement is verifiable only begs the question of what it exactly means, and for that the Court turned to context.

2. Undisclosed Defamatory Facts Test

Once they have found a statement to be opinion, many courts apply a second, arguably unnecessary test to distinguish further between protected and unprotected opinions.[57] According to the *Restatement (Second) of Torts*, "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."[58] This test requires consideration of whether the opinion implies the existence of undisclosed defamatory facts.[59] An opinion is not actionable if it explicitly supplies the facts upon which it was based, or those facts are sufficiently known to the reader that he or she can make an independent evaluation. If, however, a reasonable reader would infer that the author of the statement is privy to undisclosed defamatory facts, then the statement could be actionable.[60]

This test has been applied inconsistently. Similar news reports about a woman divorcing her maimed husband have been found to imply defamatory facts on one occasion, while not implying them on another.[61] The Seventh Circuit recently stated that "[e]very statement of opinion contains or implies some proposition of fact, just as every statement of fact

56. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

57. *See* Ollman v. Evans, 750 F.2d 970, 984 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

58. Restatement (Second) of Torts § 566 (1977).

59. *See, e.g.*, Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446, 453 (3d Cir. 1987) (citing Restatement (Second) of Torts § 566); Koch v. Goldway, 817 F.2d 507, 509 (9th Cir. 1987) (same).

60. *See* Davis v. Ross, 754 F.2d 80, 85-86 (2d Cir. 1985); Lauderback v. American Broadcasting Cos., 741 F.2d 193, 195-96 (8th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983); Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980); Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); Steinhilber v. Alphonse, 68 N.Y.2d 283, 289-90, 501 N.E.2d 550, 552-53, 508 N.Y.S.2d 901, 903-04 (1986).

61. *Compare* Burns v. Denver Post, Inc., 43 Colo. App. 325, 326-27, 606 P.2d 1310, 1310-11 (1979) ("[s]he just couldn't live with a blind man" did not imply undisclosed defamatory facts) *with* Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 (Colo. 1983) (en banc) (statement that she "deserted" him since accident implied undisclosed defamatory facts).

has or implies an evaluative component."[62] Yet the same court then applied an undisclosed facts test before—and instead of—deciding whether the disputed statements were fact or opinion.[63] It then held that the term "racist" applied to an elementary school principal "is not actionable unless it implies the existence of undisclosed, defamatory facts."[64]

It is not clear why "racist" does not imply undisclosed facts, while "alcoholic" (the example given by the *Restatement*)[65] supposedly does. The distinction between opinions that imply undisclosed facts and those that do not only encapsulates all the problems of distinguishing between fact and opinion. Indeed, the widespread consensus on the undisclosed facts test has engendered almost no analysis to help make the necessary distinctions.[66]

The Supreme Court did not explicitly mention the undisclosed defamatory facts test in *Gertz, Greenbelt* or *Letter Carriers.* The *Gertz* dictum made no distinction between opinions implying undisclosed facts and those that did not, but seemed to protect *all* statements of opinion.[67] *Greenbelt* pointed out that the newspaper fully and accurately reported the plaintiff's proposal, and thus could be said to have disclosed the facts upon which the statement "blackmail" was based.[68] But the major thrust of the decision, that "blackmail" in these circumstances was "rhetorical hyperbole," did not logically rely on any distinction between disclosure and non-disclosure of facts. *Letter Carriers* also did not mention an undisclosed facts test, but instead asked whether a reader would infer a factual representation in that context.[69]

The major difficulty with the undisclosed facts test, however, is that it limits context analysis to one particular factor. As *Ollman* reasoned, the presence of disclosed facts is merely one aspect of context:

> factors besides the disclosure of facts are relevant in determining whether a statement implies factual allegations to the reasonable reader. . . . In a word, disclosure of facts in the surrounding text is not the *only* signal that hard facts cannot reasonably be inferred from a statement.[70]

Focusing solely on disclosure of facts unduly limits a court's inquiry into

62. Stevens v. Tillman, 855 F.2d 394, 398 (7th Cir. 1988), *cert. denied,* 109 S. Ct. 1339 (1989); *see also* Immuno AG. v. Moor-Jankowski, 74 N.Y.2d 548, 559, 549 N.E.2d 129, 134, 549 N.Y.S.2d 938, 943 (1989) ("As a practical matter, it is hard to conceive that any published statement could be wholly devoid of factual reference.").

63. *See Stevens,* 855 F.2d at 400-01.

64. *Id.* at 402.

65. *See* Restatement (Second) of Torts § 566 illustration 3 (1977).

66. *See* Note, *Need for a Bright-Line Rule, supra* note 1, at 1830.

67. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); Note, *Statements of Fact, supra* note 1, at 1014.

68. *See* Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970).

69. *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974).

70. Ollman v. Evans, 750 F.2d 970, 985 (D.C. Cir. 1984) (en banc) (emphasis in original), *cert. denied,* 471 U.S. 1127 (1985).

the context of disputed statements, and can cause the court to disregard other relevant factors.

3. Totality of the Circumstances Test

Before the *Ollman* decision, the Ninth Circuit formulated a test for distinguishing opinion from actionable fact which also considered the context of the disputed statement.[71] Under this three-pronged "totality of the circumstances" test the court looks to (1) "all the words used, not merely a particular phrase or sentence," (2) "cautionary terms used by the person publishing the statement," and (3) "all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published."[72] Applying this test, the Ninth Circuit often finds litigated statements to be opinion.[73]

One commentator has argued that this test is inferior to the one developed in *Ollman*.[74] The primary difference seems to be the greater detail and specificity of *Ollman*. The "totality of the circumstances" test examines "all of the words," without offering any guidance about what exactly is worth notice. Cautionary language, for example, "I think," receives particular attention.[75] Precision and verifiability are not specifically mentioned, while context is generalized rather than subdivided as in *Ollman*. If the *Ollman* test is vague and indefinite, the Ninth Circuit's test is even more so.

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71. *See* Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 783-84 (9th Cir. 1980).

72. *Id.* at 784.

73. *See, e.g.,* Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1193-94 (9th Cir.) (in context of debate on pornography, abusive cartoon and captions concerning anti-pornography activist were protected opinion), *cert. denied,* 110 S. Ct. 59 (1989); Leidholdt v. L.F.P. Inc., 860 F.2d 890, 894 (9th Cir. 1988) (description in pornographic magazine of plaintiff as "pus bloated walking sphincter" who is "sexually repressed" not statement of fact), *cert. denied,* 109 S. Ct. 1532 (1989); Ault v. Hustler Magazine, Inc., 860 F.2d 877, 879-81 (9th Cir. 1988) (description of plaintiff as "Asshole of the Month" and "wacko" not statements of fact), *cert. denied,* 109 S. Ct. 1532 (1989); Koch v. Goldway, 817 F.2d 507, 509 (9th Cir. 1987) (in political controversy, implausible identification of plaintiff with fugitive Nazi war criminal with same name not statement of fact); Lewis v. Time, Inc., 710 F.2d 549, 553-54 (9th Cir. 1983) (inference that lawyer with judgments against him for fraud and malpractice is "shady practitioner" was protected opinion). *But see* Church of Scientology v. Flynn, 744 F.2d 694, 698 (9th Cir. 1984) (defendant's suggestive linkage between his refusal to accept bribe from Scientologists and power failure of his airplane could be factual allegation of murder attempt).

74. *See* Note, *Statements of Fact, supra* note 1, at 1015-21, 1045-46 (characterizing *Ollman* as a "verifiability test" superior to Ninth Circuit "totality of circumstances test").

75. *See* Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980). *But see* Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980) ("It would be destructive of the law of libel if a writer could escape liability for accusations of crime by simply using, explicitly or implicitly, the words 'I think.' ").

II. Ambivalence of Current Doctrine

A. Ollman's *Formulation of a Four-Factor Test*

The most influential analysis of the fact-opinion distinction occurred in the en banc decision of the Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans.*[76] The case involved the statements in a newspaper column that Bertell Ollman, a professor of political science, " 'is an outspoken proponent of 'political Marxism' " and " 'has no status within the profession, but is a pure and simple activist.' "[77] The last statement caused sharp divisions within the court.[78]

Judge Starr formulated a four-factor test to distinguish contitutionally protected statements of opinion from actionable statements of fact.[79] This test requires consideration of (1) the precision or ambiguity of the statement, (2) its verifiability, (3) the literary context in which the statement occurred, and (4) the "broader" social context in which it appeared.[80] The four factors easily fall into two sets: the first set seems to examine the text of the statement in abstract isolation, while the second set considers the context in which the statement was made.

