July 2015

Milkovich vs. Lorain Journal Co.: Is The Supreme Court "Holding the Balance True" in Defamation Actions?

Sheila Noonan

MILKOVICH VS. LORAIN JOURNAL CO.: IS THE SUPREME COURT "HOLDING THE BALANCE TRUE" IN DEFAMATION ACTIONS?

INTRODUCTION

Andy Rooney, the outspoken commentator on the television show, *Sixty Minutes,* was sued for defamation for comments he made in an April 17, 1988 broadcast of the show.[1] In his show-ending commentary, Mr. Rooney discussed his annoyance with receiving junk mail.[2] Commenting on the product "Rain-X", of which he had received a complementary supply in the mail, Mr. Rooney stated that "Rain-X" didn't work.[3] Is such a statement considered defamatory under today's law or is it protected under the first amendment?[4]

For the past sixteen years, federal circuit courts[5], state courts[6], and the American Law Institute[7] have considered expressions of opinion to be absolutely

---

[1] Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir., 1990), cert. denied, 59 U.S.L.W. 3701 (U.S. April 15, 1991).

[2] *Id.* at 1051.

[3] *Id.*

[4] *Id.* at 1052. The Ninth Circuit Court of Appeals affirmed the lower court ruling that the statements were not defamatory. However the court of appeals used the standard outlined in Milkovich v. Lorain Journal, Co., 110 S.Ct. 2695 (1990) and was the first court to do so.

[5] *See, e.g.*, Biggs v. Village of Dupo, 892 F.2d 1298 (7th Cir. 1990); Deupree v. Iliff, 860 F.2d 300 (8th Cir. 1988); Ault v. Hustler Magazine, Inc., 860 F.2d 877 (9th Cir. 1988); Fudge v. Penthouse Intern, Ltd., 840 F.2d 1012 (1st Cir. 1988); Falls v. Sporting News Publishing Co., 834 F.2d 611 (6th Cir. 1987); Potomac Valve & Fitting v. Crawford Fitting, 829 F.2d 1280 (4th Cir. 1987); Koch v. Goldway, 817 F.2d 507 (9th Cir. 1987); McCabe v. Rattinger, 814 F.2d 839 (1st Cir. 1987); Yagman v. Baden, 796 F.2d 1165 (9th Cir. 1986); Keller v. Miami Herald Pub. Co., 778 F.2d 711 (11th Cir. 1985); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); Ollman v. Evans, 750 F.2d 970 (D.C.Cir. 1984)(en banc), *cert. denied*, 471 U.S. 1127 (1985); Rinsley v. Brandt, 700 F.2d 1304 (1983); Cianci v. New York Times Publishing Co., 639 F.2d 54 (1980); Avins v. White, 627 F.2d 637 (3rd Cir. 1980), *cert. denied*, 449 U.S. 982 (1980); Orr v. Argus-press co., 586 F.2d 1108 (6th cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

[6] *See, e.g.*, Bland v. Verser, 299 Ark. 490, 774 S.W.2d 124 (1989); Jones v. Palmer Communications, Inc., 440 N.W.2d 884 (Iowa 1989); Casso v. Brandt, 776 S.W. 2d 551 (Tex 1989); Bussie v. Lowenthal, 535 So. 2d 378 (La. 1988); Gernander v. Winona State University, 428 N.W.2d 473 (Minn. App. 1988); Johnson v. Delta-Democrate Pub. Co., 531 So. 2d 811 (Miss. 1988); Frignon v. Morrison-Maierle, 233 Mont. 113, 760 P.2d 57 (1988); Riley v. Moyed, 529 A.2d 248 (Del. 1987); Turner v. Welliver, 226 Neb. 275, 411 N.W.2d 298 (1987); Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587 (Okla. 1982), *cert denied*, 459 U.S. 923 (1982); Pease v. Telegraph Pub. Co., 121 N.H. 62, 426 A.2d 463 (1981).

[7] *See* RESTATEMENT (SECOND) OF TORTS, Section 566 (1976) and accompanying comments. Section 566 provides:

> 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.

But see, Milkovich, 110 S.Ct. at 2702-03. The *Milkovich* Court interpreted section 566, comment a, to state that defamatory statements are actionable regardless of whether they are statements of opinion or fact.

protected from defamation liability under the First Amendment. The courts have interpreted the United States Supreme Court's *Gertz v. Robert Welch, Inc.*[8] opinion to direct that only false statements of fact are actionable because opinions "depend for [their] correction not on the conscience of judges and juries but on the competition of other ideas".[9]

Since this supposed creation of an absolute constitutional privilege for expressions of opinion, lower courts have struggled to develop a consistent method of distinguishing statements of opinion from fact.[10] Until now, the Supreme Court has refused to review this issue.[11]

However, in *Milkovich v. Lorain Journal Co.*,[12] the Supreme Court ruled that opinions are not afforded absolute First Amendment Protection.[13] The court even offered a test whereby lower courts can determine whether a statement is constitutionally protected.[14]

This Note examines the background of defamation law and the Milkovich court's reasoning. The Note will discuss the *Milkovich* test's ability to distinguish fact from opinion and its potential future impact on broadcasters and journalists in the United States.

BACKGROUND

The Evolution of the Fact/Opinion Distinction

The common law defines defamation as a false communication, written[15] or

[8] 418 U.S. 323 (1974).

[9] *Id.* at 339-340. The Court stated, "Under the First Amendment there is no such thing as a false idea."

[10] *See generally*, Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas"*, 43 ARK L. REV. 57 (1990); *The Illusion of the Fact-Opinion Distinction in Defamation Law*, 39 CASE W. L. REV. 867 (1988-89); *The Fact/Opinion Distinction: An Analysis of the Subjectivity of Language and Law*, 70 MARQ. L. REV. 673 (1987).

