MILKOVICH REVISITED: "SAVING" THE OPINION PRIVILEGE

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> Language is a labyrinth of paths. You approach from one side and know your way about; you approach the same place from another side and no longer know your way about.
>
> —Ludwig Wittgenstein[1]

INTRODUCTION

I wish to offer an explanation of *Milkovich v. Lorain Journal Co.*[2] that "saves" the constitutional protection of the opinion privilege. I place "save" in quotation marks because I do not believe that the constitutional protection of the opinion privilege was lost, or even misplaced, by *Milkovich*—although the case has been misread in a manner that suggests otherwise.[3] This Note reviews *Milkovich*, and rebuts a serious misunderstanding of the case that has found its way into several law reviews.[4] The Note then discusses the constitutional dimensions of libel actions based on statements capable of more than one reasonable interpretation.

Milkovich provided the Supreme Court with an opportunity to address squarely whether the broad category of speech commonly labeled as "opinion" is afforded special protection by the Constitution. The case involved a libel suit brought against an Ohio newspaper. The suit alleged that a sports column appearing in the newspaper defamed Michael

1. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 203 (1953).

2. 110 S. Ct. 2695 (1990).

3. *See, e.g.*, Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 343 n.56 (1991) (arguing that the *Milkovich* opinion is "incoherent" and suggesting that the Court may have wished to "encourage more libel lawsuits"); Nat Stern, *Defamation, Epistemology, and the Erosion (But Not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 595 (1990) ("At a more significant and ominous level, *Milkovich* points to a tilt toward the less skeptical of the various and sometimes competing epistemological assumptions hitherto employed by courts in deciding whether a statement is actionable as containing a factual accusation."); T.R. Hager, Note, Milkovich v. Lorain Journal Co.: *Lost Breathing Space—Supreme Court Stifles Freedom of Expression by Eliminating First Amendment Opinion Privilege*, 65 TUL. L. REV. 944, 952 (1991) (predicting as a result of *Milkovich*, "rising libel litigation" and "a severe chilling impact," as well as stating that "the Supreme Court has unanimously disposed of a useful tool for ensuring freedom of expression").

4. *See supra* note 3.

Milkovich, a local high school wrestling coach.[5] In its defense, the newspaper asserted that the sports column was protected by the First Amendment as a statement of opinion.[6] The Ohio Court of Appeals agreed, and affirmed summary judgment against Milkovich.[7] The Supreme Court granted certiorari to consider the question of constitutional protection for statements of opinion, the Court's first direct examination of the issue.[8] Previously, however, the Court had dealt extensively with related issues,[9] and the doctrine developed by these cases formed the basis of what was widely recognized as a constitutional opinion privilege.[10]

In *Milkovich*, the Court declined to fashion "an additional separate constitutional privilege for 'opinion.' "[11] But while reasserting existing doctrine, the Court emphasized the constitutional protection that statements of opinion already enjoyed, specifically holding that statements not asserting "actual facts" are not subject to libel suit.[12] In so doing, the Court was careful to state that merely labeling a statement "opinion," or inserting words such as "in my opinion" before a factual statement, is insufficient to trigger constitutional protection for the statement.[13] "[C]ouching [factual] statements in [the] terms of opinion" does not create a blanket exemption from libel.[14] Rather than creating "an artificial dichotomy between 'opinion' and fact," the Court stated that existing

5. *See Milkovich*, 110 S. Ct. at 2699-700.

6. *Id.* at 2698.

7. *See Milkovich v. News-Herald*, 545 N.E. 2d 1320, 1324 (Ohio Ct. App. 1989).

8. *See Milkovich*, 110 S. Ct. at 2708 (Brennan, J., dissenting).

9. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (holding that the First Amendment protects an advertisement parody that could not reasonably be understood as describing "actual facts" about the public figure involved); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (holding unconstitutional the common-law presumption that defamatory speech is false); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974) (ruling that an accusation that an individual was a "traitor" for acting as a union "scab" was not a basis for a defamation action because the word "traitor" was used in a "loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (rejecting the contention that a local newspaper's use of word "blackmail" describing a real estate developer's position implied that the developer actually committed the crime of blackmail).

10. *See Milkovich*, 110 S. Ct. at 2709 (Brennan, J., dissenting) (The majority employs "the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made.") (citations omitted).

11. *Id.* at 2707.

12. *See id.* at 2706 ("[W]e think that the 'breathing space' which 'freedoms of expression require in order to survive' is secured by existing constitutional doctine . . . .") (citation omitted).

13. *See id.*

14. *Id.*

doctrine requires an inquiry into the implied factual content of a statement.[15]

The Court's inquiry, limited as it is to implied and direct factual content, is not an "erosion,"[16] but rather an affirmation of the Court's previous holdings regarding libel. Foremost, the *Milkovich* Court stated that for media defendants, *Philadelphia Newspapers, Inc. v. Hepps*[17] requires that statements on matters of public concern "must be provable as false before there can be liability under state defamation law."[18] Additionally, the *Milkovich* Court held that *Greenbelt Cooperative Publishing Ass'n v. Bresler*,[19] *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*,[20] and *Hustler Magazine, Inc. v. Falwell*[21] "provide protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual."[22]

In applying this existing constitutional doctrine to the newspaper column under examination in *Milkovich*, the Court applied three criteria. First, whether the statement contained "the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining" the alleged factual assertion.[23] Second, whether "the general tenor of the article negate[s] this impression."[24] Finally, whether the assertion is "sufficiently factual to be susceptible of being proved true or false."[25] In other words, the question is whether tenor, context, and provability indicate that a statement asserts a "fact."

As others have already noted, although perhaps without sufficient explanation,[26] this articulation of the constitutional opinion privilege differs only in semantics from the pre-*Milkovich* opinion privilege, as commonly applied.[27] In substance, the privilege remains identical. Concerns

15. *See id.*

16. *See* Stern, *supra* note 3.

17. 475 U.S. 767 (1986).

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

19. 398 U.S. 6 (1970).

20. 418 U.S. 264 (1974).

21. 485 U.S. 46 (1988).

22. *Milkovich*, 110 S. Ct. at 2706 (quoting *Falwell*, 485 U.S. at 50). For an excellent overview of libel law, see LUCAS A. POWE, THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA (1991).

23. *Milkovich*, 110 S. Ct. at 2707.

24. *Id.*

25. *Id.*

26. *See, e.g.*, *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 219, 223 (1990) ("The standard articulated by the *Milkovich* Court for determining when a statement is an actionable assertion of fact is essentially the same as that the lower courts have used for years to distinguish between fact and opinion.").

27. *See infra* text accompanying notes 93-104.

that the opinion privilege has been "disposed" of,[28] or that the decision signals an "ominous" tilting toward the finding of actionable statements,[29] are unwarranted from the *Milkovich* opinion itself.[30] For although the newspaper sports column at issue in *Milkovich* is full of the sort of opinion statements previously understood to be exempt from libel actions,[31] in the end, all the *Milkovich* Court does is apply its "new" articulation of the opinion privilege to the column's factual content, leaving undisturbed all of the column's "pure" opinion content.[32] In short, the Court maintained the status quo. It held that assertions of fact, whether implied or directly stated, if false and defamatory, may be the subject of a libel suit.[33]

Why, then, the confusion and concern found in law review articles[34] and the profound misapplication of *Milkovich* found in at least one recent state supreme court case?[35] I submit the following: Read without close attention to Chief Justice Rehnquist's explicit instruction as to *how* the passage in question is to be tested for the truth of its factual content, the application of the *Milkovich* test might seem to indicate that the column's "pure" opinion statements are potentially defamatory.[36] Yet such

28. *See* Hager, *supra* note 3, at 952.

29. *See* Stern, *supra* note 3, at 595.

30. Of course, too much concern may itself be cause for concern if lower courts are misled into believing that the constitutional opinion privilege has been weakened. *See, e.g.*, Spence v. Flynt, 816 P.2d 771 (Wyo. 1991), discussed *infra* text accompanying notes 159-73. I do not mean to imply that lower courts, in general, have been misapplying *Milkovich*. Examples of published opinions that correctly apply *Milkovich* include Foretich v. Glamour, 753 F. Supp. 955, 966 (D.D.C. 1990) ("The ultimate fact must then be such that plaintiff can prove its falsity; thus some generalized opinions or 'rhetorical hyperbole' often found in the media are privileged even though they may be said to place a person in an unfair or unfavorable light.") and Don King Prods., Inc. v. Douglas, 742 F. Supp. 778, 781-85 (S.D.N.Y. 1990) (holding that remarks by a boxing promoter, to the effect that Mike Tyson should have been declared the winner of a match with the boxer Buster Douglas, were protected opinions under *Milkovich*).

31. *See infra* text accompanying notes 74-86.