1. Precision

Ollman reasoned that courts must analyze "common usage" of the disputed words in order to determine whether they have a "precise core of meaning for which a consensus of understanding exists."[81] In theory, readers are less likely to interpret a statement as factual when it seems indefinite or ambiguous.[82] Thus, a statement that a judge was "incompe-

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76. 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

77. *Id.* at 972-73 (quoting Evans & Novak, *The Marxist Professor's Intentions*, Wash. Post, May 4, 1978) (court's emphasis omitted).

78. The court issued seven opinions, including four dissents. Judge Starr's opinion is discussed *infra* at notes 79 to 133 and accompanying text. Judge Bork's influential concurring opinion suggested that a "totality of the circumstances" test be applied, taking into consideration the extent to which liability would burden freedom of speech or press. *See Ollman*, 750 F.2d at 997. Also concurring, Judge MacKinnon argued that the political debate surrounding Ollman's nomination rendered the statement opinion. *See id.* at 1015.

Writing dissenting opinions were Chief Judge Robinson, and Judges Wald, Edwards and Scalia. Chief Judge Robinson argued that a continuum stretched from fact to pure opinion, with hybrid opinion in between. *See id.* at 1021-28. Classifying the "no status" statement as hybrid opinion, he argued that such statements were not protected unless they fully disclosed the facts upon which they are based. *See id.* at 1029-30. Judge Wald argued that the "no status" statement was verifiable by means of a poll of Ollman's collegues. *See id.* at 1033. Judge Edwards agreed with much of Starr's opinion, but still argued that Ollman's status was a verifiable fact. *See id.* at 1035-36. Lastly, Judge Scalia argued in a vigorous dissent that Judge Bork's concurrence involved a "constitutional 'evolution,' with very little reason and very uncertain effect" and that free speech and press were already amply protected by existing doctrines. *Id.* at 1036.

79. *See id.* at 979.

80. *See id.*

81. *Id.*

82. *See id.*

tent" was held to be ambiguous opinion, while a statement that the same judge was "corrupt" was held an actionable fact.[83]

Ollman offered an accusation of crime as example of "a statement with a well-defined meaning."[84] According to the court, such accusations "depend for their meaning upon social normative systems. . . . so commonly understood that the statements are seen by the reasonable reader or hearer as implying highly damaging facts."[85] Remarkably, however, *Ollman* did not mention that the two Supreme Court cases upon which it explicitly relies, *Greenbelt* and *Letter Carriers*, both involved supposed accusations of crime—blackmail and treason.[86] Evidently, the factor of "precision" involves more complexities than *Ollman* explicitly admitted.[87]

Ollman did not explicitly state how this precision/ambiguity distinction should be made, but its practice was particularly revealing. The court suggested "fascist" was an epithet with widely varying meanings, and consequently too imprecise to be factual.[88] Then, in a footnote, the *Ollman* court observed "that if the term were applied in a history of Italy

83. Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 381-82, 366 N.E.2d 1299, 1306-07, 397 N.Y.S.2d 943, 950-51, *cert. denied*, 434 U.S. 969 (1977).

84. Ollman v. Evans, 750 F.2d 970, 980 (D.C. Cir. 1984) (en banc) (citing Cianci v. New Times Publishing Co., 639 F.2d 54, 63-64 (2d Cir. 1980)), *cert. denied*, 471 U.S. 1127 (1985).

85. *Id.*

86. *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 268 (1974); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 8 (1970). For a discussion of the two cases, see *supra* notes 30-51 and accompanying text.

A more recent Supreme Court case, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48 (1988), also involved what the plaintiff construed as an accusation of criminal conduct—that Falwell committed incest with his mother. The jury found against the plaintiff on this defamation claim because the statements could not be reasonably understood as factual. *See id.* at 49. Although the case at the Supreme Court level only involved claims of intentional infliction of emotional distress, the Court began its analysis by discussing *Gertz* and opinion. *See id.* at 50-51.

87. The notion of precision in relation to "common usage," is itself much more complex than *Ollman* suggests. The "common usage" of a word derives from its repeated appearance in certain contexts, together with a reasonable reader's expectation that it will continue to appear in similar contexts. Those reasonable expectations also vary both between different communities and within a particular community. "Definitions are not unanimously accepted. Each one represents only a consensus, and the strength of the consensus varies from word to word. Imposition of the majority consensus necessarily would restrict the speech of those not sharing the consensus." Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 Va. L. Rev. 263, 282-83 (1978). Often the meaning of a word changes because it is transferred from one context to another, for example, from a literal use to a figurative use. "The distortion of language to emphasize a point—to express or to elicit an emotion—is present in varying degrees in virtually all human dialogue. . . . There is no concrete line between the metaphor and the 'proper' use of words." *Id.* at 285.

88. The court briefly rehearsed the facts of *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), where the Second Circuit found that "fascist" was used with widely varying meanings in both a book and "the realm of political debate." In short, "fascist" was imprecise *in that context.*

between the World Wars," it would be defamatory.[89] In short, "fascist" might be precise *in another context.*

Effectively *Ollman*'s first factor, the precision of a statement, has collapsed into context. Whether a statement is precise or imprecise depends not upon an abstract "common usage" or "core of meaning" of the words, but upon the situation in which the words were used. When a court relies on the short cut of "common usage," it can leave the defendant "convicted more by the dictionary than by the law."[90] In order to explain how its first factor works, the *Ollman* court itself ultimately turned to context.

2. Verifiability

Ollman also reasoned that courts should consider whether disputed statements are verifiable, or capable of being proved, asserting that a reasonable reader would not interpret an unverifiable statement as factual.[91] Again, "fascist" was suggested as an unverifiable epithet.[92] The panel did not explicitly offer any methods for determining what is verifiable and what is not, but it seemed optimistic about the prospects for courts doing so: "Trial judges have rich experience in the ways and means of proof and so will be particularly well situated to determine what can be proven."[93] Other courts have been much less sanguine, recognizing the difficulty of drawing distinctions between verifiable and unverifiable statements.[94]

Decisions purporting to apply *Ollman*'s four factors have divided over whether allegations about motives are verifiable or not.[95] Courts following *Ollman* have often held that allegations of criminal conduct are verifiable,[96] but many exceptions undercut the general rule.[97] The *Ollman*

89. *Ollman*, 750 F.2d at 980 n.20 (citing *Buckley*, 539 F.2d at 893-94 n.11).

90. Schauer, *supra* note 87, at 265.

91. *See Ollman*, 750 F.2d at 981.

92. *See id.*

93. *Id.* at 982.

94. *See, e.g.,* Stevens v. Tillman, 855 F.2d 394, 399 (7th Cir. 1988) ("no one can separate the 'verifiable' from the 'non-verifiable' "), *cert. denied*, 109 S. Ct. 1339 (1989); Schauer, *supra* note 87, at 276-81 (drawing distinction between verifiable factual truth and unverifiable doctrinal truth, with large and difficult continuum in between); Post, *supra* note 1, at 658 (distinguishing between factual statements that purport to be independent of particular perspective, and opinions that depend upon community institutions and conventions for their validity).

95. *Compare* Price v. Viking Penguin, Inc., 881 F.2d 1426, 1438 (8th Cir. 1989) (qualitative judgments about motivation unverifiable), *cert. denied*, 110 S. Ct. 757 (1990) *and* Deupree v. Iliff, 860 F.2d 300, 303 (8th Cir. 1988) (allegation that sex education teacher derives "secret" sexual gratification from teaching is unverifiable) *with* Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1289 (4th Cir. 1987) ("emphatically" rejecting suggestion that statements about motives and intentions are unverifiable).

96. *See, e.g.,* Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1501-02 (D.D.C. 1987) (internal corporate report names plaintiff as responsible for fraudulent practices); Vern Sims Ford, Inc. v. Hagel, 42 Wash. App. 675, 677, 683, 713 P.2d 736, 738, 741

court was itself sharply divided over whether an allegation that a university professor had "no status" in his profession was verifiable. Three judges (including then Judge Scalia) joined in arguing that "Ollman's scholarly reputation is adequately verifiable" by devising a poll of the American Political Science Association.[98] Judge Bork forcefully contested such a suggestion, arguing that any poll would become engulfed in disputes about the phrasing of questions, the representativeness of the sample and the effect of the defendant's statements on the poll.[99]

Judge Starr's decision, by using "fascist" as an example of both imprecision and unverifiability, affirmed the close connection between the two concepts. Before a court can decide whether a statement is verifiable, it must first decide what it means. If " 'the sweet and sour pork contained more dough (badly cooked) than meat' " actually means "the sweet and sour pork was too doughy for my tastes," an abstractly verifiable statement suddenly becomes unprovable.[100] Similarly, if " 'Fuller—Murderer of Sacco and Vanzetti' " actually means "In my opinion, Governor Fuller, although not legally responsible for the deaths of Sacco and Vanzetti, is nonetheless morally responsible because he did not exercise his power of pardon or commutation," an abstractly factual accusation turns into a statement of opinion.[101] "Only if taken literally can [the statement] be deemed capable of being proved false."[102] Thus, *Ollman*'s second factor, verifiability, effectively collapses into context along with the first factor, precision.

