"THOU SHALT NOT USE HIS NAME IN VAIN" — THE MISAPPLICATION OF *MILKOVICH V. LORAIN JOURNAL: SPENCE V. FLYNT*

INTRODUCTION

Throughout history, a person's reputation has been given the highest order of protection by society and its laws.[1] The Bible commands us, "Thou shalt not bear false witness against thy neighbor," and counsels that "[a] good name is rather to be chosen than great riches."[2] William Shakespeare teaches us that a good name "is the immediate jewel of our souls. Who steals my purse steals trash. . . . But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed."[3] In American jurisprudence, courts have recognized that a state has a legitimate interest in compensating individuals for the injuries received from defamatory falsehoods.[4] At the same time, "our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged."[5]

To recover under an action for defamation, a plaintiff must prove an invasion of reputation and good name by any statement "which tends to hold the plaintiff up to hatred, contempt or ridicule, or cause him to be shunned or avoided."[6] The statement must reduce a person's standing in the community or profession through an assertion of a false fact, a lie.[7] However, the law of defamation does not try to

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1. Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

2. *Exodus* 20:16 (King James); *Proverbs* 22:1 (King James).

3. WILLIAM SHAKESPEARE, THE TRAGEDY OF OTHELLO act 3, sc. 3, lines 155-61 (Yale Shakespeare ed. 1942).

4. *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Justice Stewart added:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Id.

5. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 686 (1989).

6. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 739 (4th ed. 1971).

7. RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 65 (1988) [hereinafter SMOLLA]. The person's standing must be re-

remedy every harm which results from another's statement.[8] Some harms are considered to be simply the price we must pay for living in a modern society.[9]

When attorney Gerry Spence began his representation of Andrea Dworkin in her libel suit against *Hustler* magazine, he was awarded the distinction of being the magazine's "Asshole of the Month."[10] In the accompanying column, Spence was called, in various ways, a greedy, hypocritical "asshole" by *Hustler*.[11] Following publication of the column, Spence filed a defamation suit, which was dismissed on *Hustler*'s motion for summary judgment by a Wyoming district court.[12] Upon appeal by Spence, the Wyoming Supreme Court reversed the district court's grant of summary judgment in *Spence v. Flynt*.[13] The case was remanded to the district court for a determination of whether Spence was a public figure, and whether *Hustler* was fairly commenting on Spence.[14]

This Note discusses the reasoning that the Wyoming Supreme Court used in *Spence* to determine that the district court was incorrect in granting *Hustler* magazine's motion for summary judgment.[15] This Note then reviews the history of First Amendment protection of defamatory speech from the early common law to the modern cases of *New York Times Co. v. Sullivan*[16] through *Milkovich v. Lorain Journal Co.*,[17] focusing on the requirement of a false statement of fact.[18] This Note then demonstrates that the reasoning used in *Spence* was erroneous, both procedurally and substantively.[19] Finally, this Note suggests an alternative application of constitutional principles to *Spence*.[20]

FACTS AND HOLDING

In its July, 1985, issue, *Hustler* magazine designated Gerry

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duced "in the eyes of a substantial and respectable minority of [the community]." RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

8. SMOLLA, *supra* note 7, at 163.

9. *Id.*

10. Spence v. Flynt, 816 P.2d 771, 772 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992). *See infra* notes 21-25 and accompanying text.

11. *Spence*, 816 P.2d at 772.

12. *Id.* at 772-73.

13. 816 P.2d 771, 772 (Wyo. 1991).

14. *Spence*, 816 P.2d at 774, 777.

15. *See infra* notes 36-76 and accompanying text.

16. 376 U.S. 254 (1964).

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

18. *See infra* notes 77-262 and accompanying text.

19. *See infra* notes 263-308 and accompanying text.

20. *See infra* notes 309-54 and accompanying text.