32. *See Milkovich*, 110 S. Ct. at 2706-07. The term "pure" opinion is not that of the Supreme Court, but is borrowed from the RESTATEMENT (SECOND) OF TORTS § 566 (1977). The *Milkovich* Court probably avoids the term "pure" opinion because it does not fully convey that an implied statement of fact underlying an opinion statement may still be considered libelous. Used in this Note, the term "pure" opinion is not intended to encompass those statements of opinion that, in context, imply potentially libelous facts. Rather, the term "pure" opinion is used because it provides a convenient shorthand form to describe the category of statements identified by *Milkovich* as not sufficiently factual to be reasonably labeled "true" or "false."

33. *See Milkovich*, 110 S. Ct. at 2706-07.

34. *See supra* note 3.

35. *See* Spence v. Flynt, 816 P.2d 771 (Wyo. 1991), discussed *infra* text accompanying notes 159-73.

36. *See infra* text accompanying notes 117-20.

an inclusion of "pure" opinion would make the *Milkovich* test "incoherent"[37] because it is an application that is unintended by the Court and for which the *Milkovich* test is ill suited. If *Milkovich* were read to invite scrutiny into "pure" opinions (such as many of those in the sports column), then the change in libel law would be radical and unsettling, as some have suggested.[38]

But if the Court had intended to eliminate constitutional protection for opinion, it would not have devoted energy to distinguishing statements that do garner constitutional protection from those that do not.[39] Indeed, deciding when a statement is "pure" opinion (that is, a statement identified by *Milkovich* as having the characteristics that require protection by the Constitution; in other words—not reasonably subject to being found "true" or "false" by a jury), and when it is something else, is the central problem of *Milkovich*.

The sports column at question in *Milkovich* provides a good forum to explore this problem because it contains statements of both "pure" and "couched" opinion.[40] Most of the statements of "pure" opinion in the *Milkovich* column relate to the actions of high school wrestling coach Michael Milkovich at a team meet. For example, the column states that "Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired . . . and resulted in . . . a brawl . . . ."[41] Because the "fact" that the coach made gestures

37. *See* D'Amato, *supra* note 3, at 343 n.56.

38. *See, e.g.*, Hager, *supra* note 3, at 952.

39. *See Milkovich*, 110 S. Ct. at 2705-06.

40. For instance, the statement "that painting is ugly" is "pure" opinion. I do not mean to suggest that in linguistic terms a statement can be rigorously characterized as "opinion" or "fact." Even the statement "that painting is ugly" operates on more than one level. It asserts, in an "opinion," the speaker's evaluation of the painting's aesthetic worth. But it also asserts, as "fact," that the painting exists. One might imagine a scenario where the mere assertion of the painting's existence could be defamatory and, thus, even this statement of "pure" opinion could be the subject of a libel action. In no circumstance, however, could a jury reasonably decide the "truth" of the speaker's characterization of the painting as "ugly." This is because some words and statements are subject to interpretative variance too wide for a jury to decide reasonably that one interpretation is "true" and another "false." *See* discussion *infra* text accompanying notes 130-34.

By contrast, the statement, "in my opinion, Jack robbed the bank at the corner of Main and Spring Streets" conveys a factual assertion, albeit an assertion "couched" in the terms of opinion. This "factual" assertion is reasonably subject to being found "true" or "false" by a jury. But, just as I do not wish to suggest that statements of "pure" opinion are devoid of "fact" content, I also do not wish to suggest that statements of "fact" are devoid of a range of interpretation similar to statements of "opinion." For example, depending on context, the word "robbed" might mean "held up the bank teller at gun point," or the word "robbed" might mean "cleverly took advantage of the bank's unusually high interest rates by opening an account." However, by "facts," I mean those statements that in context have a suitably narrow range of reasonable interpretation such that juries can decide if the meaning conveyed by the statement corresponds as "true" or "false" to a state of events.

41. Ted Diadiun, *Maple Beat the Law with the "Big Lie,"* THE NEWS-HERALD (Willoughby, Ohio), Jan. 8, 1975, at 39, *quoted in Milkovich*, 110 S. Ct. at 2698-99 n.2.

and said words at the meet, and that there was a fight, was not disputed by Milkovich,[42] the statement's remaining meaning concerns the *characterization* of the words and gestures, and the question of whether the words and gestures aroused violence in the crowd. These later "opinions" are subject to such wide interpretation that a jury could not reasonably decide if they are "true" or "false."[43]

By contrast, the column also contains "couched" opinion. For example, it states that before attending a court hearing, Milkovich and the school superintendent "*apparently* had their version of the incident polished and reconstructed" from the time of an earlier hearing.[44] The word "apparently" functions in this sentence similarly to the words "in my opinion." Without the word "apparently," the sentence would be a direct statement of "fact" indicating that the men, in some manner, had changed their story. This indication of change is reasonably subject to being found "true" or "false" by a jury.[45] When reviewed as part of the entire column, the statement's tenor, context, and provability indicate that the accusation of a change in testimony can be regarded as "fact."[46]

The precise method that the *Milkovich* Court specifies for ascertaining whether defamation occurred indicates that a distinction between "pure" opinion and "couched" opinion remains in the law, and that only the latter may properly be subject to a libel suit. More specifically, the Court states that the alleged defamation is to be established "on a core of objective evidence by comparing" the testimony at the two hearings stemming from the fight.[47] Such a comparison would reveal whether there was a change in Milkovich's testimony from the first to the second hearing. This alleged change in testimony is the subject of the "couched" opinion sentence, quoted above.[48] Comparing the two testimony records would not reveal whether Milkovich *encouraged* the altercation—whether the testimony between the two hearings is the same or different says nothing about the cause of the altercation. The cause of the altercation is the subject of the "pure" opinion sentence, quoted above.[49]

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42. *See Milkovich*, 110 S. Ct. at 2713 n.9 (Brennan, J., dissenting).

43. *See infra* text accompanying notes 130-34.

44. Diadiun, *supra* note 41, at 39 (emphasis added).

45. The words "polish" and "reconstruct" are also capable of interpretation. But regardless of whether reasonable jurors would agree on the exact degree of change implied, at a minimum the words imply that *some* alteration occurred. Testing the proposition that testimony was altered is a relatively objective task. Trial transcripts could be compared for consistency without jurors having to agree on an exact definition of "polish" or "reconstruct."

46. *See infra* text accompanying notes 123-25.

47. *Milkovich*, 110 S. Ct. at 2707.

48. *See supra* text accompanying note 44.

49. *See supra* text accompanying note 41.

My primary purpose in this Note is to show that *Milkovich* did not change libel law to include statements of "pure" opinion as potentially defamatory. My secondary purpose is to explore a more subtle issue suggested by the confusion over *Milkovich*: whether and when statements that can reasonably be interpreted as conveying either opinion or fact should be subject to libel suit. Specifically, in Part One I review the facts and law relevant to the *Milkovich* case and conclude with a discussion of why statements with especially wide variance in potential meaning—such as "beautiful" and "ugly"—cannot reasonably be labeled "true" or "false," the core *Milkovich* requirement for holding that a statement is potentially defamatory. In Part Two I review and critique two law review treatments and a recent state supreme court decision relying on *Milkovich*. Finally, in Part Three I discuss the complex problem of how to address statements that can be reasonably read in a libelous *or* nonlibelous manner.

I. *MILKOVICH*: ITS FACTS, HOLDING, AND APPLICATION

A. *Factual Background*

The *Milkovich* case stems from events at a high school wrestling match in Maple Heights, Ohio. During a match between the Maple Heights team and rival Mentor High School, a fight broke out, leading to an investigation by the Ohio High School Athletic Association (OHSAA). Both Michael Milkovich (the coach) and H. Don Scott (the superintendent of Maple Heights Public Schools) testified at the hearing held by OHSAA. As a result of the investigation, OHSAA censured Milkovich for his role in the altercation. In addition, the Maple Heights team was placed on probation for a year and disqualified from the 1975 state wrestling tournament.[50]

In an attempt to restrain the OHSAA order from taking effect, several parents and wrestlers brought suit against OHSAA in the Court of Common Pleas of Franklin County, Ohio; they alleged that the OHSAA hearing failed to provide them with adequate due process. Following testimony by Milkovich and Scott, the court agreed, and ordered that the OHSAA ruling not be put into effect.[51]

The next day, Ted Diadiun, a local sports columnist, published an article that severely criticized Milkovich and Scott.[52] Diadiun, who attended the wrestling meet and the OHSAA hearing, accused Milkovich

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

51. *Id.*

52. The full text of the column is as follows:

of lying about his role in the altercation. Although Milkovich maintained that he was powerless to control the crowd and that he did nothing to encourage the fight, Diadiun said that Milkovich was "ranting"

Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet—the judge granted Maple only a temporary injunction against the ruling—but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

A lesson, which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor [sic], and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition [sic] of superintendent of schools.

Instead they chose to come to the hearing and misrepresent the thing that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurrances [sic] is purely coincidental.

To anyone who was at the meet, it need ouly be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as "shrugs," and that Milkovich claimed he was "Powerless to control the crowd" before the melee.

Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Marin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

from the sidelines and "egging on" the crowd. Diadiun also said that Milkovich and Scott "polished and reconstructed" their stories about the incident prior to testifying before the Court of Common Pleas,[53] and quoted the OHSAA commissioner as saying that the two men's accounts given before the court differed from those given to the OHSAA board.[54] The headline to the column read: "Maple Beat the Law with the 'Big Lie.'" Diadiun's photograph appeared below the headline with the words "TD Says." The headline on the jump page to the column said "Diadiun Says Maple Told a Lie."[55]

Both Milkovich and Scott filed defamation suits against Diadiun and the newspaper's owner, the Lorain Journal Company.[56] Milkovich's action, brought in the Court of Common Pleas of Lake County, Ohio, alleged that the headline of the column and nine passages within it "accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation of coach and teacher, and constituted libel per se."[57]

A series of court maneuvers ensued. Eventually, in Scott's case, the Ohio Supreme Court held that the challenged passages in Diadiun's article were "constitutionally protected opinion."[58] The Ohio courts held that this decision also determined the result in the *Milkovich* case.[59] The U.S. Supreme Court granted certiorari to consider "the Ohio courts' recognition of a constitutionally-required 'opinion' exception to the application of its defamation laws."[60]

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart the Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.

Diadiun, *supra* note 41, at 35, 39, *quoted in Milkovich*, 110 S. Ct. at 2698 n.2.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Milkovich*, 110 S. Ct. at 2699-700.

57. *Id.* at 2700.

58. Scott v. News-Herald, 496 N.E.2d 699, 709 (Ohio 1986).

59. *See Milkovich*, 110 S. Ct. at 2701.

60. *Id.*

B. *The Opinion on Opinion: The Supreme Court's Holding*

Chief Justice Rehnquist devotes the bulk of the *Milkovich* opinion to reviewing the development of libel law and related constitutional doctrine. The opinion begins with a reminder that a common law tort for written defamation has been available since the sixteenth century.[61] Although the common law required that a publication be false and defamatory to state a cause of action, statements of opinion, if sufficiently damaging to injure reputation, were still deemed to be actionable.[62] Eventually, to protect public debate, the principle of "fair comment" was adopted into the common law. Fair comment exempted from the tort of defamation expressions of opinion regarding matters of public concern and based upon "true" facts.[63]

As *Milkovich* notes, the Supreme Court injected dramatic change into the common law of libel with its decision in *New York Times Co. v. Sullivan*.[64] *New York Times* held that the First Amendment served to restrict state defamation law. Namely, public officials could not recover for defamatory falsehoods regarding the official's public activity absent a showing of "actual malice"—reckless disregard of whether the statement was false or not.[65] *Curtis Publishing Co. v. Butts*[66] extended *New York Times* to include all public figures.[67] Later, in *Gertz v. Robert Welch, Inc.*,[68] the Court held that malice must be shown by clear and convincing proof.[69] Although this standard was held not to control private individuals who allege defamation related to a statement of public concern,[70] the Court did rule that in this circumstance the states must require a showing of fault, and no punitive or presumed damages could be awarded absent a showing of actual malice.[71]

In reaching its decision in *Gertz*, the Court, in dictum, briefly touched on the issue of opinion: "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

61. *Id.* at 2702.
62. *Id.* at 2702-03 (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977)).
63. *Id.* at 2703.
64. 376 U.S. 254 (1964).
65. *Id.* at 279-80.
66. 388 U.S. 130 (1967).
67. *See id.* at 155.
68. 418 U.S. 323 (1974).
69. *See id.* at 343.
70. *See id.* at 351.
71. *See id.* at 350.

but on the competition of ideas. But there is no constitutional value in false statements of fact."[72]

Ultimately, in *Milkovich*, the Court held that although this dictum did not create a separate "wholesale" constitutional privilege for anything that might be labeled opinion, at the same time several other Supreme Court rulings, taken together, were found already to secure constitutional protection for opinion.[73] For example, in *Philadelphia Newspapers, Inc. v. Hepps*,[74] the Court held unconstitutional the common law presumption that defamatory speech is false—at least where a media defendant publishing speech of public concern is involved.[75] *Hepps* required the plaintiff to bear the burden of showing falsity, as well as fault.[76] *Greenbelt Cooperative Publishing Ass'n v. Bresler*[77] held that the First Amendment prohibits state defamation law from reaching certain *types* of speech.[78] In *Bresler*, a newspaper article quoted individuals who characterized a real estate developer's negotiating position as "blackmail."[79] Because the article stated the underlying facts of the negotiation accurately and fully, the Court reasoned that the word "blackmail" was intended as "rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable."[80] The Court held that the article did not imply that the developer committed the actual crime of blackmail.[81] Similarly, in *Hustler Magazine, Inc. v. Falwell*,[82] the Court held that a vulgar advertisement parody was protected by the First Amendment as satire because the parody "could not reasonably have been interpreted as stating actual facts about the public figure involved."[83] And in *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*,[84] the Court held that an accusation that an individual was a "traitor" due to his activity as a union "scab" was protected speech.[85] The Court said that the term "traitor"

72. *Id.* at 339-40 (footnote omitted).
73. *See Milkovich*, 110 S. Ct. at 2705-06.
74. 475 U.S. 767 (1986).
75. *See id.* at 777.
76. *See id.* at 776.
77. 398 U.S. 6 (1970).
78. *See id.* at 14.
79. *See id.* at 13.
80. *Id.* at 14.
81. *See id.*
82. 485 U.S. 46 (1988).
83. *Id.* at 50.
84. 418 U.S. 264 (1984).
85. *See id.* at 284-86.

was, in context, used in a "loose, figurative sense," and not to be taken literally.[86]

Thus, although the *Milkovich* Court explicitly declined to recognize a separate constitutional privilege for opinion,[87] under existing constitutional doctrine (including the *Bresler-Letter Carriers-Falwell* line of cases) the Court reaffirmed protection of "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual."[88]

Prior to *Milkovich* an initial inquiry in a libel suit was whether the challenged utterances were fact or opinion. Facts, if false and defamatory, were potentially libelous, while opinions were protected by the First Amendment.[89] *Milkovich* recognized that fact and opinion may overlap and thus requires that courts ask whether a reasonable factfinder could conclude that the expression in question implies an objective assertion of fact.[90] If so, even phrases couched in the langnage of opinion may be libelous.[91]

But although the formulation of the required inquiry changed, the Court left the underlying principle of the opinion privilege intact: Only assertions that "contain a provable false factual connotation" are potentially libelous.[92] Even the method the Court delineated for deciding when a statement is sufficiently concrete and definable to warrant an action did not change, except in semantics, from its previous incarnations in lower courts.

As discussed earlier, the *Milkovich* Court's "new" method employed three criteria in analyzing the challenged statements in the Diadiun column.[93] First, whether the statements contained "the sort of loose, figurative or hyperbolic langnage which would negate the impression that the writer was seriously maintaining" the alleged factual assertion.[94] Second, whether "the general tenor of the article negate[s] this impression."[95] Finally, whether the assertion is "sufficiently factual to be

86. *See id.* at 284.

87. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990).

88. *Id.* (quoting *Falwell*, 485 U.S. at 50).

89. *See, e.g.*, Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir. 1986); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

90. *See Milkovich*, 110 S. Ct. at 2705-06.

91. *See id.* at 2706.

92. *Id.*

93. *See supra* text accompanying notes 23-25.

94. *Id.* at 2707.

95. *Id.*

susceptible of being proved true or false."[96] In sum, the Court recognized that the context, tenor, and provability of a statement must be examined to understand its reasonable interpretation.

The constitutional opinion privilege previously delineated by lower courts used the same inquiry. For instance, the test as formulated in *Ollman v. Evans*[97] by the Court of Appeals for the District of Columbia Circuit (which was relied on by the Ohio Supreme Court in analyzing Diadiun's column[98]) states that four factors are relevant in determining if a statement is constitutionally protected opinion: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statements appeared.[99] The *Milkovich* Court specifically held that the *Ollman* court was mistaken in asserting that the *Gertz* dictum required a "wholesale" separate constitutional protection for "anything that might be labeled 'opinion.' "[100] But it should be apparent by even a surface comparison of the *Ollman* and *Milkovich* tests that both employ identical factors: context, tenor, and the provability of factual content. The first *Ollman* factor—examining the specific language used—is equivalent in meaning to examining tenor. The third and fourth *Ollman* factors are explicitly concerned with context. And the second *Ollman* factor—verifiability—is the same as provability. To restate the comparison: The *Milkovich* method of excluding from libel protection ostensible opinion statements containing "implied objective fact" is identical to the *Ollman* analysis distinguishing protected "opinion" from unprotected fact.