3. Literary Context

Noting that readers are "inevitably" influenced by the literary context in which a statement appears, the *Ollman* plurality reasoned that courts distinguishing fact from opinion must consider the article, column or writing as a whole.[103] One court following *Ollman* listed a number of considerations included in literary context: "cautionary or qualifying

(1986) (customer's protest that "Vern Sims Ford and Their Salesperson Bob Martin Are Thieves!!!" was defamatory fact), *review denied*, 105 Wash. 2d 1016 (1986).

97. *See, e.g.*, *Price*, 881 F.2d at 1438 (supposed allegation that plaintiff suborned perjury was opinion); Southern Air Transp., Inc. v. American Broadcasting Cos., 877 F.2d 1010, 1016-17 (D.C. Cir. 1989) (with untested law, allegation of illegality not verifiable outside of court); Catalfo v. Jensen, 657 F. Supp. 463, 466 (D.N.H. 1987) (supposed allegation of illegal drug use was opinion); Scott v. News-Herald, 25 Ohio St. 3d 243, 254, 496 N.E.2d 699, 708-09 (1986) (sportswriter's allegation of perjury was opinion).

98. Ollman v. Evans, 750 F.2d 970, 1033 (D.C. Cir. 1984) (Wald, J., dissenting), *cert. denied*, 471 U.S. 1127 (1985).

99. *See id.* at 1006 (Bork, J., concurring).

100. *See* Mr. Chow v. Ste. Jour Azur S.A., 759 F.2d 219, 221, 228 (2d Cir. 1985) (initial statement quoted from English translation of French Gault/Millau Guide to New York (1981)).

101. *See* Schauer, *supra* note 87, at 263-65 (initial statement quoted from placard message litigated in Commonwealth v. Cantor, 269 Mass. 359, 168 N.E. 790 (1929)).

102. *Mr. Chow*, 759 F.2d at 229.

103. *See* Ollman v. Evans, 750 F.2d 970, 982 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

language, language or style which signifies opinion, the type of publication, the location of the statement or work within the publication, and the intended audience."[104] Generally, literary context includes not only the language and medium in which the statement appeared, but also what that language and medium signifies about the author's intentions and the reasonable audience's expectations.

Thus, a statement that the plaintiff sex educator " 'derives probably a very secret sort of sexual gratification' " from enlightening her students on " 'homosexuality and perversion' " would be discounted by a reasonable listener to the "Christian Family" radio call-in program in which it appeared.[105] The reasonable listener, given the radio call-in format, the hypothetical intentions of the participants, and the expected audience, would not anticipate any statements of fact.

Literary context can powerfully reshape statements that might, abstractly considered, appear "obviously" precise and verifiable. For example, the statement that plaintiff was " 'the only newscaster in town who is enrolled in a course for remedial speaking,' "[106] would seem easily verifiable. In an article on the best and worst sports personalities, complete with cartoons and numerous "one-liners," the statement was held not to be factual.[107]

Decisions adopting the *Ollman* rationale have found many specific literary genres to signal opinion: editorials and newspaper columns,[108] letters to editors,[109] humorous and satirical articles,[110] restaurant reviews,[111] campaign press releases,[112] sports columns,[113] and "first per-

104. Price v. Viking Penguin, 881 F.2d 1426, 1432 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990).

105. Deupree v. Iliff, 860 F.2d 300, 302-04 (8th Cir. 1988) (quoting from *Encounter*, radio broadcast, Mar. 1, 1984).

106. Myers v. Boston Magazine Co., 380 Mass. 336, 338, 403 N.E.2d 376, 377 (1980) (quoting *Best & Worst: Sports*, Boston Magazine, Sept. 1976, at 71).

107. *See Myers*, 380 Mass. at 341-43, 403 N.E.2d at 379-80.

108. *See, e.g.*, Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1290, 1300 (D.C. Cir.) (newspaper column accused plaintiff organization of anti-semiticism and inflammatory trial tactics), *cert. denied*, 109 S. Ct. 75 (1988).

109. *See, e.g.*, Immuno AG. v. Moor-Jankowski, 74 N.Y.2d 548, 558, 549 N.E.2d 129, 134, 549 N.Y.S.2d 938, 943 (1989) (Journal of Medical Primatology letter); Epstein v. Trustees of Dowling College, 152 A.D.2d 534, 543 N.Y.S.2d 691, 692 (2d Dep't 1989) (letters in student newspaper criticized professor).

110. *See, e.g.*, Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015-16 (1st Cir.) (in magazine selection of humorous stories from newspapers "amazon" does not mean "sexually aggressive and insatiable female who uses a mechanical device for her gratification"), *cert. denied*, 109 S. Ct. 65 (1988); Catalfo v. Jensen, 657 F. Supp. 463, 465 (D.N.H. 1987) (satiric article in magazine described politico as "a fat version of Dustin Hoffman's 'Ratso' in Midnight Cowboy" who might be responsible for "a mickie in the Canadian Club").

111. *See, e.g.*, Mr. Chow v. Ste. Jour Azur, S.A., 759 F.2d 219, 227-29 (2d Cir. 1985) (acerbic restaurant review); *cf.* Mashburn v. Collin, 355 So. 2d 879, 888-89 (La. 1977) (pre-*Ollman* case holding that review suggesting that dinners be entitled "trout a la green plague" and "yellow death on duck" was opinion).

112. *See, e.g.*, Secrist v. Harkin, 874 F.2d 1244, 1249 (8th Cir.) (defendant politician

son" narratives in newspapers.[114] But creating a list of literary genres explicitly labelled "opinion" limits the flexibility inherent in *Ollman*.[115] At its most powerful, the test focuses on a *particular statement* in a *particular context*, because a reasonable reader is affected by both the general literary genre and the particular characteristics of the communication under discussion. Understood in this way, the *Ollman* test reveals that even a television broadcast of "hard news" can be opinion.[116]

4. Social Context

When discussing "social context," *Ollman* initially seemed to focus on the social expectations surrounding a particular genre of writing or speaking.[117] But in practice, courts following *Ollman* have looked not only to expectations about a particular genre, but to the reasonable expectations of anyone confronted with a contentious social or political dispute.[118]

Social context, therefore, includes a consideration of the public controversy, if any, in which the statement was made and the plaintiff's status as a public or private person. *Price v. Viking Penguin, Inc.*[119] followed just such a model. Given the political controversy over events on the Indian reservation and the conduct of government agents, as well as plaintiff's status as a public person deeply involved in those events, any reasonable reader would expect statements of opinion.[120]

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questioned propriety of military man on active duty working for opposing campaign), *cert. denied*, 110 S. Ct. 324 (1989).

113. *See, e.g.*, Henderson v. Times Mirror Co., 669 F. Supp. 356, 357, 359-60 (D. Colo. 1987) ("sleaze-bag agent" who "slimed up from the bayou" not statement of fact), *aff'd mem.*, 876 F.2d 108 (10th Cir. 1989); Scott v. News-Herald, 25 Ohio St. 3d 243, 251, 496 N.E.2d 699, 706-07 (1986) ("knows in his heart that [plaintiffs] lied" not a statement of fact).

114. *See, e.g.*, McCabe v. Rattiner, 814 F.2d 839, 843 (1st Cir. 1987) (described condominium project as "scam").

115. For a contrary position, see Note, *Need for a Bright-Line Rule*, *supra* note 1, at 1851, where the author advocates that the news media actually label certain articles as "opinion," with an absolute privilege for any statement so labelled. "Conversely, any column appearing without the opinion label would be treated as a statement of fact." *Id.* The author does not discuss the easily foreseeable consequences of such a policy—that an entire newspaper or news broadcast will come with an "opinion" label and courts will then have to decide which labels are mere pretense.

116. *See* Southern Air Transp., Inc. v. American Broadcasting Cos., 877 F.2d 1010, 1016-17 (D.C. Cir. 1989).

117. *See* Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984) (en banc) ("Some types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact."), *cert. denied*, 471 U.S. 1127 (1985).