[11] *See, e.g.*, Avins v. White, 627 F.2d 637 (3rd Cir. 1980), *cert. denied*, 449 U.S. 982 (1980); Hammerhead v. Brezenoff, 707 F.2d 33 (3d Cir. 1983), *cert. denied*, 104 S.Ct. 237 (1983); Janklow v. Newsweek, Inc., 759 F.2d 644 (8th Cir. 1985), *aff'd on reh'g*, 788 F.2d 1300 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 272 (1986); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1985)(en banc), *cert. denied*, 471 U.S. 1127 (1985); Tavoularas v. Piro, 817 F-2d 762 (D.C. Cir. 1986), *cert. denied*, 479 S.Ct. 200 (1987); Ault v. Hustler Magazine, 860 F.2d 877 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1532.

[12] 110 S.Ct. 2695 (1990).

[13] *Id.* at 2705. The *Milkovich* court provided:

> We do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion". ...Not only would such an interpretation be contrary to the tenor and context of the passage, but it would ignore the fact that expressions of "opinion" may often imply an assertion of objective fact. *Id.*

[14] *Id.* at 2707. The "dispositive question" in defamation suits is whether a reasonable factfinder could conclude that a statement impl[ies] an assertion of objective fact..

[15] Libel is the "publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." RESTATEMENT (SECOND) OF TORTS, section 568(1)(1977).

spoken[16], that injures an individual's reputation.[17] Under early defamation law, the plaintiff's only burden was to introduce the alleged defamatory statement into evidence.[18] The defendant then carried the burden of proving that the statement was true.[19] The plaintiff was not required to prove the defendant's fault.[20] A conflict eventually developed between defamation law and the constitutional right to freedom of expression.[21] As a result, the qualified "fair comment"[22] privilege was developed to balance the conflicting interests of freedom of expression and an individual's right to protect his or her reputation.[23]

Fair Comment: The First Fact/Opinion Distinction

The distinction between opinion and fact was first made under the common law privilege of fair comment.[24] The fair comment privilege protected opinions on matters of legitimate public interest from defamation liability.[25] Thus, the fair comment privilege emerged to protect alleged defamatory statements which could not be proven true or false because they were the writer's or speaker's "opinion".[26]

Constitutional Concerns: New York Times and Its Progeny

Defamation was traditionally regulated by state common law until 1964, when the Supreme Court extended First Amendment protection to media defendants in its landmark case, *New York Times Co. v. Sullivan.*[27] Justice Brennan, writing for the majority in *New York Times*, stated that the first[28] and fourteenth[29] amendments must apply to both statements of fact and opinion to encourage unrestrained debate on public issues.[30] Because defendants in defamation cases were required to prove the

[16] Slander is the "publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1), " *Id.* at section 568(2).
[17] W. PROSSER, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, THE LAW OF TORTS, 771, 773(5th ed. 1984).
[18] RESTATEMENT (SECOND) OF TORTS, section 613(1938) outlined a defamation plaintiff's burden of proof.(defamatory character of the communication, its publication by the defendant, its application to the plaintiff, the understanding of its defamatory meaning by a third party, and injury to the plaintiff).
[19] *Id.*, section 581A.
[20] *Id.*, section 613.
[21] *See* Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1212-1213 (1949); A. Meiklejohn, Political Freedom (1965).
[22] *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 18, sections 606-610.
[23] *See* Note, *supra* note 21 at 1207.
[24] The fair comment defense required the defendant to establish: 1) that the statement was opinion, not fact; 2) that the opinion was based upon true facts; 3) that the opinion was not an overly personal attack on the plaintiff; 4) that the opinion related to a matter of public interest. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 820 (4th ed. 1971); Restatement (Second) of Torts, *supra* note 18, section 606.
[25] SEE W. PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 17 at 773.
[26] Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas"*, 43 ARK L. REV. 57, 91 (1990).
[27] 376 U.S. 254 (1964).
[28] *Id.* at 269. "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions."
[29] *Id.* at 292 n. 30.
[30] *Id.* at 279. "A rule compelling the critic of official conduct to guarantee the truth of all his factual

truth of their statement, commentators were discouraged from criticizing official conduct.[31] The Court concluded that the Constitution required a public official to prove that the defendant uttered the statement with "actual malice."[32]

Thus, *New York Times* represents the first time that first amendment rights were emphasized in the balance between protection of individual reputation and freedom of expression.

Since *New York Times*, the Supreme Court has further defined the proper balance between freedom of expression and the protection of individual reputation.[33] In doing so, the Supreme Court has extended additional constitutional protection to media defendants.[34] The Court has determined that "statements which cannot reasonably be interpreted as stating actual facts" are not defamatory.[35] The *New York Times* "actual malice" standard extends to plaintiffs who are either public figures or public officials.[36] Further, a private plaintiff in a defamation action must prove that a media defendant's statements which regarded a public concern were false.[37]

In *New York Times*, the Supreme Court hinted that statements of opinion might be constitutionally protected.[38] However, ten years later, dicta in *Gertz v. Robert Welch, Inc.*[39] seemingly established the absolute privilege for opinion which

---

assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship'." *Id.*

[31] *Id.* "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . .The rule thus dampens the vigor and limits the variety of public debate." *Id.*

[32] Actual malice was defined by the court as "knowledge that the [statement] was false or with reckless disregard of whether it was false or not." *Id.* at 279-280.

[33] *See infra notes*, 35-37.

[34] *Id.*

[35] *See* Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970). In *Greenbelt*, the plaintiff, a local real estate developer, was negotiating with the city to acquire a zoning variance. At the same time, the city was attempting to buy property owned by the plaintiff. The plaintiff attempted to use his property as leverage to obtain the zoning variance. This attempted leverage was discussed at city council meetings. The defendant published news reports quoting council members describing the plaintiff's techniques as "blackmail." *Id.* at 7. The Supreme Court ruled that the word "blackmail" in these circumstances was not defamatory. "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 [the developer's] negotiation position extremely unreasonable." *Id.* at 13-14; *See also*, Letter Carriers v. Austin, 418 U.S. 264, 284-282 (1974), *infra*, note 43; Hustler Magazine v. Falwell, 485 U.S. 46, (1988), *infra*, note 43.