Two other widely used articulations of the opinion privilege are founded on common law protections of opinion, and not on the constitutional protection of opinion discussed in *Ollman*. Nonetheless, the tests are, like *Ollman*, strikingly similar to *Milkovich*. The totality-of-circumstances test, as articulated by the Court of Appeals for Ninth Circuit in *Information Control Corp. v. Genesis One Computer Corp.*,[101] calls for a consideration of "the statement in its totality in the context in which it

96. *Id.* Chief Justice Rehnquist applies these three criteria, in a distilled form, not only in analyzing the allegedly libelous newspaper column, but also in analyzing the Court's own well-known dictum on opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). Rehnquist rejects the view that the dictum creates a "wholesale defamation exemption" as being "contrary to the tenor and context of the passage" and as ignoring "the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich*, 110 S. Ct. at 2705. This analysis of context, tenor, and the presence of provable factual content is identical to the three-step inquiry later applied in *Milkovich*.

97. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

98. *See* Scott v. News-Herald, 496 N.E.2d 699, 709 (Ohio 1986).

99. *Ollman*, 750 F.2d at 979.

100. *Milkovich*, 110 S. Ct. at 2705.

101. 611 F.2d 781 (9th Cir. 1980).

was uttered or published" to determine if the statement is protected opinion or unprotected fact under California law.[102] Furthermore, tenor is to be considered; as the court put it, "cautionary terms used by the person publishing the statement."[103]

The test set forth by the *Restatement (Second) of Torts* makes the same distinction as *Milkovich* between protected opinion and opinion that implies fact: "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."[104]

Neither of the above non-constitutional protections of opinion statements is in any way abridged by *Milkovich*'s requirement that only "provably false factual connotation[s]" may be libelous as determined by considering the context, tenor, and the provability of a statement.[105] In fact, it may be that the *Restatement* approach does not provide sufficient constitutional protection for opinion in light of *Milkovich*. If the implied "undisclosed" defamatory fact contemplated by the *Restatement* cannot "reasonably [be] interpreted as stating *actual* facts"[106] about an individual, as opposed to speculative "undisclosed" facts, then the *Restatement* approach fails to provide the constitutional protection *Milkovich* requires. Far from restricting the opinion privilege, *Milkovich* might ultimately force the enlargement of the *Restatement* approach.

What the Supreme Court rejected in *Milkovich* was an entirely separate constitutional privilege for *any* statement couched in the language of opinion. *Gertz* was not intended "to create a wholesale defamation exemption for anything that might be labeled 'opinion.' "[107] But, as the above examples of the "old" opinion standard illustrate, the pre-*Milkovich* opinion privilege never created such a wholesale exemption. *Milkovich* removed nothing from existing doctrine by refusing to find content in the *Gertz* dictum.

Chief Justice Rehnquist used the following as an illustration of the implied fact/protected opinion distinction: "[U]nlike the statement 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable."[108] Presumably, the first example is

102. *See id.* at 784.

103. *Id.*

104. RESTATEMENT (SECOND) OF TORTS § 566 (1977).

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

106. *Id.* (emphasis added) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).

107. *Id.* at 2705.

108. *Id.*

one of "couched" opinion, focusing on the telling of truths or untruths, as might be determined in a court action for perjury. The second example is one of "pure" opinion, focusing on the phrase "abysmal ignorance," presumably because a plaintiff could not "prove" if by accepting Marx and Lenin the plaintiff showed ignorance or enlightenment.

This particular hypothetical, however, is only helpful to a point, as varying contexts for the statements could be imagined so as to give the hypothetical opposing interpretations. For example, if the statement "Mayor Jones said he never stole from the public treasury" precedes the sentence "In my opinion, Mayor Jones is a liar," then the interpretative focus imagined by the Chief Justice is clear: One would ask if there is a factual basis for the speaker's assertion that the Mayor stole, despite the "couching" of the accusation in terms of opinion. But if the statement "Mayor Jones says he no longer accepts the teachings of Marx" precedes the sentence "In my opinion, Mayor Jones is a liar," then the hypothetical is turned on its end. The speaker in this second example is asserting that Mayor Jones still accepts the teachings of Marx, despite his statement to the contrary. Read this way, Mayor Jones is a "liar" because he says he does not accept what he really does accept, and the speaker's comment is an assertion of his opinion about the mayor's beliefs. The speaker might assert, for example, that the Mayor's support for public health care proves that the Mayor is really still a Marxist. The Mayor might assert that he abandoned Marxism years ago, and his support for public health care just makes him a liberal. Neither the speaker nor the Mayor could prove the falsity of this alleged "lie," although the hypothetical, because it is not grounded in context, might be misread to imply otherwise.

C. *Which Lie? Applying the Law to the Facts*

To get a firmer grasp of the Court's intended use of the *Milkovich* test, one should pay particular attention to the Chief Justices's specific instructions as to *how*, on remand, the Ohio court should test Diadiun's statement. The crucial question in understanding the specific instruction is: What lie is being referred to when the Court says Diadiun's accusation of a "lie" told by Milkovich is actionable? Although the column discusses two distinct "lies," the Court's specific instruction in testing the statement shows that the Court only intended to hold one of these accused "lies" as potentially actionable. The first, more obvious "lie" is Diadiun's rejection of Milkovich's characterization of Milkovich's behavior during the altercation. This is the question of whether Milkovich "shrugged" or "ranted," whether he was "powerless" to control the crowd, or whether he was "egging on" the crowd. The second "lie"

Milkovich is accused of telling is his alleged change in testimony from the first to the second hearing. Chief Justice Rehnquist's specific instructions to test the alleged defamation by comparing the two hearing transcripts[109] demonstrates that only this second alleged "lie" is to be considered as a potentially actionable statement. To gain a better understanding of why only the second "lie" is held actionable, it is necessary to examine the Diadiun column in fuller context.

On the night of the altercation, in front of a crowd of fans, it is undisputed that Michael Milkovich served as the wrestling coach to Maple Heights.[110] It is also undisputed that during the match Milkovich made statements and gestures that were audible and visible to the crowd.[111] But the nature of the remarks, and any effect the remarks might have had in inciting the altercation, are very much in dispute.

In his column, Diadiun described the events at the meet, which he attended, as follows: "Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor (sic), and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital."[112] That Milkovich and Scott vehemently disagreed with Diadiun's assessment of the incident is made clear by Diadiun's column itself: "the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as 'shrugs,' and that Milkovich claimed he was '[p]owerless to control the crowd' before the melee."[113] Diadiun continued: "Fortunately, it seemed at the time, the Milkovich-Scott version presented to the [OHSAA] board of control had enough contradictions and obvious untruths so that the six board members were able to see through it."[114]

Diadiun's first accusation against Milkovich and Scott is that they misrepresented the events at the match to the OHSAA board: "Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor."[115]

109. *See id.* at 2707.

110. *Id.* at 2698.

111. *See id.*

112. *See* Diadiun, *supra* note 41, at 39.

113. *Id.*

114. *Id.*

115. *Id.*

However, the above passage was not listed in Milkovich's libel suit as defamatory. Instead, Milkovich identified the headline and the following nine passages from the column as defamatory:

> [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.
>
> A lesson which, sadly, in view of the events of the past year, is well they learned early.
>
> It is simply this: If you get in a jam, lie your way out.
>
> If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.
>
> . . . .
>
> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
>
> But they got away with it. Is that the kind of lesson we want our young people learning from their high school administrators and coaches?
>
> I think not.[116]

Not clear from any of the alleged defamatory statements quoted above is the exact content of the "lie." Because truth is an absolute defense in a libel suit,[117] if Milkovich really did lie in court, no legal action would be possible, regardless of the damage to his reputation. As fundamental a question as "what was the lie" might seem to the disposition of the case, Chief Justice Rehnquist never answers it directly. However, the intended content of the "lie" is made plain by Rehnquist's specified method for testing the "lie." Toward the conclusion of the majority opinion, Rehnquist states that "[a] determination of whether petitioner lied in this instance can be made on a core of objective evidence by comparing, *inter alia*, petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court."[118] This specified method narrowly focuses on the *change* in testimony that Diadiun alleges took place before the Court of Common Pleas.

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116. *Id.*

117. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (fashioning "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages" against a media defendant for speech of public concern).

118. *Milkovich*, 110 S. Ct. at 2707.

The other possible interpretation of the alleged "lie" is a reference to Milkovich's characterization of the fight. This interpretation is rationally based on the language of the column. Recall that one of the passages Milkovich identified as defamatory said that "[a]nyone 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 [Court of Common Pleas] hearing after each having given his solemn oath to tell the truth."[119] One understanding of the sentence is that "anyone" at the match saw and heard what happened; at the Court of Common Pleas hearing, Milkovich and Scott described the events in a way that Diadiun believed "anyone" at the match would find inconsistent with what actually happened. Namely, Diadiun believed that Milkovich encouraged the fight, while Milkovich and Scott denied this. This "lie," then, is Milkovich's statement that he did not encourage the altercation.