118. As the court in Price v. Viking Penguin, Inc., 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990), reasoned, "[s]tatements made in the course of a political debate are . . . more likely to be understood as opinion." *Id.* at 1433.

119. *Id.*

120. *See id.* at 1437-38; *see also* Southern Air Transp., Inc. v. American Broadcasting Cos., 877 F.2d 1010, 1016-17 (D.C. Cir. 1989) (given context of political controversy over

As with literary context, categories of social context signalling opinion could be distinguished: political controversies,[121] union disputes,[122] sports controversies,[123] business competition,[124] charged debates on topics of social controversy,[125] and even a scientific controversy between a hepatitis researcher and the chairwoman of the International Primate Protection League over the use of chimpanzees in medical experimentation.[126] But such a compilation of categories could be both endless and pointless, because controversial topics are not limited to any particular category. The operative question is whether a reasonable reader would expect statements of opinion in this *particular* social context.

B. Ollman's *Application of the Four Factors*

Ollman refused to state explicitly how to weigh these factors, although their relative weight certainly influences the fact-opinion distinction.[127] Judge Starr listed the precision and verifiability factors first, perhaps seeming to accord them greater weight. Yet the *Ollman* court opened its own analysis with the contextual factors.[128]

Ollman began by mentioning the nation's history of pamphleteering on political and social issues and the expectations of a reasonable reader when confronted with a column on the Op-Ed page of a newspaper.[129] The "traditional function" of newspaper columns and the text of this particular column were found to "predispose the average reader to regard what is found there to be opinion."[130] In such a context, the allega-

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Boland Amendment and plaintiff's place in that controversy, allegation of illegality could only be taken as opinion).

121. *See, e.g., Southern Air Transp.*, 877 F.2d at 1016 (debate on aid to Nicaraguan contras); Secrist v. Harkin, 874 F.2d 1244, 1249 (8th Cir.) (senatorial campaign), *cert. denied*, 110 S. Ct. 324 (1989); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1304-05 (8th Cir.) (political disputes and controversial criminal prosecutions on an Indian reservation), *cert. denied*, 479 U.S. 883 (1986); Catalfo v. Jensen, 657 F. Supp. 463, 468 (D.N.H. 1987) (political primary).

122. *See* Steinhilber v. Alphonse, 68 N.Y.2d 283, 287-88, 501 N.E.2d 550, 551, 508 N.Y.S.2d 901, 902 (1986) (tape recorded telephone message describes plaintiff as "scab," with additional insults).

123. *See* Henderson v. Times Mirror Co., 669 F. Supp. 356, 359 (D. Colo. 1987) (football coach referred to player's agent as "sleaze bag"), *aff'd mem.*, 876 F.2d 108 (10th Cir. 1989).

124. *See* Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1290 (4th Cir. 1987) (businessmen discount views of one competitor about his rival's product).

125. *See, e.g.*, Deupree v. Iliff, 860 F.2d 300, 304 (8th Cir. 1988) (sex education in the schools); Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1017 (1st Cir.) (social debate about gender roles), *cert. denied*, 109 S. Ct. 65 (1988).

126. *See* Immuno AG. v. Moor-Jankowski, 74 N.Y.2d 548, 553-54, 559, 549 N.E.2d 129, 130-31, 134, 549 N.Y.S.2d 938, 939-40, 943 (1989).

127. *See* Ollman v. Evans, 750 F.2d 970, 980, n.17 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

128. *See id.* at 986.

129. *See id.*

130. *Id.* at 987.

tions that Ollman was a "political Marxist" were easily held to be imprecise and unverifiable opinion.

The decision then turned to what it considered "the most troublesome statement," the claim that Ollman had no status in his profession.[131] Remarkably, all discussion of the precision or verifiability of this "no status" allegation was relegated to the footnotes.[132] By so doing, the *Ollman* court demonstrated that literary and social context are not merely two of the factors involved, but the determining influences.[133] In practice, *Ollman* makes context crucial and even dispositive, whether it explicitly says so or not.

C. *Divergent Applications of the* Ollman *Test*

Two approaches, both relying on *Ollman*, disagree about the relative emphasis that should be granted to the first set of factors (precision and verifiability) or to the second set (literary and social context). Courts stressing precision and verifiability tend to examine the statement for these factors first, and then turn to context as a possible exculpatory factor.[134] Conversely, courts that treat context as formative rarely make an initial finding of factuality. Instead, they emphasize the literary and social setting, and often declare the statement an opinion despite its abstract precision or verifiability.[135]

1. Context as Formative and Essential

In effect, *Ollman* treated context as a formative influence that deserves

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131. *See id.* at 989.

132. *See id.* at 990 n.42. Also see Judge Bork's concurrence, which details the problems of conducting a poll of Ollman's colleagues, from determining exactly who they are, to phrasing the questions, to interpreting the results. *Id.* at 1006-07 (Bork, J., concurring).

133. "The identical quotation in [another context] would, of course, be quite another matter." *Id.* at 990.

134. *See* Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 685 (4th Cir. 1989); Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1288-89 (4th Cir. 1987); Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1129-30 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

An extreme example of this approach is Capan v. Daugherty, 402 N.W.2d 561 (Minn. Ct. App. 1987), where defendant, a member of the municipal government, stated that a recently fired city employee was not " 'dealing with a full deck.' " *Id.* at 562. " 'Maybe the girl is frustrated. Maybe she has mental problems.' [Defendant] pointed out that he is a lifelong resident of Minneapolis and is happily married, whereas [plaintiff] is neither." *Id.* at 562-63 (quoting *Karen Capan: Was She Fired for Political Reasons*? Minneapolis Tribune, May 12, 1979, at 4B, col. 2). The court explicitly stated that this was a specific and verifiable allegation that the plaintiff lacked mental competence. Only the context of cautionary language, an adversarial relationship, and local politics immunized it as opinion. *See id.* at 563-64.

135. *See* Price v. Viking Penguin, Inc., 881 F.2d 1426, 1431-34 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990); Southern Air Transp., Inc. v. American Broadcasting Cos., 877 F.2d 1010, 1016-17 (D.C. Cir. 1989); Secrist v. Harkin, 874 F.2d 1244, 1248-51 (8th Cir.), *cert. denied*, 110 S. Ct. 324 (1989); Immuno AG. v. Moor-Jankowski, 74 N.Y.2d 548, 557, 549 N.E.2d 129, 133, 549 N.Y.S.2d 938, 942 (1989).

primary consideration.[136] Courts following this approach consider the issues of precision and verifiability *within* a particular context.[137] "Judgments about context often determine a statement's proper classification."[138] Literary context signals a reasonable reader to expect either opinion or fact, and social context shapes the ways in which statements are understood.[139]

Only within such a framework can the precision and verifiability of a statement be determined. In isolation, a statement might seem to display a precision and verifiability that it does not possess in context. "Ultimately, we must decide—not whether a statement in isolation is by virtue of its phrasing factual—but rather whether, when taken in context, the statement functions and would be understood as an unqualified assertion of fact rather than as an element of an opinion."[140]

This emphasis on context not only aids a court when it interprets a disputed statement, but also guarantees that libel liability does not chill the robust debate on public issues encouraged by the first amendment. "Where core values of the first amendment are implicated, even some false statements of fact must be protected."[141] If statements made during a public debate on a controversial topic are more likely to be understood as opinion,[142] recognizing that reasonable expectation ensures that a borderline statement of opinion is not actionable as a false statement of fact.[143]

The reach of this argument becomes apparent when allegations of criminal conduct are considered. An accusation of illegality would seem on its face to be clearly verifiable.[144] Emphasizing context, however, courts have occasionally found such allegations to be no more than ex-

136. *See infra* notes 127-133 and accompanying text.

137. *See Price*, 881 F.2d at 1432; *Secrist* 874 F.2d at 1248-50; *Southern Air Transp.*, 877 F.2d at 1016-17.

138. *Price*, 881 F.2d at 1433.

139. *See id.* at 1432-33.

140. *Id.* at 1432 (citing Ollman v. Evans, 750 F.2d 970, 994 (D.C. Cir. 1984) (en banc) (Bork, J., concurring)). The court concluded that context must be paramount: "We must therefore always ultimately focus on the context from which both the dispute and the statements arise, remaining sensitive to our republic's interest in robust debate and the protection of unpopular viewpoints." *Id.* at 1433.