[36] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[37] Philadelphia Newspapers Inc. v. Hepps, 475 U.S. 767 (1986). The Court reasoned that the common-law presumption that defamatory speech is false deterred true speech on matters of public opinion. Therefore, in cases involving a question of the truth or falsity of the allegedly defamatory statements, the plaintiff bears the burden of proving falsity.

[38] 376 U.S. at 292, n. 30. The Court provided that: "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expressions of opinion based upon privilege, as well as true, statements of fact."

[39] *See Gertz*, 418 U.S. at 339-340.

many lower courts have recognized.[40] In *Gertz*, the court stated:

> 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.[41]

Federal courts of appeals and several state courts interpreted the Gertz dicta to define the point at which protection from defamation must yield to the first amendment protection of free expression.[42]

The Supreme Court seemingly supported the lower courts' interpretation of *Gertz* in two other Supreme Court cases: *National Association of Letter Carriers v. Austin* [44]and *Falwell v. Hustler Magazine*.[45] However, according to the *Milkovich* Court, the lower courts have improperly interpreted the *Gertz* dicta. The *Milkovich* court reasoned that the *Letter Carriers* and *Hustler* opinions merely place constitutional limits on the types of speech which may be subject to state defamation actions and did not grant constitutional immunity to opinions.[46]

The Tests That Courts Developed to Distinguish Fact From Opinion[47]

Prior to its ruling in *Milkovich*, the Supreme Court had not yet articulated a test to distinguish opinion from fact.[48] Thus, the lower courts developed several different

---

[40] *Gertz* was not decided on the issue of fact/opinion distinction. Rather, the main thrust of the decision addressed the distinction between a private individual plaintiff and public official or public figure plaintiff. The Court held that the *New York Times* higher standard of actual malice does not apply to a private plaintiff. However, to insure consitutional protection for the media, a private individual must prove fault and cannot collect punitive damages without showing actual malice. *Id.* at 342-352.

[41] *Id.* at 339-340 (footnote omitted).

[42] *See* cases cited *supra*, notes 5 and 6. *But see*, Cianci v. New York Times Publishing Co., 539 F.2d 54, 62-63 (2d Cir. 1980); Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 604, 552 P.2d 425, 430 (1976)(dictum); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 382, 397, N.Y.S.2d 943, 951, 366 N.E. 2d 1299, 1307 (1977). These courts have held that the constitutional protection of opinion does not apply to accusations of dishonesty or criminal conduct.

[43] *See* National Assoc. of Letter Carriers v. Austin, 418 U.S. 264 (1974)(Union's use of the word "scab" to describe workers who had refused to join the union was an opinion protected under federal labor law.) *Id.* at 284.

[44] Hustler Magazine v. Falwell, 485 U.S. 46 (1988)(Publisher was not liable for invasion of privacy for publishing an advertisement parody about a public figure. The court intended to protect "the free flow of ideas and opinions on matters of public interest and concern.") *Id.* at 879.

[45] Milkovich, 110 S.Ct. at 2705.

[46] *Id.* at 2705.

[47] The organization of this section is modeled after the Respondent's Brief, at 36-48, Milkovich v. Lorain Journal, 110 S.Ct. 2695 (1990)(No. 89-645).

[48] *See* Note, *Structuring Defamation Law to Eliminate the Fact-Opinion Determination: A Critique of Ollman v. Evans*, 71 IOWA L. REV. 913, 918 (1986). *See also* Keller v. Miami Herald Pub. Co., 778 F.2d 711, 717 (11th Cir. 1985)(without Supreme Court guidance, courts have struggled to formulate a workable test.).

tests to make this distinction.[49] Some courts have cautioned that no single test can incorporate all of the constitutional considerations implicit in the fact/opinion distinction. The courts have noted that "the potential for erroneous condemnation of harmless or beneficial speech should make courts reluctant to embrace in structured, multi-factor 'tests'."[50]

1. Verifiability

Some courts used the text of "verifiability," which separates fact from opinion on the basis of whether the challenged statement is capable of being proven true or false.[51] However, standing alone, this test is useful only in cases which involve opinions regarding personal taste.[52] As a result, most courts have assessed verifiability in conjunction with other factors, such as context.[53] Verifiability is probably best suited to be a "minimum threshold issue," not the sole basis for identifying constitutionally protected opinion.[54]

2. Restatement Approach

Recognizing that verifiability, alone, cannot distinguish opinion from fact, courts turned to the Restatement's test.[55] This test draws distinctions between statements of pure opinion and statements of mixed opinion.[56] The Restatement test attempts to measure the likelihood that the reader would accept the statement as objective fact.[57]

---

[49] *See* Note, *Ohio Provides Even Greater Protection For Its Press*, 15 N. KY. L. REV. 153, 161 (1988).

[50] Stevens v. Tillman, 855 F.2d 394, 399 (7th Cir. 1988). *See also* Scott v. News Herald, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986)(Celebrezze, C.J., dissenting in part). Justice Celebrezze stated that "the clarity of today's majority opinion gives way to the amorphous 'totality of circumstances' test which is used to comlete the Jekyll and Hyde transformation of this newspaper article from fact to opinion." *Id.* at 263, 496 N.E.2d at 716. (footnote omitted). Justice Sweeney, also dissenting in part, stated that: "under the elastic test adopted by today's majority, the only thing that *is* clear is that a statement's characterization as fact or opinion is truly in the eye of the individual judge. Rather than providing 'predictability,' the cryptic totality of the circumstances test leaves those in search of stability with as much guidance as that provided in the newspaper's daily horoscope." *Id.* at 265, 496 N.E.2d at 717, n. 8 (Sweeney, dissenting in part).

[51] *See* Brief for Respondent, at 37, Milkovich v. Lorain Journal, 110 S.Ct. 2695 (1990)(No. 89-645).