But considering the wide variance in meaning a reasonable juror might give to the definition of enticing violence in a crowd of wrestling fans, holding such a statement as potentially defamatory would seem to violate *Milkovich*'s maxim that only statements capable of being proven true or false may be considered libelous. Indeed, requiring jurors or a court to resolve such an issue as "fact" is wholly inconsistent with the Court's specific instruction (to compare Milkovich's testimony from the OHSAA hearing to the court hearing) regarding the ultimate resolution of the *Milkovich* defamation action. How could comparing transcripts of Milkovich's own testimony determine whether his characterization of events at the wrestling match was accurate? After all, even if he wildly lied in both instances, his own testimony would not be likely to reveal anything but internal inconsistencies—hardly an "objective" evaluation of what transpired at the match. This cannot be the inquiry the Court calls for because it is not resolvable by a "core of objective evidence."[120]

Instead, Chief Justice Rehnquist's analysis leads exclusively to a focus on the question of the *change* in testimony from the OHSAA hearing to the court hearing. The paragraphs preceding and following the sentence, "[a]nyone who attended the meet," put this focus into context.

> But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.
>
> "I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of

119. Diadiun, *supra* note 41, at 39 (emphasis added).

120. *Milkovich*, 110 S. Ct. at 2707.

> the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."
>
> Nevertheless, the judge bought their story, and ruled in their favor.
>
> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
>
> But they got away with it.[121]

The only way the Court's test of comparing Milkovich's testimony at the hearings is coherent is if the "lie" referred to is the "polishing and reconstructing" of the stories. The Court must have this, and this "lie" alone, in mind or it could not have stated so directly and concisely just what the lower court was to do in assessing the alleged defamatory statements: relying on a "core of objective evidence," compare Milkovich's testimony at the two hearings.[122]

It might be argued that the bulk of Diadiun's column does not focus on this "lie." Diadiun demonstrates much more concern in the column with Milkovich's characterization of his behavior at the wrestling match than with Milkovich's alleged change in testimony. One should keep in mind, however, that just because one potentially libelous statement or implied fact in a column is among many others does not necessitate that all of the statements or implied facts in the column be considered potentially libelous. Making such a blanket assumption defies logic, and perhaps more to the point, defies the explicit standard in *Milkovich* requiring that for any statement to be considered libelous it must reasonably be provable as true or false. For this standard to function, each allegedly libelous statement in an article, and each allegedly libelous implied fact, must be examined separately.

Applying this statement-by-statement examination to the Diadiun column reveals only a single challenged accusation that might be considered libelous. In his column, Diadiun states that "Milkovich and Scott *apparently* had their version of the incident polished and reconstructed."[123] The accusation is somewhat tempered by the use of the word "apparently." However, without the word "apparently," the factual assertion of the sentence is direct: There was some change in testimony from the first OHSAA hearing to the second court hearing. Thus, the word "apparently" serves to "couch" the sentence in a term of opinion. The "couched" accusation is supported by a quotation from Dr.

121. Diadiun, *supra* note 41, at 39.

122. *Milkovich*, 110 S. Ct. at 2707.

123. Diadiun, *supra* note 41, at 39 (emphasis added).

Meyer, and is implicitly repeated, this time without the word "apparently," in the following sentence, when Diadiun states that the judge "bought their story."[124]

The use of Dr. Meyer's quotation, the implicit repetition of the accusation in the following sentence, and Diadiun's immediate juxtaposition of the accusation against the charge of violating a solemn oath to tell the truth, make plain that Diadiun presents his assertion without intending the reader to question its veracity. The Court must be referring to this assertion when it declines to afford Diadiun's column full constitutional protection.

In his dissent, Justice Breunan disagrees that this assertion of a change in testimony should be considered potentially libelous.[125] Brennan argues that the use of the "cautionary term 'apparently' " is an "unmistakable sign that Diadiun did not know what Milkovich had actually said in court."[126] Justice Brennan also argues that because the piece is a signed editorial with a photograph of the author, the reader is signaled that the story is not to be taken as fact. And he asserts that the tone "is point, exaggerated and heavily laden with emotional rhetoric and moral outrage," thus negating the impression that the article is factual.[127]

Whether or not one agrees with Justice Brennan about the significance of the "couched" term "apparently," it is important to recognize that the debate within the *Milkovich* Court does *not* extend to the "pure" statements of opinion found in the Diadiun column. Nowhere does *Milkovich* discuss sending to the jury questions regarding the *characterization* of the fight. The misunderstanding some commentators have demonstrated to the contrary is explained by the structure of the Diadiun column. Certain passages of the column vagnely make reference to a "lie" without specifying the nature of the accusation.

For example, although the implied act of perjury[128] recognized by Chief Justice Relnquist is the change in the story itself, the "lie" in the

124. *Id.*

125. *Milkovich*, 110 S. Ct. at 2712 (Brennan, J., dissenting).

126. *Id.*

127. *Id.*

128. Diadiun never actually uses the word perjury in his column. He states "that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." Diadiun, *supra* note 41, at 39. Of course, this accusation is very close to a charge of perjury. The term was used by the petitioner in his complaint and accepted by Rehnquist without discussion of the possible distinction between it and lying. But there *is* a possible distinction, resting precisely on the contextual difference between the use of the word "lie" as a term of dishonor and the use of the word as a term with legal meaning.

In the context of Diadiun's exhortation of a "lesson" to be learned by high school students, Diadiun is not so much concerned with (or even knowledgeable about) the legal requirements of perjury as he is with the question of honor and doing the right thing—even if (or despite the fact

alleged defamatory sentence beginning "[a]nyone who attended the meet" also refers to Milkovich's general characterization of the meet. As discussed earlier, the use of the phrase "[a]nyone who attended the meet" implies that those familiar with events at the meet know that Milkovich's characterization of his behavior was a "lie."[129] Those at the meet would have no knowledge of Milkovich's alleged change in testimony. However, in context, the sentence follows directly from Diadiun's discussion of the alleged alteration in testimony. The "lie," therefore, can also be read to refer to the change in story. *Milkovich* teaches that the corresponding "opinion" content of this sentence does not prevent the implied "fact" content from being challenged. The presence of implied "fact" content in the passage, however, does *not* indicate that the "pure" opinion content of the statement may also be challenged.

Further complicating the matter is another challenged section of the column referring to a "lie." This section is also as equally oriented toward the description of the fight as it is to a comparison of the testimony from the first to the second hearing. The section states: "If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened." The immediately following paragraphs then turn to the events of the altercation. The statement "what really happened" might refer to the change in story from the first to the second hearing. But another reading, given the immediate juxtaposition against a description of events at the meet, is a reference to "what really happened" at the wrestling match. Despite the two possible interpretations, the Court could not have meant to hold the latter interpretation out as potentially defamatory because the Court's requirement of a "core of objective" evidence would not allow for it.

The constitutional requirements reiterated by *Milkovich* allow for only one possibility in analyzing the potential defamatory content of the above ambiguous sentences: The implied "fact" content of the passages

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that) no damaging legal consequences will result from doing the wrong thing. This is how Diadiun closes his column: "Is that the kind of lesson we want our young people learning from their high school administrators and coaches? I think not." *Id.* This is not the tenor of a prosecutor seeking a perjury indictment. Yet this is the standard to which Rehnquist assumes Diadiun should be held. Instead, the Court should hold Diadiun to the standard he sets with his own words. Diadiun states that Milkovich polished and reconstructed his story, and that this change constituted a violation of Milkovich's oath to tell the truth. The factual question on remand should be whether the comparison of the transcripts reveals that Milkovich polished and reconstructed his story to a degree that would lead a reasonable juror to believe that he violated his oath to tell the truth. Whether such a reconstruction could actually lead to a conviction of perjury only clouds the issue. It should be clear, however, that even Rehnquist's tacit assumption of a "perjury" accusation does not implicate a "pure" statement of opinion as potentially defamatory.

129. *See supra* text accompanying note 119.

may be scrutinized, but the "pure" opinion content *must* be left undisturbed. The presence of both types of content in a single passage should not be understood to indicate that "pure" opinion assertions "lose" their privilege.[130]

D. *The Beautiful and the Ugly: Why Different Words Require Different Constitutional Protection*

The *Milkovich* Court's focus on "a core of objective evidence" makes it more straightforward for Michael Milkovich to prove his case. He need only demonstrate that his testimony at the two hearings, as recorded by transcript, was not sufficiently different to justify Diadiun's accusation that it constituted a "lie." But the Court's focus also makes it easier for Diadiun to disprove Milkovich's case. Small but significant changes in his testimony might be found reasonably to justify characterization of the testimony as a lie.

By contrast, if the court forced Milkovich to disprove Diadiun's account of the fight, then it would require the parties to enter into an unresolvable quagmire because of the linguistic difficulties associated with confining the meaning of the phrases that Diadiun used to suggest Milkovich encouraged the fight.[131]

To reach the conclusion that these statements are not susceptible to a libel suit because they are not "factual," one must accept the proposition that even words with stable meanings can have a wide variance in interpretation depending on context and tenor. The *Milkovich* Court, by requiring an examination of context and tenor, recognizes that the meaning of words is always subject to interpretation depending on context. Some words and phrases have a greater potential for variance, as they are commonly used, than others. For instance, the words "beautiful" and "ugly" are usually subject to much greater variance in meaning than the words "open" and "shut." Words, phrases, and statements with the potential for especially wide variance in interpretation are bad candidates for libel suits because the plaintiff or defendant will be unable to "prove" as true or false any one interpretation.