141. *Id.*

142. *See id.*

143. *See id.*; *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (first amendment presupposes "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); Secrist v. Harkin, 874 F.2d 1244, 1249 (8th Cir.) ("While political commentators often decry the 'low level' of campaign tactics or rhetoric, the debate which accompanies public examination of candidates for public office lies at the heart of the First Amendment and is essential to our democratic form of government."), *cert. denied*, 110 S. Ct. 324 (1989).

144. *See* Ollman v. Evans, 750 F.2d 970, 980 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); *cf.* Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 382, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 ("Accusations of criminal activity, even in

pressions of opinion.[145] One litigated statement, for example, seemed in the abstract to accuse an FBI agent of criminal subornation of perjury: " 'More serious than [the witness's] lies was the all but inescapable conclusion that [plaintiff] had knowingly prepared this [witness] to give false testimony; at the very least, [plaintiff] found his story so convenient that [plaintiff] had not bothered to find out if it was true.' "[146]

Given the social and literary context,[147] this seemingly "specific and verifiable" allegation that the plaintiff had "not bothered" to investigate was actually "a qualitative judgment about the agency's motivation, effort and effectiveness."[148] According to the court, the suggestion that the plaintiff had suborned perjury, embedded in the context of frank opinion about governmental actions, would also be interpreted as opinion.[149] An abstractly verifiable accusation was thus revealed to be unverifiable opinion.[150]

2. Context as Extrinsic and Circumstantial

Ollman listed precision and verifiability first, perhaps seeming to grant them greater emphasis.[151] One approach derived from *Ollman* stresses

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the form of an opinion, are not constitutionally protected."), *cert. denied*, 434 U.S. 969 (1977).

145. *See, e.g.*, Southern Air Transp., Inc. v. American Broadcasting Cos., 877 F.2d 1010, 1016-17 (D.C. Cir. 1989) (suggestion that plaintiff participated in "illegal operation" was opinion, given untested reach of Boland amendments); *Secrist*, 874 F.2d at 1249-51 (suggestion that military officer violated Hatch Act by soliciting funds for a political campaign was opinion); Scott v. News-Herald, 25 Ohio St. 3d 243, 250-54, 496 N.E.2d 699, 705-09 (1986) (suggestion that plaintiff committed perjury was statement of opinion).

146. Price v. Viking Penguin, Inc., 881 F.2d 1426, 1438 (8th Cir. 1989) (quoting P. Matthiessen, In the Spirit of Crazy Horse 98 (1982)), *cert. denied*, 110 S. Ct. 757 (1990).

147. The court made explicit the context of legal and political controversy surrounding the trial and the government's conduct, as well as the conflict between the FBI and the American Indian Movement. *See id.* at 1434-35. The author's preparation and his sympathies were outlined, *see id.* at 1435-37, and the court discussed the plaintiff's role in the controversial events. *See id.* at 1431.

The original perjury had been egregious, crowned by the revelation that the witness "had been in California appearing on television and at college campuses" during some of the events he claimed to witness in South Dakota. *Id.* at 1437. The court before which the perjury occurred dismissed the case for government misconduct, *id.* at 1435, and sharply criticized the FBI investigation as "consist[ing] of giving [the witness] liquor, putting him up at plush resorts and overcompensating him for his short service as a witness in the amount of $2,074.50." *Id.* at 1439 (citing the trial transcript at the time of the original perjury). For a discussion of the resulting news accounts, editorials, and books, see *id.* at 1431. Members of Congress also expressed concern. *See id.*

148. *Id.* at 1438.

149. *See id.*

150. In the words of the Eighth Circuit, "[t]he entire discussion in context is a consideration of possibilities and likelihoods with respect to [the witness's] testimony. The author concludes with the opinion that the only certainty is that the episode discredited the prosecution." *Id.*

151. *See* Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). However *Ollman* actually began its analysis by examining context. *See supra* notes 127-133 and accompanying text.

these two factors, treating literary and social contexts as circumstantial considerations which possibly exculpate statements otherwise factual.[152]

According to this view, words possess an abstract meaning, independent of context, and that abstract meaning can be characterized with degrees of precision and verifiability. Social context and literary context are seen as extrinsic to the disputed statement, and only circumstantially affect its intrinsic meaning.[153] If the intrinsic meaning is sufficiently precise and verifiable, a context of social controversy and opinion format have negligible effect.

For example, a reasonable television viewer might expect opinion when interpreting statements made during the "Perspective" segment of a newscast, particularly allegations that a cigarette company aimed its advertising strategy at young people and associated smoking with the " 'illicit pleasure[s]' " of the adult world, such as " 'wine, beer, shaving, or wearing a bra.' "[154] However, by emphasizing abstract specificity,[155] a decision reasoned that "[t]he critical passages of the Perspective are without question factual under the first two *Ollman* factors. The only issue is whether the quoted statement is true or false."[156]

The decision ignored the formative character that *Ollman* implicitly grants to context. Instead, context was treated as merely an exculpatory factor that may or may not "immunize" statements on certain occasions.[157] The court effectively found irrelevant the tone of the comments, the use of the "Perspective" format, and the context of public debate about cigarette smoking.[158]

III. CONTEXT MUST RECEIVE PRIMARY CONSIDERATION

When distinguishing actionable statements of fact from constitutionally protected opinion, courts should emphasize context, taking into account the formative effect that it has upon the meaning of a statement. Indeed, without explicitly examining the context or implicitly assuming one, the meaning of a disputed statement could not be interpreted at all. Minimizing the importance of context and effectively separating fact

152. Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1129-30 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). The Seventh Circuit's use of *Ollman* was grudging, and it explicitly noted that it used the four-factor test only at the request of the parties. *Id.* at 1129 n.3.

153. For example, the court in *Brown & Williamson Tobacco* reasons "[t]he fact that a report is delivered in a caustic tone does not turn a statement of fact into a statement of opinion." *Id.* at 1131. The tone of a statement thus becomes an external feature which fails to effect the statements predetermined meaning.

154. *Id.* at 1123 (quoting *Walter Jacobson's Perspective* (WBBM-TV broadcast, Nov. 11, 1981)). The anchorman then concluded " '[t]hey're not slicksters. They're liars.' " *Id.*

155. "[T]his case involves some very specific statements against a very specific company in the tobacco industry." *Id.* at 1122.

156. *Id.* at 1130.

157. *Id.*

158. *See id.* at 1130-31.

from opinion by a *de facto* bright-line rule risks underprotecting speech and confining opinion into a conceptual strait-jacket.

A. *Hermeneutic Arguments for the Importance of Context*

Linguists and philosophers of language have frequently stressed the formative power of context in determining the meaning of individual words and sentences.[159] Justice Holmes pointed out the chameleon-like quality of individual words in various contexts: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[160] Although the comment is redolent of the biological view of language common in the nineteenth century,[161] it does emphasize that context determines and delimits the meaning assigned to statements by a reasonable reader.

Despite the great weight it gives context, *Ollman* offered an example of an abstract factual statement: "Mr. Jones had ten drinks at his office party and sideswiped two vehicles on his way home."[162] The court suggested it would be "rather hard" to view this as opinion.[163] Yet viewing the statement as fact requires a number of contextual assumptions. The reader assumes that "ten drinks" is a verifiable amount of alcohol, not ten sips of water, and that the two "vehicles" were automobiles, not theatrical performances. The reader also presumes that the statement was not made by a comedian at a celebrity roast of a notorious teetotaler.[164] That these assumptions about context are "normal" does not render them any less hypothetical.

Ollman's exemplary statement, like any other, carries a particular

159. *See, e.g.*, R. Palmer, Hermeneutics 87 (1969) ("A whole sentence, for instance, is a unity. We understand the meaning of an individual word by seeing it in reference to the whole of the sentence; and reciprocally, the sentence's meaning as a whole is dependent on the meaning of individual words."); H. Gadamer, Truth and Method 258-59 (1975) ("we must understand the whole in terms of the detail and the detail in terms of the whole. . . . We learn that we must 'construe' a sentence before we attempt to understand the individual parts of the sentence in their linguistic meaning. But this process of construing is itself already governed by an expectation of meaning that follows from the context of what has gone before."); J. Austin, How to Do Things with Words 139 (2d ed. 1978) ("what we have to study is *not* the sentence but the issuing of an utterance in a speech situation") (emphasis in original).

On the multifold purposes which words and sentences can serve, see L. Wittgenstein, Philosophical Investigations 11 (3d ed. 1958) ("how many kinds of sentences are there? Say assertion, question, and command?—There are *countless* kinds: countless different kinds of use of what we call 'symbols', 'words', 'sentences'. And this multiplicity is not something fixed, given once for all; but new types of language, new language-games, as we may say, come into existence, and others become obsolete." (emphasis in original)).