[52] *See, e.g.*, Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 219(2d Cir. 1985)(judgments based upon personal tastes are not capable of being proven true or false); Potomac Valve, 829 F.2d at 1289(verifiability is only relevant as it preserves the truth defense and protects statements which the ordinary reader would perceive to be incapable of positive proof).

[53] *See* McCabe v. Rattiner, 814 F.2d 839, 842-43 (1st Cir. 1987); Potomac Valve, 829 F.2d at 1289-90.

[54] Potomac Valve, 829 F.2d at 1288.

[55] RESTATEMENT (SECOND) OF TORTS, Section 566 (1977). *See supra* note 7, quoting the RESTATEMENT test for libel.

[56] *Id.* A mixed opinion is defined as "one which, while an opinion in form or context, is apparently based on facts regarding the plaintiff and his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication." *Id.* comment b. Under the Restatement test, statements of pure opinion were given constitutional immunity. *See Id.*, comment c. Statements of mixed opinion are actionable if they imply that the author is alleging undisclosed defamatory facts through the opinion. *Id.* section 566.

[57] *See* Brief for Respondent at 41-42, Milkovich v. Lorain Journal, 110 S.Ct. 2695 (1990)(No. 89-645). The

3. Totality of the Circumstances Test

In an attempt to consider more of the "total picture" surrounding a statement, several courts adopted a four step "totality of the circumstances" approach, or a variation thereof.[58] This test was first articulated in *Ollman v. Evans.* [59] Under the "totality of the circumstances" test, courts analyzed the totality of circumstances in which the statements were made and decided whether the average reader would view the statement as fact or opinion.[60] Although courts have adopted different factors, their tests commonly seek to analyze the alleged defamation in the context of the article or broadcast in which it is found and in the larger social context to which it relates.[61]

The *Ollman* "totality of circumstances" test consists of the following four factors: (1) the precision of the language used;[62] (2) the verifiability of the statements made;[63] (3) the literary context in which the statements were made;[64] and (4) the broader social context in which the statement were made.[65] Some courts do not believe that this mechanical analysis will effectively and predictably distinguish opinion from fact.[66] Other courts believe that the test cannot resolve the fact versus opinion distinction when all four factors are not in agreement.[67]

The development of defamation law since *New York Times* suggested that the lower courts could not determine the proper scope of constitutional protection for opinion. Both plaintiffs and the media defendants needed direction. In *Milkovich,*[68] the Supreme Court attempted to provide this direction.

Ninth Circuit has interpreted the Restatement test as follows:

> The rule derives from the statement's effect on the reader. If an expression of opinion follows from the nondefamatory facts that are either stated or assumed, the reader is likely to take the opinion for what it is. Indeed, the reader is free to form another, perhaps contradictory opinion from the same facts. But when the opinion derives from unstated or unassumed facts, the reader can only presume that the publisher of the statement is asserting the facts to support the opinion as well. Lewis v. Time, Inc., 710 F.2d at 555.

[58] *See e.g.*, Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980); Janklow v. Newsweek, Inc., 759 F.2d 644 (8th Cir. 1985), aff'd on reh'g, 788 F.2d 1300 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 272 (1986); McCabe, *supra* note 53, 814 F.2d 839; Scott, *supra* note 50, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986); Keller v. Miami Herald Pub. Co., 778 F.2d 711 (11th Cir. 1985).

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

[60] Ollman, 750 F.2d at 979.

[61] *Compare* Lewis v. Time, Inc., 710 F.2d at 553 (three factors important in determining whether a statement is fact or opinion) *and Mr. Chow*, 759 F.2d at 220, *with Ollman*, 750 F.2d 970 (four factors analysis).

[62] *See* Ollman at 979-81.

[63] *See Id.* at 981-82.

[64] *See Id.* at 982-83.

[65] *See Id.* at 983-84.

[66] *See Scott, supra* note 50 at 250, 496 N.E.2d at 706 (the totality of circumstances test can "only be used as a compass to show general direction and not a map to set rigid boundaries"); Ollman, at 993(Bork, J., concurring)(factor analysis too rigid).

[67] *See Potomac Valve*, 829 F.2d at 1288.

[68] 110 S.Ct. 2695 (1990).

STATEMENT OF THE CASE

The Facts

On February 9, 1974, Maple Heights High School hosted a wrestling match. At the time, Petitioner Michael Milkovich, Sr. was the head wrestling coach for Maple Heights High School.[69] Following a controversial call against the Maple Heights team[70] and Milkovich's expressive hand gestures, a fight broke out among spectators and members of both teams.[71] Several people were injured in the altercation.[72]

On February 28, 1974, the Ohio High School Athletic Associations ("OHSAA") held a hearing on the incident.[73] Both Milkovich and the Superintendent of Maple Heights Public Schools, H. Don Scott, testified at the hearing.[74] As a result of the hearing, OHSAA placed the Maple Heights wrestling team on probation for one year and declared the team ineligible for the 1975 state wrestling tournament.[75] OHSAA also censured Milkovich.[76]

Following the OHSAA ruling, several wrestlers and their parents sued OHSAA in the Court of Common Pleas of Franklin County for an alleged denial of due process.[77] Milkovich and Scott also testified at this proceeding.[78] The trial court ruled that OHSAA had violated the plaintiffs' due process rights in imposing sanctions and the court ordered OHSAA to remove the suspension.[79]

The next day, J. Theodore Diadiun, a sports writer for the *News-Herald,* wrote and published a column entitled "Maple beat the law with the 'Big Lie'."[80] The words "TD says" appeared beneath the title.[81] The article appeared in the sports section of the paper.[82] The carry-over page was entitled "... Diadiun says Maple told

---

[69] Milkovich v. News Herald, 46 Ohio App.3d 20, 20 545 N.E.2d 1320, 1321 (1989).

[70] Brief for Respondent at 4, Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990). According to Respondent's rendition of the facts, an undefeated Maple Heights wrestler was ahead on match points when he fouled and injured a Mentor wrestler. Meet officials awarded the match to the injured Mentor wrestler and Coach Milkovich became visibly upset. Following this, two Maple Heights wrestlers left their bench and fought with at least one Mentor wrestler. Then the benches and stands cleared and the altercation ensued.