Spence as the "Asshole of the Month."[21] He earned this dubious distinction because of his legal representation of Andrea Dworkin in her lawsuit against the magazine.[22] In a profanity-packed page, *Hustler* magazine argued that Spence was hypocritical in promoting himself as a cowboy lawyer who believes in family values.[23] *Hustler* magazine stated that Spence was instead a typical greedy lawyer, and that this greed and lack of values led him to represent Dworkin in a frivolous action.[24] However, *Hustler* chose exceedingly colorful language to make its point:

> Many of the vermin-infested turd dispensers we name Asshole of the Month are members of that group of parasitic scum-suckers often referred to as lawyers. These shameless shitholes (whose main allegiance is to money) are eager to sell out their personal values, truth, justice, and our hard-won freedoms for a chance to fatten their wallets. The latest of these hemorrhoidal types to make this page is Jackson, Wyoming attorney Gerry Spence, our Asshole of the Month for July.
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> Spence dudes himself up in Western duds and calls himself a "country lawyer," but the log-cabin image is as phony as a cum-dripping whore's claim of virginity. This reeking rectum is worth millions and owns a 35,000 acre ranch. Spence's claim to fame is that in the name of "the little guy" he's won some mighty big judgments against some mighty

21. Spence v. Flynt, 816 P.2d 771, 772-73 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992). The "Asshole of the Month" column is a regular feature of *Hustler* magazine. According to Larry Flynt, the award is given to anyone in the public spotlight who appears to be hypocritical and whose ideas, views, or ideals conflict with those of Flynt, the magazine, and its readers. Previous *Hustler* targets have included Jerry Falwell, former President Ronald Reagan, and Pat Boone. RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 60, 139-40 (1988) [hereinafter SMOLLA].

22. *Spence*, 816 P.2d at 773. Dworkin, a prominent feminist and anti-pornography activist, sued *Hustler* magazine based on a series of articles published in the February, March, and December, 1984, issues. The articles included a cartoon about oral sex, a pictorial of lesbianism and female masturbation, and a "Porn from the Past" pictorial featuring a woman who supposedly was Dworkin's mother. Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1190-91 (9th Cir.), *cert. denied*, 493 U.S. 812 (1989).

Spence also represented Dorchen Leidholdt and Peggy Ault in their own separate lawsuits against *Hustler* magazine. Leidholdt sued immediately after being named "Asshole of the Month" for June, 1985, because of her work in the anti-pornography movement. She was described as a sexually repressed man-hater who was one of many "sexual fascists." Leidholdt v. L.F.P. Inc., 860 F.2d 890, 891 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989). Ault was named "Asshole of the Month" in April, 1985, based also on her opposition to pornography. *Hustler* called her a "fanatic," "crackpot," "tight-assed housewife," who was "threatened by sex" and "needed professional help." Ault v. Hustler Magazine, 860 F.2d 877, 879 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989).

23. *Spence*, 816 P.2d at 773.

24. *Id.*

> big corporations: $10.5 million against Kerr-McGee (the famous Karen Silkwood case), $26.6 million against *Penthouse* and $52 million against McDonald's. He'd like to add HUSTLER to the list . . . for a whopping $150 million. His client is "little guy" militant lesbian feminist Andrea Dworkin, a shit-squeezing sphincter in her own right. In her latest publicity-grab, Dworkin has decided to sue HUSTLER for invasion of privacy among other things.
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> Dworkin seems to be an odd bedfellow for "just folks," "family values" Spence. After all, Dworkin is one of the most foul-mouthed, abrasive manhaters on Earth. In fact, when Indianapolis contemplated an antiporn ordinance *co-authored* by Dworkin, she was asked by its supporters to stay away for fear her repulsive presence would kill the statute. Spence, however, can demand as much as 50% of the take from his cases. And a possible $75 million would buy a lot of country for this lawyer. Considering that Dworkin advocates bestiality, incest and sex with children, it appears Gerry "This Tongue for Hire" Spence is more interested in promoting his bank account than the traditional values he'd like us to believe he cherishes.
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> This case is a nuisance suit initiated by Dworkin, a crybaby who can dish out criticism but clearly can't take it. The real issue is freedom of speech, something we believe even Dworkin is entitled to, but which she would deny to anyone who doesn't share her views. Any attack on First Amendment freedoms is harmful to all . . . Spence's foaming-at-the-mouth client especially. You'd think someone of Spence's stature would know better than to team up with a censor like Dworkin. Obviously, the putrid amber spray of diarrhea known as *greed* has clouded this Asshole's senses.[25]