Roughly speaking, those statements with the potential for wide variance in interpretation are "opinion," while those statements with the least potential for reasonable interpretation are "fact." Because context results in a myriad of interpretative possibilities, a set determination of

130. The problem of what to do with a statement that contains both constitutionally protected opinion and factual content is more fully discussed in Part Three.

131. These phrases were "ranting from the side of the mat," "egging the crowd on," "wild gestures," and the statement that this behavior "backfired . . . and resulted . . . in a brawl." Diadiun, *supra* note 41, at 39.

which words are fact and which words are opinion is impossible. In a constitutional setting, however, the determinative factor is reasonableness. Thus, "facts" are contained in those statements that in context have a suitably narrow range of interpretation such that juries can reasonably decide if the meaning conveyed by the statement corresponds as "true" or "false" to a state of events.

Absent context, there is no formula for deciding which phrases are sufficiently limited in meaning to be the potential subject of a libel suit. Rather, as the Court indicates in *Milkovich*, the context, tenor, and provability of each challenged statement must always be examined.[132] Doing just that with the phrases "ranting," "egging on," "wild gestures," and the core assertion that all of these things "resulted" in the "brawl," does not yield nearly the requisite level of "objective" fact that the Court mandates. If, for instance, the coach said, "Go get 'em" in a loud voice, does this constitute "egging on"? What if the coach said that he always yells "Go get 'em" before a meet and there had never been a fight before? What if Diadiun could call as a witness a sixteen-year-old fan who would testify that upon hearing the coach yell "Go get 'em" he felt an irresistible urge to pummel the opposing team's members? What if the coach said he always raised his arms as signals to his players? What if Diadiun sincerely believed that waving one's arms around is the same as making "wild gestures"?

Or, to go to the heart of the matter, who can conclusively say what action or events led to the altercation? Where a series of underlying facts are undisputed and made plain to the reader, and the conflict revolves around an evaluation of these underlying facts, there is no "objective" method of proving the evaluation right or wrong. The *Milkovich* Court states that where "the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or his assessment of them is erroneous, the statement may still imply a false assertion of fact."[133] Yet the presence of an "erroneous" assessment is *not* sufficient to trigger a potential libel action, unless the "erroneous" assessment implies the existence of facts that turn out to be false. The question of the "truthfulness" of the evaluation itself is one of reasonableness in interpretation subject to differences in assessment from individual to individual. If no "false" statement of fact is implied by an evaluative statement, even if the speaker's assessment is "erroneous" in the eyes of a court, the statement cannot constitutionally be considered libel.

132. *See Milkovich*, 110 S. Ct. at 2707.

133. *Id.* at 2706.

The characterization of events leading up to the altercation in *Milkovich* is just such an individual evaluation. Dozens of witnesses saw Milkovich's gestures and heard his words. One might imagine that the event was videotaped. Even with such strong evidence of what occurred at the match, it remains an individual judgment whether or not the net effect of Milkovich's gestures and words was to encourage the altercation. The opinion content of this judgment is akin to a critic calling a singer's voice "flat," or a restaurant reviewer labeling soup "lousy."[134] There is no "right" or "wrong" answer to such an individual judgment, and *Milkovich* wisely leaves wide freedom for individuals to make evaluative statements not provable as "true" or "false."

II. BAD APPLES: MISUSES OF *MILKOVICH*

Failure to recognize that the *Milkovich* holding only applies to those statements that can be reasonably described as carrying direct or implied fact content has already led to significant confusion. Two law review treatments of *Milkovich* and a recent decision by the Wyoming Supreme Court are illustrative.[135]

Professor Anthony D'Amato, in his essay *Harmful Speech and the Culture of Indeterminacy*, explains at length how "the core of objective evidence" required by *Milkovich* cannot determine whether Milkovich's characterization of the fight was, in fact, a "lie."[136] Yet D'Amato does not recognize the necessary implication of his observation: The Supreme Court did not intend the lower court, on remand, to reach such a determination.

D'Amato's apparent assumption is that the holding applies to all statements in the column and to all levels of interpretation of all the statements. He chooses as an example of the scope of *Milkovich* the column's "shrugging allegation," and he demonstrates (successfully I believe) that the opinion content of a charge of "shrugging" versus "ranting" does not leave the statement open to factual analysis.[137]

D'Amato writes that although Milkovich "is in the best position to know what he is doing," Diadiun might have interpreted Milkovich's behavior differently from the way in which Milkovich interpreted his

134. For a more rigorous analysis of why language can mean different things at different times, see WITTGENSTEIN, *supra* note 1, and J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 143 (2d ed. 1975) ("It is essential to realize that 'true' and 'false' like 'free' and 'unfree,' do not stand for anything simple at all; but only for a general dimension of being a right or proper thing to say as opposed to a wrong thing, in these circumstances, to this audience, for these purposes and with these intentions.").

135. *See* D'Amato, *supra* note 3; Stern, *supra* note 3; Spence v. Flynt, 816 P.2d 771 (Wyo. 1991).

136. *See* D'Amato, *supra* note 3, at 339.

137. *See id.* at 346.

own behavior.[138] Although "Milkovich may well have thought he was shrugging [and], may well have tried to shrug . . . perhaps Diadiun's statement should be interpreted only as saying, 'I saw Milkovich ranting; he later told the court he was shrugging, but it sure looked like ranting to me.' "[139] According to D'Amato, the distinction between actor and observer necessarily signals to a reader that the observer's comments about the actor are not based on the actor's internal beliefs. "[W]e cannot credibly conclude that Diadiun's statement that Milkovich was *lying* was anything other than an abbreviated and hyperbolic way of saying, 'I saw him ranting even though . . . he may have thought he was only shrugging,' " D'Amato asserts.[140] Thus, neither Diadiun's nor Milkovich's opposing interpretations of the same event is provable as "false," and a descriptive statement regarding the event could only be "opinion."

D'Amato analyzes the fact/opinion distinction in Diadiun's column cogently, but despite this he does not realize *which* passages in Diadiun's column the Court instructed the lower court to assess. For instance, D'Amato recognizes that if Milkovich consistently lied from the first to the second hearing, then a comparison of the two transcripts would not reveal the "lie."[141] D'Amato apparently has in mind the "lie" concerning the fight. But D'Amato does not realize that if Milkovich's testimony was consistent, then Diadiun's column was inaccurate in asserting that Milkovich "polished and reconstructed" his testimony, another aspect of the "lie" accusation. And this assertion could easily be tested by comparing the testimony at the two hearings.

D'Amato's overinclusive reading of the range of statements implicated by *Milkovich* leads him to conclude:

> On remand, the Supreme Court gave Milkovich no guidance. He has no way to prove he was telling the truth to the trial judge. Similarly, the Court gave Diadiun no guidance. All he can do is repeat his story that he saw Milkovich ranting, not shrugging, and that he said so in his column.[142]

D'Amato asks rhetorically: "And is not the reporter entitled to state his own opinion that Milkovich lied both to the Board and to the common pleas court when Milkovich told them that he had only shrugged?"[143] D'Amato believes *Milkovich* answers this question in the negative. But a closer look at *Milkovich* reveals the answer to be "yes."

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138. *Id.* at 345-46.

139. *Id.* at 345.

140. *Id.* at 345-46.

141. *See id.* at 341.

142. *Id.* (footnote omitted).

143. *Id.* at 341-42.

Such an opinion cannot be proven true or false from a "core of objective evidence" and thus is constitutionally protected from defamation actions.

Professor Nat Stern, in his article *Defamation, Epistemology, and the Erosion (But Not Destruction) of the Opinion Privilege*, states that *Milkovich* represents an "ominous" tilting toward "the less skeptical" of the methods previously used by lower courts to determine a statement's factual content.[144] Despite this assertion, Stern recognizes that the *Milkovich* Court did not change the Court's previous constitutional standard. He writes, "the Court has jettisoned the terminology rather than the essence of the fact-opinion distinction."[145] Stern's concern, then, stems not from any change in the law, but from what he calls "the Court's preference for a particular way of reading the facts"[146] of the Diadiun column. In fact, it is Stern's apparent misreading of the Court's application of the law to the Diadiun column that gives rise to Stern's assertion that "*Milkovich* may provide momentum to a more subtle expansion of the range of expression subject to successful defamation suits."[147]

Professor Stern seems to operate under much the same assumption as D'Amato. Stern argues that "having conceded that [Diadiun's] first-hand knowledge was limited to observations made at the wrestling meet and the OHSAA hearing, Diadiun could also have been viewed simply as offering the conclusion—'conjecture'—that he had drawn from the information set forth in his column."[148] Instead, Stern states that Diadiun is "held accountable for the most severe construction that could be placed on [his] words."[149] Stern does not specify the meaning of "severe construction" that he has in mind, but from his mention of Diadiun's first-hand observations at the meet, Stern implies that the "severe construction" to which Diadiun will be held "accountable" relates to Diadiun's characterization of the fight at the wrestling meet. However, this is *not* a construction that the Supreme Court's instruction permits—at least in so far as identifying the meaning of the challenged Diadiun passage that may properly be the subject of a libel suit.