[71] *Milkovich* at 20, 545 N.E.2d at 1321.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* On March 5, 1974, the OHSAA issued a written censure to Milkovich and mailed copies to schools, newspapers and television stations throughout Ohio. Brief for Respondents, *supra*, note 70 at 5 n. 2.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See Milkovich*, 110 S.Ct. at 2698-99, n. 2 for the article in its entirety.

[81] *Milkovich*, 46 Ohio App.3d at 20, 545 N.E. 2d at 1321.

[82] *Id.*

a lie."[83] Diadiun charged that Milkovich and Scott "... lied at the hearing after each having given his solemn oath to tell the truth."[84] Diadiun attended the wrestling match and the OHSAA hearing, but was not present at the court proceedings.[85] Diadiun, however, explained in the article that he had discussed the court proceedings with Dr. Meyer, the OHSAA commissioner.[86]

After the article was published, Milkovich and Scott filed separate libel suits against the *News-Herald,* its parent company, the *Lorain County Journal* and Diadiun.[87] Milkovich alleged that nine passages[88] in the article were defamatory.

Milkovich asserted that the headline and nine passages of the article accused him of perjury and damaged his reputation as a teacher and coach.[89] At a jury trial, the trial court directed a verdict in favor of the media defendants because Milkovich was a public figure and had failed to establish "actual malice" as required by *Curtis Publishing Co. v. Butts.*[90]

Procedural History

This case has developed a complicated procedural history over the past fifteen years. After the trial court's directed verdict against Milkovich, the Court of Appeals reversed and remanded because it believed that the jury could have found actual malice.[91] The Ohio Supreme Court dismissed the *News-Herald* motion to certify the record.[92] The United States Supreme Court denied certiorari.[93]

---

[83] *Id.*

[84] *Id.* at 20, 545 N.E. 2d at 1322.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 21, 545 N.E.2d at 1322.

[88] *Id.* Milkovich contested the following passages:

1) Maple beat the law with the "big lie,"...
2) ***[A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor meet of last Feb. 8.
3) A lesson which, sadly, in view of the events of the past year, it is well they learn early.
4) IT IS SIMPLY THIS: IF YOU GET IN A JAM, LIE YOUR WAY OUT.
5) If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
6) The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich and former superintendent of schools, H. Donald Scott.
7) Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
8) But they got away with it.
9) Is that the kind of lesson we want our young people learning from their high school administrators and coaches? I think not. *Id.*

[89] *Milkovich,* 110 S.Ct. at 2699-2700.

[90] Milkovich v. News Herald, 15 Ohio St.3d 292, 293, 473 N.E.2d 1191, 1192 (1984).

[91] Milkovich v. Lorain Journal Co., 65 Ohio App.2d 143, 416 N.E.2d 662 (1979).

[92] Motion to certify the record was overruled by the Ohio Supreme Court on March 20, 1980.

[93] Lorain Journal Co. v. Milkovich, 449 U.S. 966 (1980)(Brennan, J., dissenting). Justice Brennan would

Upon remand, the trial court granted *News-Herald's* motion for summary judgment.[94] The trial court found that the alleged statements were opinion and, therefore, were protected under the first amendment.[95]

Milkovich appealed this ruling.[96] The Court of Appeals affirmed and found that the defendants' statements were opinion and that Milkovich was a public figure who had failed to prove actual malice. The Ohio State Supreme Court reversed the court of appeals.[98] The United States Supreme Court again denied certiorari.[99]

However, two years later, in Superintendent Scott's case, the Ohio Supreme Court reversed its two year-old decision on the Diadiun article.[100] The court held that the article contained constitutionally protected opinion.[101] To distinguish fact from opinion, the *Scott* court adopted the *Ollman* "totality of circumstances" test.[102]

Subsequently, in the *Milkovich* case, on remand to the trial court, the court entered summary judgment in favor of the newspaper.[103] The court held that the *Scott* case established, as a matter of law, that the Diadiun article contained constitutionally protected opinion.[104] On appeal, the Court of Appeals concluded that it was bound by the *Scott* Supreme Court ruling and, therefore, affirmed the trial court's ruling.[105] The Ohio Supreme Court dismissed the appeal.[106]

The United States Supreme Court granted certiorari to consider the Ohio

---

have granted certiorari because the appellate court's interpretation would "chill the freedom" of Ohio newspapers to publish their views. *Id.* at 970.

[94] *Milkovich*, 46 Ohio App.3d at 21, 545 N.E.2d at 1322.

[95] *Id.*

[96] *Milkovich*, 15 Ohio St.3d at 293, 473 N.E.2d at 1192-93.

[97] *Id.*

[98] *Id.* at 297, 473 N.E.2d at 1196. The Ohio Supreme Court found Milkovich was a private person under defamation law and thus was not required to prove actual malice. The court also found that the article contained fact, not opinion. In ruling on the opinion issue, the court declined to establish a clear definition of protected opinion. However, the court found the statements to be factual assertions because the article did not clearly caution the reader that the statements were the author's opinion. The court followed the reasoning in Cianci v. New York Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980) that a writer must do more than impliedly or explicitly use the words "I think" in order to qualify a statement as opinion. *Id.* 99 474 U.S. 953 (1985).

[100] *Scott, supra* note 50.

[101] *Id.* at 254, 496 N.E.2d at 709. In overruling *Milkovich*, the *Scott* court contended that *Milkovich* offered no test or analysis for concluding that the article's statements were factual. Thus, the *Scott* court refused to apply *stare decisis* to a decision that would increasely confuse the distinction between fact and opinion. In *Scott*, the court emphasized the importance of "providing assurance to local media that they will remain free to print the news we need to know." *Id.* at 256, 496 N.E.2d at 710 (1986).