160. Towne v. Eisner, 245 U.S. 418, 425 (1918).

161. *See* G. Sampson, Schools of Linguistics 17 (1980).

162. Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

163. *See id.*

164. The "ordinary meaning of words" is completely undercut when the context suggests irony. "Ollie is an honorable man" means the opposite in a comedian's monologue.

"factual" meaning only in certain contexts and because of certain social conventions. A sign reading "PRIVATE MEMBERS ONLY" has one meaning in its "normal" context, on the door of a private club, while it might have other meanings in the vagaries of classroom discussion.[165] The statement "Our mothers bore us" has different meanings depending on whether the conversation dealt with birth or boredom.[166] Similarly, a sign reading "NO LITTERING" has a different meaning on a public beach and on the wall of a birth control clinic.

These various meanings are not the rare creatures of a limited preserve of "ambiguous" language. Rather they clarify the way in which context shapes a reader's interpretation of particular words. Even a statement as facially "obvious" as "I will go" can be interpreted as a threat, a warning, a promise, a statement of intent and so on depending upon the context in which it appears.[167] "Dr. Jones is a murderer" seems abstractly factual, until placed on an anti-abortion placard outside the doctor's house.[168] To decide that the statement is factual outside its context only assumes unconsciously that it appeared in a "normal" context. "But what is normal (like what is ordinary, literal, everyday) is a *function* of circumstances in that it depends on the expectations and assumptions that happen to be in force."[169]

Because context shapes the meaning of individual words and sentences, it also influences their degree of precision or ambiguity.[170] In

165. S. Fish, Is There a Text in This Class? 275 (1980).

166. *See* W. Quine, Word and Object 129 (1960).

167. *See* S. Fish, *supra* note 165, at 284.

168. *See* R. Smolla, *supra* note 15, at 60. The protester's statement might be analyzed as two simultaneous statements: "Dr. Jones is an abortionist," an undisputed fact, and "Abortionists are murderers," a privileged opinion. But this analysis is itself possible only because context alerts the reasonable reader that two intertwined statements are being made simultaneously.

The reasonable reader must also know when to stop this dissection. "Dr. Jones is an abortionist" perhaps separates into "Dr. Jones has counseled women to have abortions," a supposed statement of fact, and "Anyone who counsels abortions is an abortionist," a supposed statement of opinion. "Dr. Jones has counseled women to have abortions" can then be analyzed as "Dr. Jones has discussed positively the arguments for abortion with women facing the decision," a supposed statement of fact, and "Anyone who discusses arguments for abortion positively has counseled abortion," a statement of opinion. Analysis of sentence meaning can always be carried to another level, revealing yet more shades of fact and opinion.

Professor Smolla's hypothetical was soon followed by an actual case on similar facts, Van Duyn v. Smith, 173 Ill. App. 3d 523, 527 N.E.2d 1005 (1988), *appeal denied*, 124 Ill. 2d 562, 535 N.E.2d 922 (1989), *cert. denied*, 109 S. Ct. 3217 (1989). Defendant abortion protestor displayed a poster with the name and picture of plaintiff, the director of an abortion clinic, stating that she was "Wanted" for "killing the unwanted and unprotected." *Id.* at 537, 527 N.E.2d at 1014. The court noted that the statement, abstractly considered, was a "potentially damaging fact." *Id.* In this social context, however, the statement was protected opinion. *See id.*

169. S. Fish, *supra* note 165, at 287 (emphasis in original).

170. *See, e.g.*, W. Quine, *supra* note 166, at 128 (on precision/vagueness of "Mount Rainer," depending on whether the statement involves height or area); L. Wittgenstein, *supra* note 159, at 32-34, 41 (on "family resemblances" and "exactness").

an example frequently used in speech act theory, the statement "France is hexagonal" might be "good enough for a top-ranking general, perhaps, but not for a geographer."[171] Whether a statement is precise or not depends on the purposes for which it is intended. As *Ollman* noted, "fascist" is more precise in one context for one purpose (a historical work on pre-war Italy) and less precise in another context and with another purpose (a polemic between a political commentator and his critics).[172] Abstracted from context, "fascist" cannot be said to have any degree of precision at all. In order to judge the precision of a statement, context and purpose must be examined.

Similarly, whether a statement is verifiable or not depends upon the context in which it appears and the purpose for which it is formulated.[173] Even scientific statements are verifiable because of the context of shared assumptions, the paradigm, in which the statement appears.[174] Courts, however, must weigh the verifiability not of scientific statements, but of statements like " 'Little Amazons Attack Boys.' "[175] To adjudge these statements verifiable, a court must first determine what they mean, an inquiry that leads inevitably towards social and literary context.

B. *Policy Considerations*

The Supreme Court reaffirmed the significance of constitutional protection for opinion in *Hustler Magazine, Inc. v. Falwell*,[176] which emphasized "the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[177] The Court then cited the *Gertz* dictum approvingly, with the gloss "[w]e have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions."[178]

Numerous rationales have been offered to justify the first amendment's dictate, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[179] As formulated by one scholar, four

171. J. Austin, *supra* note 159, at 143.

172. *See* Ollman v. Evans, 750 F.2d 970, 980 n.20 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

173. *See* Stevens v. Tillman, 855 F.2d 394, 398-99 (7th Cir. 1988) ("2 + 3 = 5" is verifiable statement in context where "+ signifies addition, in base six or higher), *cert. denied*, 109 S. Ct. 1339 (1989).

174. *See* T. Kuhn, The Structure of Scientific Revolutions 10-22 (1970) (on paradigms in "normal science").

175. Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1014 (1st Cir.) (quoting *Hard Times*, Penthouse, Apr. 1986, at 144), *cert. denied*, 109 S. Ct. 65 (1988).

176. 485 U.S. 46 (1988).

177. *Id.* at 50.

178. *Id.* at 51; *see also* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-04 (1984) (stating that "the freedom to speak one's mind" is "essential to the common quest for truth and the vitality of society as a whole" and quoting the *Gertz* dictum); Stevens v. Tillman, 855 F.2d 394, 399 (7th Cir. 1988) (constitutional distinction between fact and opinion justified by cost of condemning speech that turns out harmless or socially useful), *cert. denied*, 109 S. Ct. 1339 (1989).

179. U.S. Const. amend. I.

primary motivations underlie the speech and press clauses of the first amendment: (1) free expression assures individual self-fulfillment; (2) free discussion advances knowledge and aids the discovery of truth; (3) free speech is required for the participation of all citizens in decision-making; and (4) free expression leads towards "a more adaptable and hence a more stable community," which "maintain[s] the precarious balance between healthy cleavage and necessary consensus."[180] Each of these rationales leads to a presumption for wide protection of statements of opinion, and suggests that statements should be carefully considered in context before they are held to be actionable fact.

Although courts often commend free expression of opinion for its social benefits, the Supreme Court has also stated that "the freedom to speak one's mind" is "a good unto itself."[181] Thus the typical defamation suit involves not only the plaintiff's interest in his or her reputation and society's interest in free expression, but also the defendant's right to individual expression. That alone should encourage courts to make certain that the disputed statement was actually understood by the community as a defamatory statement of fact, not merely a personal expression of dislike.

The second rationale, that the search for knowledge and truth is advanced by free discussion, is perhaps the most widely encountered. This "marketplace of ideas" argument derives in part from Justice Holmes' famed dissent in *Abrams v. United States*,[182] where he argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[183] Given the fallibility of both the individ-

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180. T. Emerson, *supra* note 1, at 6-7.

181. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503 (1984); *see also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("the final end of the State was to make men free to develop their faculties") (overruled by Brandenberg v. Ohio, 395 U.S. 444, 449 (1969)); T. Emerson, Towards a General Theory of the First Amendment 5 (1966) ("every man—in the development of his own personality—has the right to form his own beliefs and opinions. And it also follows that he has the right to express these beliefs and opinions. Otherwise they are of little account."); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 991 (1978) ("To justify legal obligation, the community must respect individuals as equal, rational and autonomous moral beings."); Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 Nw. U.L. Rev. 54, 80 (1989) (free expression allows development of individual's rational faculties and creative impulses). *But see* F. Schauer, Free Speech: A Philosophical Inquiry 64-65 (1982) (arguing that speech cannot claim special status over other activities as self-realizing and self-expressive).

182. 250 U.S. 616 (1919).