Stern goes on to say that courts concluding that a statement has factual content "bear a special responsibility to delineate precisely"[150] the nature of the facts. He asserts that *Milkovich* fails "to confine more

144. *See* Stern, *supra* note 3, at 595.
145. *Id.* at 614.
146. *Id.* at 615.
147. *Id.* at 616.
148. *Id.* at 623.
149. *Id.*
150. *Id.* at 624.

clearly the universe of permissible implications [giving] unfortunate encouragement to judicial inclinations to find implied factual assertions on an unpredictable basis."[151] Stern's concern is understandable. After all, Chief Justice Rehnquist does not go through the allegedly defamatory statements line by line to separate the provable facts from the protected opinions. Ultimately, however, it is not an exceedingly difficult task to make one's own delineation given the Court's precisely articulated method of applying the *Milkovich* holding to the facts of the case. To the extent that Stern suggests that the Court's articulated method is capable of yielding anything more than a demonstration of whether Milkovich changed his testimony, then Stern is mistaken and he may mislead others into believing that *Milkovich* encourages libel suits based on statements of "pure" opinion.

Stern is also mistaken when he argues that "[p]erhaps the most ominous aspect" of *Milkovich* is the Court's "apparent enthusiastic embrace" of the Restatement.[152] Stern cites a section of the Court's opinion that details the historical background of libel to justify his conclusions.[153] Although the section does extensively quote the *Restatement*, the Court uses the *Restatement* here only to summarize the historical development of the common law.[154] Subsequently, the Court states that "[i]t is worthy of note that at common law" the principle of fair comment did not protect false statements of fact, quoting the *Restatement*'s summation of the common law.[155] Neither of these instances suggests that the Court is "enthusiastic[ally] embrac[ing]" the common law as representative of the state of constitutional doctrine.[156] Quite the contrary. Immediately following the historical discussion of the *Restatement*, the *Milkovich* Court states that, since 1964, the Supreme Court has "placed [constitutional] limits on the application of the state law of defamation."[157] Stern's critique of the *Restatement* approach then, is not a critique of *Milkovich*. As previously argued, *Milkovich* might actually necessitate the enlargement of the *Restatement* protection of opinion statements.[158]

Perhaps the most troubling example of a misreading of *Milkovich* is found in a recent Wyoming Supreme Court decision, *Spence v. Flynt*.[159] *Spence* involved a defamation action brought by attorney Gerry Spence

151. *Id.* at 623-24.
152. *Id.* at 617.
153. *See id.* at 617 (citing *Milkovich*, 110 S. Ct. at 2702-03).
154. *See Milkovich*, 110 S. Ct. at 2702-03.
155. *Id.* at 2706.
156. *See* Stern, *supra* note 3, at 617.
157. *Id.* at 2703.
158. *See supra* text accompanying notes 105-06.
159. 816 P.2d 771 (Wyo. 1991).

against *Hustler* magazine. *Hustler* featured a story about Spence in its July 1985 issue. The story attacked Spence, and in the course of the attack made Spence the subject of a great many vulgarities.[160]

In its opinion, the Wyoming Supreme Court states that "*Milkovich* laid to rest the absurd notion that anything published that is couched in opinion language cannot be defamation . . . ."[161] The *Spence* court then states that *Milkovich* "affords legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact"[162]—a holding *Spence* asserts *Milkovich* justifies based on "fair comment" doctrine.[163]

Spence represents such a serious misreading of *Milkovich* that it is difficult to choose where to begin a rebuttal, but let me start with a refutation of the Wyoming court's description of the *Milkovich* holding. First, Chief Justice Rehnquist in no way relies on the fair comment doctrine, which is part of common law, as a basis for the *Milkovich* holding. Although "fair comment" is mentioned as part of the historical discussion of defamation,[164] the Court entirely relies on constitutional decisions in ruling that statements of public concern may not be the subject of defamation unless they contain "a provably false factual connotation."[165] Thus, before the *Spence* court can assert that the *Hustler* statement is defamatory, it must conclude that the statement can be proven true or false. The common law presumption that defamatory speech is false was ruled unconstitutional by *Hepps*, as reiterated by *Milkovich*.[166]

The *Spence* court also is mistaken in stating that *Milkovich* only protects an "honest expression of opinion" based on "true" facts. The *Spence* court seems to imply that *dishonest* expressions of opinion based on true facts are not protected, although the court does not attempt to explain just how an opinion can be dishonest if it is based exclusively on "true" facts, and does not, by virtue of its evaluative nature, imply any additional untrue facts. *Milkovich* leaves no room for the possibility that an opinion that does not in some manner imply untrue facts can be considered libelous, even if the lower court believes the opinion not to be "honest."

Most critically, the *Spence* court fails to mention the *Milkovich* requirement that a statement be provably false before it can be libelous.

160. For the full text of the story, see *id.* at 773.
161. *Id.* at 775.
162. *Id.*
163. *Id.* at 774-75.
164. *See Milkovich*, 110 S. Ct. at 2703.
165. *Id.* at 2706.
166. *Id.* at 2704 (*quoting Hepps*, 475 U.S. at 777).

Such an inquiry reveals that none of the direct or implied *factual* (as opposed to opinion) assertions in the *Hustler* story could hold Spence up to "hatred, contempt, or ridicule."[167] A review of the *Hustler* story will make this plain.

First, the story identifies lawyers as a parasitic group "eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets."[168] Next, the story identifies Spence as a lawyer and notes that although he holds himself out as a "country lawyer" he is actually rich and owns a large ranch.[169] The column then states that *Hustler* is among those Spence has sued and that he is seeking $150 million from the magazine on behalf of radical feminist Andrea Dworkin.[170] All of the above is accomplished with substantially more vulgarity than represented here, but not one of the essential opinions or facts, implied or directly stated, is omitted. Isolating just the facts, the article states that Spence portrays himself as a little guy, but he is in fact wealthy and is suing *Hustler* on behalf of Andrea Dworkin. These factual assertions, however, are obviously not what bothers Spence. First, Spence would probably concede that all of the above facts are true; even if he did not, the portrayal of one's self as a country lawyer while being rich and suing *Hustler* magazine on behalf of a well-known feminist hardly seems the stuff that holds one up to "hatred, contempt, or ridicule." Rather, the defamation action seems motivated by the story's vulgarly presented accusations that Spence is greedy and has sold out his "personal values, truth, justice and our-hard-won freedoms" for the pursuit of large sums of money.[171] It should be obvious that there is no "fact" at stake in these accusations that can be decided by a "core of objective evidence."[172] No judge or jury can decide as a factual matter if a lawyer's pursuit of a $150 million verdict makes the lawyer greedy or a sell-out. *Milkovich* forbids such an inquiry as a matter of constitutional law.

Furthermore, *Milkovich* in no way suggests that vulgarity, by itself, can be the subject of a defamation action. The opposite is true. Because vulgarity, by itself, typically has no provable fact content, but instead represents only an individual's personal judgment about another, *Milkovich* generally protects such statements from defamation actions.[173]

167. *See Spence*, 816 P.2d at 776.
168. *Id.* at 772.
169. *See id.* at 773.
170. *See id.*
171. *See id.*
172. *Milkovich*, 110 S. Ct. at 2707.
173. The *Restatement (Second) of Torts* takes the position that vulgarity ordinarily cannot be reasonably understood as asserting a fact. *See* RESTATEMENT (SECOND) OF TORTS § 566 cmt. e

III. ROADS NOT TRAVELED: THE POSSIBILITY OF MULTIPLE REASONABLE INTERPRETATIONS

The confusion generated by *Milkovich* leads to a related question: What if the same sentence can be read as conveying fact and opinion simultaneously, or as conveying only opinion, or as conveying only fact, depending on what interpretative lens is used in the reading? Consider the following statement: "While Jack's wife was away on business, he slept over at Marie's house." Suppose the statement is made in the context of a discussion of Marie's kindness to her friends. Where either an exclusively non-libelous interpretation (e.g., the literal meaning of the words) or a libelous interpretation (e.g., that Marie and Jack engaged in an extramarital affair) is reasonable, I argue in this Part that the exclusively non-libelous interpretation shonld preclude an action for libel, even if a reader later infers defamatory meaning.

The question might be viewed as follows: Does the presence of a reasonable, exclusively non-libelous interpretation (that is, an interpretation in which a potentially libelous meaning need not be part of a reasonable reader's interpretation) of a statement preclude the statement from being held defamatory? I think so, but the demonstration of this might not be obvious, especially where a reasonable libelous interpretation also seems to be present. This Part offers both a First Amendment and a tort method for analyzing statements with more than one reasonable interpretation.