[102] *Id.* at 250, 496 N.E.2d at 706 (1986). The *Scott* court found that the specific language used and the fact that the statement was verifiable indicated that the statements were fact. However, the court found that the general and broader context of the article suggested that the article was opinion. The court considered the caption "T.D. Says", the subjectivity of the wording in the article, and the fact that the article was on the sports page as indicative that the article was opinion. *Id.* at 250-54, 496 N.E.2d at 706-09.

[103] *Milkovich*, 46 Ohio App.3d at 22, 545 N.E.2d at 1323.

[104] *Id.*

[105] *Id.* at 23, 545 N.E.2d at 1324.

[106] *Milkovich*, 43 Ohio St.3d 707, 540 N.E.2d 724.

courts' recognition of a constitutional privilege for opinion.[107]

ANALYSIS

The United States Supreme Court addressed two issues in *Milkovich*.[108] First, contrary to the rulings of the majority of lower courts, the Court clearly established that a separate constitutional privilege for opinion does not exist.[109] Second, writing for the majority, Justice Rehnquist outlined a test to help courts distinguish between protected and unprotected statements.[110] Applying this test to Milkovich's claim, the Court held that a reasonable fact finder could conclude that the Diadiun article contained statements which implied that Milkovich had perjured himself.[111] The Supreme Court remanded the case to Ohio state court for further proceedings.

In his dissent, Justice Brennan, joined by Justice Marshall, agreed with the majority that a separate opinion privilege is unnecessary.[112] He asserted that the protections already afforded by the First Amendment are adequate.[113] However, the dissenting Justices applied a different test to the facts and found that the Diadiun article was not factual and, therefore, was constitutionally protected.[114]

The Supreme Court's Basis For Abolishing the Constitutional "Opinion Privilege"

The Supreme Court relied upon the *New York Times* progeny of cases to abolish any separate privilege for opinion.[115] The Court outlined the pertinent Supreme Court decisions which constitutionally protect speech that criticizes official conduct.[116] These previous rulings extended first amendment freedom of expression protection to encourage uninhibited debate about public issues, public figures and public officials.[117] Therefore, the lower courts' reliance upon the *Gertz*

---

[107] *Milkovich* v. Lorain Journal Co., 110 S.Ct. 863 (1990).
[108] *Milkovich*, 110 S.Ct. 2695 (1990).
[109] *Id.* at 2707.
[110] *Id.* at 2707-08.
[111] *Id.*
[112] *Id.* at 2708.
[113] *Id.*
[114] *Id.* at 2709.
[115] *Id.* at 2703-05.
[116] *Id.*
[117] *Id.* The Court relied upon the following Supreme Court rulings which established First Amendment protection:

1) actual malice standard required for public figures (citing *New York Times*, *supra* note 27);
2) the private and public defamation plaintiff must prove fault (citing *Philadelphia Newspapers*, *supra* note 37);
3) limitations on the type of speech that can be subject to defamation liability:
   a) rhetorical hyperbole and loose figurative language protected (citing *Greenbelt*, *supra* note 35 and *Letter Carriers*, *supra* note 43);
   b) speech that could not reasonably have been perceived as stating actual fact about a public figure (citing *Hustler*, *supra* note 44); and

dicta to establish an opinion privilege was improper.[118] According to the Court, the lower courts' interpretation of the *Gertz* dicta would improperly protect "anything that might be labeled opinion," even expressions of opinion that might "imply an assertion of fact."[119]

The Court concluded that any privilege in addition to that already provided under previous rulings is unnecessary to protect first amendment rights.[120] Rather, such additional protection would hinder a plaintiff's ability to redress reputational injury.[121] Furthermore, by abolishing the opinion privilege, the Court hoped to eliminate the difficult and often "artificial" fact-opinion distinction.[122]

Justices Brennan and Marshall agreed that no additional opinion privilege is necessary because statements of pure opinion are adequately protected under present first amendment doctrine.[123]

In rejecting the absolute opinion privilege, the Supreme Court reinforced the common law "fair comment" defense for honest expression of opinion based upon true statements of fact.[124] In that sense, the Court's rejection of the opinion privilege did not detract from first amendment rights. However, the Court did not eliminate the difficult and often tenuous task of distinguishing between protected and unprotected statements. It is this distinction upon which the balance of first amendment rights depends. Thus, the method which the court selects to make this distinction must perpetuate well-established first amendment protection.

In making this distinction, the *Milkovich* majority departed from all previous rulings.[125] The majority's "distinction test" placed greater emphasis upon the protection of individual reputation than upon protection of free expression and uninhibited discussion. However, the dissenting justices' "distinction analysis" more properly balance these conflicting rights.[126]

---

4) an appellate court must independently judge the entire record to insure that the lower court judgment does not unduly restrict free expression (citing Bose Corporation v. Consumer Union of United States, Inc., 466 U.S. 485, 499 (1984).

[118] *Id.* at 2705.

[119] *Id.*

[120] *Id.* at 2706.

[121] *Id.* The Court provided that the "'breathing space' which 'freedom of expression requires in order to survive' is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and 'fact'." *Id.*

[122] *Id.*

[123] *Id.* at 2708-09 (Brennan, J., dissent). Justice Brennan claimed that full constitutional protection is given to statements of public concern "that cannot reasonably [be] interpreted as stating actual facts about an individual." *Id.*

[124] *Id.* at 2706. *See also, supra* note 24.

[125] *See* Unelko v. Rooney 912 F.2d 1049, 1053. The Unelko court observed that Milkovich still allows protection for "pure opinion", which includes "statements that do not imply facts capable of being proven true or false." *Id.* at 1053, n.2.126

[126] *See Milkovich*, 110 S.Ct. at 2707-08.

The Majority's Distinction Between Protected and Unprotected Statements.