183. *Id.* at 630 (Holmes, J., dissenting); *see also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth"). *See generally*, L. Bollinger, The Tolerant Society 43-75 (1986) (on the classical model justifying free speech); F. Schauer, *supra* note 181, at 15-34 (praises marketplace theory for the scepticism it encourages towards our own opinions, but wonders about the assumption that truth and reason will prevail in the end); Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L.J. 1 (arguing that marketplace theory is implausible in mod-

ual and the government, free discussion provides the soundest method of arriving at socially valuable opinions.[184] Although some or even most opinions are socially valueless, free debate is trusted to sort them out. Even "wrong" or socially useless opinions have some value because their very wrongness can strengthen one's awareness of more socially beneficial opinions.[185] In this "marketplace of ideas," an opinion deserves constitutional protection even when preposterous, unpleasant and clearly offensive to community standards.[186]

The third rationale, that free expression is required for democratic self-government, has been forcefully argued by philosopher Alexander Meiklejohn.[187] In order to make informed and responsible decisions, cit-

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ern society and only legitimizes entrenched power structures); Schauer, *supra* note 88, at 268-72 (briefly criticizing marketplace theory of free speech).

The "marketplace of ideas" rationale for free speech is not without its detractors, who often argue that it presupposes an overly optimistic view of human nature. Truth may emerge victorious in the "long run," but error too frequently commands the present day. Justice Brandeis argued in *Whitney* that "discussion affords ordinarily adequate protection against the dissemination of noxious doctrine," 274 U.S. at 375, to which one critic responded "we have lived through too much to believe it." A. Bickel, Morality of Consent 71 (1975).

184. *See* Lorain Journal Co. v. Milkovich, 449 U.S. 966, 969 (1980) (Brennan, J., dissenting from denial of certiorari) ("the press is free to differ with judicial determinations. In the libel area, neither a court nor any other institution is the 'recognized arbiter of truth'. . .") (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1979)).

185. See John Stuart Mill's well-known argument:

> [T]he peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.

J.S. Mill, On Liberty 21 (C. Shields ed. 1956). *See also* Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989) ("there is a larger injury to be considered, the damage done to every American when a book is pulled from a shelf, as in this case, or when an idea is not circulated"), *cert. denied*, 110 S. Ct. 757 (1990).

186. *See* FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978); Street v. New York, 394 U.S. 576, 592-93 (1969).

187. *See* A. Meiklejohn, Free Speech and its Relation to Self-Government (1948), *reprinted in* A. Meiklejohn, Political Freedom: The Constitutional Powers of the People (1960). The discussion of Meiklejohn's position has been extensive. *See generally* L. Bollinger, *supra* note 183, at 151-52 (criticizing Meiklejohn for ignoring speech restrictions produced by democratic process, or restrictions against speech that undermines self-government); H. Kalven, A Worthy Tradition 67 (1988) (*New York Times* "almost literally incorporated" Meiklejohn's arguments); F. Schauer, *supra* note 181, at 37-46 (pointing out the distance between Meiklejohn's town meeting model and modern society, and questioning whether his position allows majority tyranny); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 26-28 (1971) (takes Meiklejohn's position further than Meiklejohn himself and argues that the first amendment protects *only* explicitly political speech, not scientific, educational, commerical or literary speech); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 14-17 (1965) (discussing influence of Meiklejohn's argument upon the Court in *New York Times* case); Kalven, *The* New York Times *Case: A Note on the "Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 209 (argues that Meiklejohn's argument strongly influenced the Court); Meiklejohn, *The First Amendment*

izens must have access to all relevant information and viewpoints. "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[188] That some of these opinions are empty, acerbic, and even obscene does not render them socially valueless. Instead, by allowing such expressions of violent and abusive opinion, readers and listeners can become aware of the unpleasant but symptomatic feelings of others, "provid[ing] us with a social thermometer for registering the presence of disease within the body politic."[189]

The last rationale, that free speech strengthens society itself, making it both more stable and adaptable, has been further developed by Professor Bollinger.[190] Free speech becomes a testing ground where society "exercise[s] extraordinary self-restraint toward injurious behavior as a means of symbolically demonstrating a capacity for self-control toward feelings that necessarily must play a role throughout social interaction, but which also have a tendency to get out of hand."[191] Under this analysis, free expression becomes not only a method of controlling intolerance, but also a practical exercise to eliminate it. Seemingly valueless and even harmful opinions are tolerated not only to protect more valued opinions, but also to learn how to tolerate other, non-speech activities.

Against the community's interest in "uninhibited, robust, and wide-open" debate,[192] courts have long recognized the individual's interest in his or her reputation.[193] "However much as individuals we may try to disconnect our own feelings about ourselves from the feelings that others bear toward us, we are never more than partially successful."[194] But as the *Gertz* dictum recognized, and the Supreme Court reaffirmed, an indi-

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is an Absolute, 1961 Sup. Ct. Rev. 245, 255-57 (first amendment protects freedom to share in governmental decisions in all their diversity, expanding beyond narrowly political concerns to education, science, philosophy, literature and public discussion of public issues); Schauer, *supra* note 87, at 272-73 (suggests that Meiklejohn's position only protects information transmitted, with principal purpose of changing minds).

188. A. Meiklejohn, *supra* note 187, at 21.

189. L. Bollinger, *supra* note 183, at 55.

190. *See id.* at 104-44.

191. *Id.* at 142-43. "[T]he purposes of the free speech enterprise may reasonably include not only the 'protection' of a category of especially worthy human activity but also the choice to exercise extraordinary self-restraint toward behavior acknowledged to be bad but that can evoke feelings that lead us to behave in ways we must learn to temper and control." *Id.* at 120. Professor Bollinger's defense of free speech has somewhat elitist aspects; the first amendment becomes the Supreme Court's excuse to send the American public unwillingly down the long and lonely road of self-improvement.

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

193. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (libel law protects " 'our basic concept of the essential dignity and worth of every human being,' " (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring))); Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984) ("[A]n individual's interest in his or her reputation is of the highest order. Its protection is an eloquent expression of the respect historically afforded the dignity of the individual in Anglo-American legal culture."), *cert. denied*, 471 U.S. 1127 (1985).

194. L. Bollinger, *supra* note 183, at 65.

vidual's reputation is harmed primarily by false statements of fact.[195]

Courts encounter their greatest difficulties balancing these two opposing interests—the individual's interest in reputation and society's interest in free debate—with disputed statements like those in *Price v. Viking Penguin, Inc.*[196] The challenged statement itself, that plaintiff "knowingly prepared [a witness] to give false testimony," seems in the abstract a precise and verifiable allegation of illegal conduct.[197] But the literary and social contexts, including qualitative judgments about the motivations and purposes of government actors involved in a contentious political and legal dispute, suggest opinion.[198]

When ruling on a statement that seems to fall within the broad continuum between undisputed fact and undisputed opinion, a court faces two dangers. If it errs by emphasizing abstract verifiability and holding the statement to be factual, the court suppresses an opinion that might be socially useful, and the very act of affixing liability could have a chilling effect on other speech. If, however, the court errs by emphasizing contextual factors and the community's reasonable interpretation and holds the statement opinion, it denies redress for an ambiguous statement with indeterminate consequences.[199] Given the imperatives of the first amendment and its protection for the expression of opinion, the danger of suppressing speech is much larger and broader.

An emphasis on the reasonable reader's interpretation of a statement in context is also particularly fitted to the harm caused by a defamatory utterance. Because the interest protected by defamation law is by definition an individual's reputation in the community,[200] the distinction between statements of fact and statements of opinion should be based upon how a reasonable member of that community would construe the statement.[201] Such an interpretation involves not only abstract categories of precision or verifiability, but also the source of the statement, its conjectural purpose, the medium in which it appeared, the status of the person to whom it referred, and the intensity of controversy—in short the multi-

195. *See* Hustler Magazine, Inc., v. Falwell, 485 U.S. 46, 52 (1988).

196. 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990).

197. *Id.* at 1438 (quoting P. Matthiessen, In the Spirit of Crazy Horse 98 (1982)).

198. *See id.* at 1438-39.

199. Actual damages in defamation suits are notoriously difficult to quantify. In Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988), for example, the jury awarded a cigarette manufacturer $3 million in compensatory damages for a televised statement that it encouraged children to smoke. *See id.* at 1139. The trial court reduced that award to $1.00, reasoning that the plaintiff had not demonstrated any lost sales, lost profits, or lost customers. *See id.* The Seventh Circuit, emphasizing the power of television, reversed the trial court and reinstated $1 million in compensatory damages. *See id.* at 1142. The court admitted, "We recognize that this is a very inexact and somewhat arbitrary process." *Id.*

200. *See* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 111, at 771 (5th ed. 1984).