The analytical difficnlty here stems from a linguistic difficulty—more than one interpretation of a statement can be reasonable.[174] For the purposes of a libel action based on a media account of a matter of public concern, however, the way out of this difficulty is contained by assigned burdens of proof, as necessitated by the First Amendment. Recall that the Supreme Court has held that the First Amendment requires that the plaintiff bear the burden of showing falsity, as well as fault, before damages can be recovered in a libel action.[175]

(1977). For instance, when an individual calls someone a "bastard" during an argument, then no defamation action will lie, even though a factual assertion regarding parentage might be implied. But the Restatement adds that because written vulgarity requires reflection by the writer, these written vulgarities are intended to be taken seriously, and thus can be defamatory. In light of *Milkovich*, this comment on written vulgaries is only valid where the vulgarity, in context, reasonably implies actual fact content. That the vulgarity is written is not sufficient, by itself, reasonably to imply actual fact content. Because the *Spence* court makes no attempt to provide a factual analysis of the vulgar *Hustler* statements, it fails to meet the constitutional standard required under *Milkovich*.

174. *See infra* text accompanying notes 130-34.

175. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986). I leave unexamined, in this Note, the implications thay may stem from the "actual malice" burden imposed in cases involving public figures.

If the reasonable reader could interpret a statement as conveying an exclusively non-libelous meaning, the plaintiff will be unable to prove by a preponderance of the evidence that the libelous reading is "more" reasonable. Once the threshold of reasonableness is met by any exclusively non-libelous interpretation, the presence of a reasonable libelous interpretation does not negate the reasonableness of the non-libelous interpretation. The exclusively non-libelous reasonable interpretation, absent evidence of defamatory intent, will always carry at least equal weight with the libelous interpretation, making it impossible as a matter of law for the libelous interpretation to be proven "more" reasonable. Nonetheless, allowing a jury to consider such a case invites a decision on the basis of *which* reasonable interpretation the jury prefers, and not whether the non-libelous reading is reasonable and complete without a necessary alternative libelous interpretation.

One may also view this question from the perspective of tort law. Namely, is it reasonably foreseeable that a statement would be interpreted with a defamatory meaning? The presence of a reasonable, exclusively non-libelous interpretation shows that the defamatory meaning is not reasonably foreseeable. Such a non-libelous interpretation means that the writer could reasonably have made the assertion without conveying *any* other meaning to reasonable readers. The fact that an additional meaning may have been conveyed does not mean that the language used made the additional meaning foreseeable. Thus, the writer might reasonably make such an assertion without foreseeing any other interpretation.

Proof of the writer's intent to defame would mean that the writer did foresee the libelous interpretation, despite any reasonable, exclusively non-libelous interpretation.[176] By this, I do not mean to suggest that proof of a writer's defamatory intent is always constitutionally necessary to prove that an opinion statement is capable of being interpreted with direct or implied factual content. No such proof of intent would be needed to show that a writer foresaw a defamatory meaning where an exclusively non-libelous interpretation of a statement is *not* reasonable.

176. It might be argued that a writer's intent should be irrelevant to this discussion, and that the sole focus should be the reasonableness (or foreseeability, in tort analysis) of an interpretation as gauged by the reasonable reader. Because the reader is unaware of any intent on the writer's part not conveyed by the expression itself, the writer's non-expressed intent does not influence the reader's interpretation and does not add (or detract) from any potential defamatory meaning. However, in those instances where it can be demonstrated that a writer was aware of a defamatory interpretation, despite the presence of an alternative, exclusively non-defamatory reasonable interpretation, then the writer can argue less persuasively that her statement was reasonably non-defamatory. Perhaps this is just another way of stating that proof of intent to defame is evidence that a non-defamatory interpretation is not the exclusive interpretation.

For example, suppose the basis of a libel action is the false written statement "Jack didn't sleep with his wife last night, he slept with Marie," where the statement is made in the context of a discussion of extramarital affairs, but no intent of the writer can be shown. The statement can plainly be interpreted in at least two ways, one of which is non-defamatory: Jack sleeping (and only sleeping) with Marie. Nevertheless, the non-defamatory interpretation is not exclusive—it is unreasonable, in this context, to make the assertion that "sleep with" need not mean "to conduct an extramarital affair with." Thus, the non-libelous interpretation should not save this writer from a libel action (assuming all other constitutional requirements, such as falsity, are also met).

Consider the following model.[177] Suppose X is a road builder. X builds road A. Some time later paths B and C are beat off of road A. At the time X built A, she knew it adjoined a popular baseball stadium and it was foreseeable that passersby would try to beat a path (path B) to the stadium despite X's failure to do so. But X did not know, and could not reasonably have been expected to know, that some years later a popular movie theater would also be built in the vicinity of road A, leading passersby to beat path C off of A.

If three pedestrians have three separate accidents on A, B and C, and they each sue X for negligence, what outcome should result? Certainly X can be held liable for the negligent construction of A. And given the foreseeability of the creation of path B, it would also probably be reasonable to hold X liable for injury resulting from negligence associated with path B (e.g., not posting a suitable warning sign, or building a fence). But X should not be held responsible for an accident on path C, because such an accident was not reasonably foreseeable to X.

I mean to equate road A with a speaker's intended linguistic meaning, path B with a (libelous or non-libelous) reasonable interpretation of A, and path C with an unintended, but reasonable, libelous interpretation of A. Although C is as real as A and B, X should not be held accountable for this unforseen (to her) interpretation. The central analogy is this: To those who beat path C, a novel interpretation, off of road A, the new path is a reasonable outcome from road A. Yet road A's builder need not have foreseen path C at all and should not be held accountable for an "accident" occurring due to path C.

177. The model is inspired by WITTGENSTEIN, *supra* note 1, § 85 ("A rule stands there like a sign-post—Does the sign post leave no doubt open about the way I have to go? Does it shew which direction I am to take when I have passed it; whether along the road or the footpath or cross-country?").

The word "exclusive" is critical to this entire argument. If the reasonable reader must see a defamatory as well as a non-defamatory interpretation, then the statement is not susceptible to an exclusive non-defamatory interpretation and should still be subject to libel suit. This is the case in Diadiun's column. Although at certain points in the column it is not clear if the "lie" being referred to is the alleged change in testimony or Milkovich's description of the fight, given Diadiun's explicit mention of both accusations, both interpretations of the term "lie" are reasonably foreseeable. Only one of the two interpretations is potentially defamatory as an implied factual statement. But because the non-defamatory interpretation is not exclusive, Diadiun is still reasonably subject to a libel suit, assuming the implied facts are shown to be false and defamatory.

Suppose the column made no mention of the alleged change in testimony or to the due process nature of the Court of Common Pleas hearing, but a court nonetheless interpreted the "lie" as referring to altered testimony. Because the court hearing was, in fact, solely concerned with due process, and the fight need not even have been discussed, such an interpretation might be reasonable to someone who independently of the article was familiar with the court hearing and nature of legal methods.[178] But if a reasonable reader looking at the article by itself could interpret the alleged "lie" as *only* referring to the fight, then this reasonable and exclusively non-defamatory (because it is a "pure" opinion) statement, should be exempt from a libel action, notwithstanding the alternative understanding reached by the other reader.

IV. CONCLUSION

In his dissent to *Ollman v. Evans*,[179] then-Judge Scalia stated that "it is a normal human reaction, after painstakingly examining and rejecting thirty invalid and almost absurd contentions, to reject the thirty-first contention as well, and make a clean sweep of the matter."[180] Nonetheless, Scalia made the point that a single defamatory statement should not escape liability just because it is buried among dozens of non-defamatory statements.[181] But Scalia warned plaintiffs that wasting a court's

178. *See Milkovich*, 110 S. Ct. at 2714 (Brennan, J., dissenting) ("[T]o anyone who knows what 'due process' means, it does not follow that the court must have believed some lie about what happened at the wrestling meet, because what happened at the meet would not have been germane to the questions at issue.").

179. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

180. *Id.* at 1036 (Scalia, J., dissenting).

181. *See id.* at 1035.

time with a long list of obviously non-defamatory statements risks having the one actually defamatory passage lost in the fray.[182]

With *Milkovich*, the problem that Scalia identified in *Ollman* has come full circle. Just because one potentially defamatory implied fact is found among a litany of protected opinions does not mean that *all* of the opinions in the challenged statement are potentially defamatory.

Read properly, *Milkovich* represents an affirmation of the constitutional protection for statements of opinion. Given the intermingling of fact and opinion in nearly any controversial statement, however, the task is not easy for a trial court faced with a defamation action based on an expression containing facts—some impliedly stated, some directly stated—and opinions. But it is the constitutional responsibility of the trial court not to allow "pure" expressions of opinion to become the subject of the trial. The limitation of evidence and arguments to the factual or implied factual assertions contained in a statement is essential to keep a jury (or judge) from being tempted to condemn a speaker for her point of view, and not for a defamatory falsehood.

182. *Id.*