Having established that the lower courts' opinion privilege was unwarranted, the *Milkovich* majority proceeded to provide a test to determine whether a particular statement is protected under the first amendment.[127] The Court's analysis focused upon whether or not the allegedly defamatory statement implied an assertion of fact.[128]

Under the Court's test, a plaintiff must first establish that the statement was provably false.[129] The plaintiff must then prove that a reasonable fact finder, after considering the statement's language[130] and general tenor,[131] could conclude that the statement implied an assertion of fact.[132]

Thus, the *Milkovich* majority devised a three prong test to determine whether a particular statement is protected.[133] Under the test, the Court determined that the statements in the Diadiun article could imply that Milkovich committed perjury.[134] Therefore, the Supreme Court reversed the trial court's summary judgment in favor of the media defendants and remanded the case to the trial court for further proceedings consistent with the opinion.[135]

The *Milkovich* court finally provided one unified test that the lower courts may use to determine whether a statement is protected. However, the Court failed to sufficiently explain each prong of the test and to apply the test to the facts of this case.[136] Without more precise guidance from the Supreme Court, the lower courts are still left with the unenviable task of interpreting, analyzing, and applying each prong. One benefit of the Court's vague analysis is that it has provided a malleable standard which may be adapted to a wide range of defamation cases.[137] However,

[127] *Id.* at 2707.

[128] *Id.* at 2706-07.

[129] *Id.* "... [T]he connotation that [Milkovich] committed perjury is sufficiently factual to be susceptible of being proved true or false." *Id.*

[130] *Id.* "[The language] is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining [that Milkovich] committed the crime of perjury." *Id.*

[131] *Id.* "Nor does the general tenor of the article negate [the impression that the writer was seriously maintaining that the petitioner committed perjury]." *Id.*

[132] *Id.* "The dispositive question in the present case then becomes whether or not a reasonable fact finder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." *Id.*

[133] *See Unelko*, 912 F.2d at 1053.

[134] *Milkovich*, 110 S.Ct. at 2707.

[135] *Id.* at 2708.

[136] The ruling in *Milkovich* calls to mind the controversy evident in the *Scott* opinion *supra* note 50. In Scott, the majority overruled the Ohio Supreme Court ruling in Milkovich, 15 Ohio St.3d 292, 473 N.E.2d 1191 (1984), because in Milkovich, "no test was offered and no analysis was given for reaching the conclusion that the article was fact and not opinion." Scott, 25 Ohio St.3d at 249, 496 N.E.2d at 705. This same difficulty may face the Milkovich Supreme Court decision in the future. *See also*, *supra* note 101.

[137] *See Scott*, 25 Ohio St.3d at 251, 496 N.E.2d at 706. The *Scott* court adopted the totality of circumstances test only as "a compass to show general direction and not a map to set rigid boundaries." *Id.*

the opinion's ambiguity will not allow media defendants to predict the types of statements which are potentially defamatory.[138]

The three prongs which the Court focused upon, verifiability, specific language used, and the internal context or tone of the article, are similar to the factors of other totality of circumstances tests.[139] However, by failing to evaluate the broader social context in which the article appears, the *Milkovich* test does not consider the "total picture."[140] As a result, the Court narrowly construed the contours of first amendment protection for statements of public interest. Consequently, the *Milkovich* court has placed less emphasis on first amendment rights than its predecessor courts.[141] Although the majority believed that it "held the balance true,"[142] its decision safeguards the plaintiff's right to protect his or her reputation more than any other decision in the *New York Times* progeny. Consequently, the majority's decision may "dampen the vigor and limit the variety of public debate," and thereby offend the spirit of *New York Times* and its progeny.[143]

Justice Brennan's Distinction Between Protected and Non-Protected Statements.

Justice Brennan disagreed with the majority's application of its distinction test to the Diadiun article and its conclusion that the author could have implied defamatory facts about Milkovich.[144] Brennan characterized the majority's analysis as too general[145] and, thereby, undertook a more thorough evaluation of the facts.[146] As a result, Brennan concluded that the Diadiun statements were pure opinion and, thus, were entitled to "full constitutional protection."[147]

Brennan reasoned that the statements could not have been false[148] because the statements were mere conjecture.[149] Brennan also analyzed the specific language

[138] *See supra* note 50.

[139] *See supra* notes 58-60.

[140] *See supra* note 62 at 983-84.

[141] *See Milkovich*, 110 S..Ct. at 2707-08. In concluding its analysis, the Milkovich court reemphasized the individual right to protect our reputations from invasion. *Id.*

[142] *Milkovich*, 110 S.Ct. at 2708.

[143] 376 U.S. at 279.

[144] *Milkovich*, 110 S.Ct. at 2709 (Brennan, J., dissent).

[145] Justice Brennan stated that the Court must provide further guidance for identifying when statements of opinion imply false and defamatory fact. The Court must "confine the perimeters of [an] unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." (quoting Bose Corp., *supra*note 117 at 505.). *Id.*

[146] *Id.* at 2710-15.

[147] *Id.* at 2709.

[148] *Id.* at 2710. The majority merely stated that the question of whether Milkovich perjured himself was readily discernible by comparing the testimony of the two proceedings. The majority reserved this determination for the trial court on remand. *Id.* at 2707.

[149] *Id.* at 2710. Justice Brennan defined conjecture as language that alerts the reader that the statement is opinion, not fact. *Id.* at n. 5. Brennan emphasized that conjecture should be afforded the same constitutional protection as "rhetorical hyperbole." *Id.* at 2714. When only some facts are known, conjecture must be preserved and encouraged in order to subject important public questions to "'uninhibited, robust and wide-

and internal content of the statements and concluded that the statements did not imply a defamatory factual assertion.[150]

In reaching this conclusion, Brennan presented a more detailed and thorough analysis of each prong.[151] Analyzing the article's language, he pinpointed the spot at which Diadiun stopped relying upon facts,[152] the point at which the word selection alerted the reader that the statements were conjecture,[153] and the words which would cause a reasonable reader to perceive the language as cautionary, and thus to discount it.[154]

Finding that the article "notified readers to expect speculation and personal judgment," Brennan analyzed the tone and format from a much broader perspective than did the majority.[155] Brennan characterized the article as a "signed editorial comment" which is a format that advises the reader to anticipate a departure from what is actually known by the author as fact.[156] Brennan was able to recognize the partiality of the article because he considered outside factors in his analysis, such as the fact that the newspaper was published in the home town of Milkovich's opponent high school.[157] This should have warned the reader that the "opinions expressed may rest on passion rather than factual foundation."[158]

Brennan's analysis is more valuable than the majority's analysis. His analysis would guide the lower courts' interpretation of each prong of the majority's three prong test. It provides much more than conclusory statements. It would enable a media defendant to estimate a statement's defamatory nature.