201. *See supra* notes 159-175 and accompanying text.

ple and variable factors of context.[202]

Many commentators have argued that speech can best be protected by formulating a sharp, bright-line definition of opinion.[203] But these attempts to create *de facto* or *de jure* bright-line rules actually authorize abstract and simplistic categories. Any single-factor or *de facto* bright-line test would falsify the boundary between fact and opinion, and therefore underprotect speech by making some opinions actionable. Unnoticed, however, is the effect that such a bright-line rule would have on the individual's interest in reputation. Making verifiability and precision the talismanic indicators of "fact" would encourage and immunize unverifiable allegations. In contrast, by examining context and according it primary emphasis, courts continue the valuable first amendment tradition of weighing the function and purpose of disputed statements.

C. *Potential Criticisms of an Emphasis on Context*

Ollman's emphasis on context has produced dismay, consternation and even hysteria among its critics.[204] A test that explicitly stressed context, and subordinated abstract precision and verifiability, could be expected to provoke similar criticisms. Two are particularly important. First, it has been argued that emphasizing context is a revolutionary departure from established practice.[205] Secondly, it has been claimed that a stress on context will lead to the dreaded result of a lawless lawmaker.[206]

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202. For example, the court in Price v. Viking Penguin, Inc., 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990), examines the political and legal controversy underlying the challenged statements, the plaintiff's position as a public figure deeply involved in that controversy, the author's tone and sympathies, and his reliance on public records. *Id.* at 1434-37.

203. *See, e.g.*, Note, *Statements of Fact, supra* note 1, at 1055 (arguing that a verifiability test is most consistent with first amendment values); Note, *Fact-Opinion Determination, supra* note 1, at 840 (arguing that only explicit and specific charges should be considered actionable fact); Note, *Need for a Bright-Line Rule, supra* note 1, at 1851 (arguing that the press should be encouraged to "label" articles either opinion or fact, with any article not so labelled deemed to be fact); Comment, *supra* note 1, at 320 (arguing that specific charges of criminal conduct should be presumed fact).

204. *See, e.g.*, Scott v. News-Herald, 25 Ohio St. 3d 243, 276, 496 N.E.2d 699, 725 (1986) (Brown, J., concurring in part, dissenting in part) ("verbal orgy of nonsensical jargon which cascades from the majority's discussion of the spurious four-factor test"); *id.* at 265 n.8, 496 N.E.2d at 717 n.8 (Celebrezze, C.J., concurring in part, dissenting in part) (comparing four-factor test to newspaper's daily horoscope).

205. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 1038 (1984) (Scalia, J., dissenting in part) (criticizing a "creative approach to first amendment jurisprudence"), *cert. denied*, 471 U.S. 1127 (1985); *Scott*, 25 Ohio St. 3d at 263, 496 N.E.2d at 716 (Celebrezze, C.J., concurring in part, dissenting in part) (likening court's decision on article to a "Jekyll and Hyde transformation"); *id.* at 274, 496 N.E.2d at 724 (Brown, J., concurring in part, dissenting in part) ("smashing to smithereens their sacred doctrine of *stare decisis*").

206. *See, e.g.*, Janklow v. Newsweek, Inc., 788 F.2d 1300, 1307 (8th Cir.) (Bowman, J., dissenting) ("[T]he result to be obtained through application of the *Ollman* factors is in the eye of the judge."), *cert. denied*, 479 U.S. 883 (1986); *Ollman*, 750 F.2d at 1038 (Scalia, J., dissenting in part) (risk of judicial subjectivity); *Scott*, 25 Ohio St. 3d at 267, 496 N.E.2d at 719 (Sweeney, J., concurring in part, dissenting in part) ("patently arbitrary, and too unreliable"); *id.* at 273, 496 N.E.2d at 723 (Brown, J., concurring in part,

Yet these criticisms are unfounded. Courts, like all readers and listeners, have long implicitly recognized the formative power of context upon the meaning of statements. Even Justice Scalia, a stalwart dissenter in *Ollman*, relied upon context when contrasting the disputed statement in *Ollman* with a hypothetical example: "If [the defendants] had chosen to call Ollman a traitor to our nation, fair enough. No reasonable person would believe, *in that context*, that they really *meant* a violation of 18 U.S.C. § 2381 (1982)."[207]

Similarly, critics need not fear that free-wheeling judges will now begin interpreting statements to mean whatever they want them to mean and institute an Orwellian Big Brother regime.[208] Because statements are always read and interpreted in a particular context, a lawless situation of "wild" interpretations is unlikely to occur. A truly idiosyncratic interpretation[209] will rarely arise in a judge's mind, because judges have already learned to interpret statements in a community-approved manner. Yet, even were this "wild" interpretation to appear, the judge would soon be enlightened, checked, and reversed by the community of other judges. Even if this interpretation were to take hold of the mind of a Supreme Court justice, there would still be the small community of eight other justices to argue otherwise.

D. *Operation of a Test Emphasizing Context*

A test explicitly emphasizing context would neither overturn established law nor make the court's task appreciably more difficult. This can be shown by examining two decisions which held statements to be actionable fact, *Brown & Williamson Tobacco Corp. v. Jacobson*,[210] and *Blue Ridge Bank v. Veribanc, Inc.*[211]

In *Brown & Williamson Tobacco*, the Seventh Circuit considered a newscast "Perspective" in which the defendant anchorman said of a cigarette manufacturer, " 'They're not slicksters. They're liars.' "[212] Considered in its social and literary context, this was not a statement of fact. It appeared during a segment specifically labelled "Perspective," which would lead the viewer to expect opinion. The anchorman's signature appeared on the screen, while the anchorman delivered the statement in a

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dissenting in part) ("so malleable and spongy as to permit any interpretation anyone wishes"); Note, *Defamation, supra* note 1, at 369 ("elaborate ad hoc judgment call").

207. 750 F.2d at 1036 (Scalia, J., dissenting) (first emphasis added).

208. *See, e.g., Scott*, 25 Ohio St. 3d at 272 n.12, 496 N.E.2d at 723 n.12 (Brown, J., concurring in part, dissenting in part) (suggesting that under *Ollman* "War is Peace," "Freedom is Slavery," and "Ignorance is Strength") (quoting G. Orwell, Nineteen Eighty-Four (1949)).

209. For example, that "amazon" means "sexually aggressive and insatiable female who uses a mechanical device for her gratification" as argued by the plaintiff in Fudge v. Penthouse Int'l Ltd., 840 F.2d 1012, 1015 (1st Cir.), *cert. denied*, 109 S. Ct. 65 (1988).

210. 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

211. 866 F.2d 681 (4th Cir. 1989).

212. 827 F.2d at 1123 (quoting *Walter Jacobson's Perspective* (WBBM-TV broadcast, Nov. 11, 1981)).

"caustic tone," further reinforcing that this was a personal viewpoint.[213] The court itself recognized the atmosphere of controversy over the tobacco industry.[214] The statement also involved allegations of motive and subliminal sexual messages in an advertisement that displayed a young woman wading in a fountain, with the slogan "If it feels good, do it."[215] Given the medium, the subject-matter of the statement, and the public controversy about the cigarette industry, a reasonable viewer would construe the statement as opinion.

Blue Ridge Bank serves as a counter-example. The defendant was a corporation in the business of gathering, processing and distributing financial information about banks, credit unions, and savings associations from such sources as the Federal Reserve Board.[216] It mistakenly listed Blue Ridge Bank (along with 126 others) among the banks which could reach zero equity within one year.[217] Here the defendant held itself out as offering accurate information based on responsible sources. The very purpose of the report would seem to be reliable factual information. Until the mistaken listing, there was no public controversy about Blue Ridge's financial stability. It is this social and literary context that causes the reader to expect a precise and verifiable factual statement. The Fourth Circuit properly found the statement to be actionable fact.

CONCLUSION

When distinguishing a constitutionally protected statement of opinion from an actionable statement of fact, courts should emphasize and explicitly examine the context in which the disputed statement was made. Because context, both literary and social, shapes the expectations of a reasonable audience, a statement can be weighed for precision and verifiability only *within* a particular context.

Any other approach, emphasizing verifiability or drawing a bright-line distinction between fact and opinion, confines opinion to an artificial and abstract category and defeats the first amendment's goal of encouraging beneficial and harmless speech. Fact can be separated from opinion only by a conscious and explicit examination of context, with all the uncertainties which that involves. There are no easy formulas.

Rodney W. Ott

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213. *See id.* at 1131.
214. *See id.* at 1122.
215. *Id.* at 1131.
216. *See* Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 683 (4th Cir. 1989).
217. *See id.*