Brennan's perspective is more consistent with past Supreme Court defamation decisions.[159] He began his analysis by reinforcing the importance of free expression.[160] This perspective shaped Justice Brennan's analysis.

---

open' debate to which this country is profoundly committed." (quoting *New York Times*, *supra* note 27 at 270.). *Id.* Brennan contended that when statements are clearly conjecture, the plaintiff suffers no injury to reputation. *Id.* at 2714-15. Brennan's dissent clearly emphasized First Amendment rights more than the majority. *Id.* at 2715.

[150] *Id.* at 2710-11.

[151] *Id.* at 2710-13.

[152] *Id.* at 2711-12. Diadiun wrote that he witnessed the altercation and the OHSAA hearing, but the writing clearly revealed that he was not at the judicial proceeding. By quoting a third party's version of the judicial proceedings, Diadiun alerted his readers that he was not at the proceeding.

[153] *Id.* at 2711. Words such as "seemed", "probably" and "apparently" indicate to the reader that Diadiun was offering conjecture.

[154] *Id.* at 2712. "Cautionary language" puts the reader on notice that the author is not relying upon defamatory but undisclosed facts.

[155] *Id.*

[156] *Id.* at 2713 (citing Ollman v. Evans, *supra* note 11 at 986.).

[157] *Id.* at n. 8. Justice Brennan observed that the impartiality of the article was clear because the author represented one side of the controversy. Such impartiality cautions the reader that the article rests more on "passion" than facts.

[158] *Id.*

[159] *See supra*, notes 33 and 34.

[160] *Id.* at 2715. Brennan stated "it is...imperative that we take the most particular care where freedom of

Brennan's first amendment perspective must be preserved. By rejecting absolute immunity for opinion, the *Milkovich* court effectively narrowed the type of expression that will be constitutionally protected in future court decisions.[161] Constitutional protection requires emphasis of first amendment rights when determining whether particular statements are protected. By considering the total picture, Brennan is able to preserve first amendment rights.

Contrasting the Majority's and Minority's Distinction of Protected and Unprotected Statements.

The contrast between the majority and the dissenting opinions illustrates the problems of developing an effective test to distinguish between protected and unprotected statements.[162] Often, courts can reach any conclusion they desire under any of the tests.[163] The definition of protected speech rests on a particular court's preference to emphasize either first amendment rights of the right to protect one's reputation.

The trend of the Supreme Court decisions since *New York Times* emphasized the importance of protecting free speech.[164] *Milkovich* dramatically departs from this trend by favoring the right to protect one's reputation over the right to freedom of expression. By insisting that freedom of expression must be protected, the Brennan dissent better balances these two policy concerns.

CONCLUSION

In *Milkovich,* [165]the Supreme Court held that statements of opinion are not constitutionally privileged. The Court concluded that prior Supreme Court rulings adequately safeguard the first amendment freedom of expression.[166] The Court determined that the *Gertz* [167]dicta did not immunize opinions from defamation liability.

Prior to *Milkovich*, the Supreme Court did not help lower courts to distinguish between statements which are protected under the First Amendment and those that

---

speech is at risk, not only in articulating the rules mandated by the First Amendment, but also in applying them." *Id.*

[161] *Id.* at 2705-06.

[162] *See Scott supra* note 50, at 265 n. 8, 496 N.E.2d at 717. Justice Celebrezze was concerned that the totality of circumstances analysis applied by the majority would allow statements to be characterized as fact or opinion merely on the basis of a particular judge's preference. *Id.*

[163] *Id.*

[164] *See supra* notes 33 and 34.

[165] 110 S.Ct. 2695.

[166] *See, e.g., New York Times*, 376 U.S. 254; *Curtis Publishing*, 388 U.S. 130; *Gertz*, 418 U.S. 323; *Greenbelt*, 398 U.S. 6; *Hepps*, 475 U.S. 767; *Hustler*, 485 U.S. 46.

[167] 418 U.S. at 3007. *See supra* note 9.

are not protected.[168] The *Milkovich* majority established a new three prong "totality of the circumstances" test to make this distinction.[169] The test considers the verifiability, specific language, and the general tenor of the allegedly defamatory statements.[170] The *Milkovich* majority failed to analyze these factors. The majority's opinion will not help lower courts to interpret these factors. Furthermore, the majority's perspective is quite different from that of previous Supreme Court rulings. Since *New York Times*, the Supreme Court had emphasized the importance of safeguarding first amendment freedom of expression. *Milkovich* marks a sharp divergence from this philosophy. In arriving at its decision, the majority placed the individual right to protect one's reputation above first amendment rights.[171]

The Brennan dissent follows previous Supreme Court philosophy more closely. Brennan's analysis is based upon the Court's commitment to preserve free and uninhibited debate of public issues.[172] Brennan also offered greater guidance to lower courts through his analysis of many contextual factors. Thus, Brennan's analysis would also enable the media to more accurately predict the scope of first amendment protection.

By establishing that no independent "opinion privilege" exists, the Supreme Court narrowed First Amendment rights that the lower courts had previously afforded media defendants. The majority's analysis of its three prong test narrowed these rights even futher. The Court's decision could stifle debate on controversial public matters. The majority's analysis will resurrect the "self-censorship" which the Supreme Court has attempted to prevent since *New York Times*.

SHEILA NOONAN

---

[168] *See supra*, notes 10 and 11.
[169] 110 S.Ct. at 2706-08.
[170] *Id.*
[171] *Id.* at 2707-08.
[172] *Id.* at 2715.