Spence filed a complaint against *Hustler* Magazine in a Wyoming district court, alleging libel, intentional infliction of emotional distress, outrage, and invasion of privacy.[26] Spence specifically complained about three portions of the article: (1) the profane descriptions of Spence as an "asshole"; (2) the allegation that, in representing Dworkin, Spence was motivated by greed to ignore all values and freedoms; and (3) the allegation that the Dworkin suit was a "nuisance suit."[27] *Hustler* magazine moved for judgment on the pleadings or, in the alternative, summary judgment.[28] The district

25. *Id.* at 793.

26. Petition for Writ of Certiorari to the Wyoming Supreme Court at 3, Spence v. Flynt, 816 P.2d 771 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992) (No. 91-1213). Andrea Dworkin also filed suit for defamation based on the *Hustler* column. *See* Dworkin v. L.F.P., Inc., 839 P.2d 903, 906 (Wyo. 1992).

27. Petition for Certiorari at 9, *Spence* (No. 91-1213).

28. *Id.* at 3.

court found that no reasonable reader of *Hustler* magazine could conclude that the article was anything but an expression of opinion.[29] Accordingly, the district court granted the motion for summary judgment.[30] Spence appealed the district court decision to the Wyoming Supreme Court.[31] After oral arguments, the Wyoming Supreme Court decided to postpone its decision on the appeal until the United States Supreme Court decided *Milkovich v. Lorain Journal Co.*[32] The Wyoming Supreme Court reversed the district court's grant of summary judgment and remanded the case for proceedings consistent with its opinion.[33]

In *Spence v. Flynt*,[34] the court rejected the district court's heavy reliance on *Hustler Magazine v. Falwell*,[35] a 1988 United States Supreme Court decision.[36] The Supreme Court had held in *Falwell* that a public figure must prove "actual malice" even if the defendant's statement is made with an improper motive and is undoubtedly offensive and repugnant to the majority who read it.[37] The court in *Spence* disagreed with this rationale from *Falwell* because, under this axiomatic line of reasoning, "the more outrageous, vile, vulgar, humiliating and ridiculous the publication, the more it is protected."[38] The court reasoned that *Falwell* did not apply in *Spence* because Spence's involvement with *Hustler* was professional, not personal, in nature.[39] Instead, the Wyoming Supreme Court decided that the common-law principle of "fair comment on matters of public concern" should be used to determine whether *Hustler*'s article was actionable.[40]

Furthermore, the court in *Spence* placed great significance on

29. Spence v. Flynt, Civ. No. 6568, slip op. at 6 (Teton Co. D. Ct. Wyo. Nov. 21, 1988) (unpublished decision).

30. *Id.* at 8.

31. Petition for Certiorari at 4, *Spence* (No. 91-1213).

32. 497 U.S. 1 (1990); Petition for Certiorari at 4, *Spence* (No. 91-1213).

33. *Spence*, 816 P.2d at 779. The oral arguments were held September 14, 1989, and the case was decided August 8, 1991. Petition for Certiorari at 4, *Spence* (No. 91-1213).

Hustler magazine petitioned the Wyoming Supreme Court for reconsideration of the decision two weeks later but was denied on September 16, 1991. *Id.* *Hustler* magazine then unsuccessfully petitioned the United States Supreme Court for a writ of certiorari. Flynt v. Spence, 112 S. Ct. 1668 (1992).

34. 816 P.2d 771 (Wyo. 1991).

35. 485 U.S. 46 (1988).

36. *Spence*, 816 P.2d at 774.

37. *See infra* notes 199-200 and accompanying text.

38. *Spence*, 816 P.2d at 774.

39. *Id.* Reverend Falwell, as the leader of the Moral Majority, was one of the foremost activists in the fight against pornography. SMOLLA, *supra* note 21, at 103, 108-09. The majority in *Spence* reasoned that Spence, like Falwell, should be able to have a jury consider his case. *Spence*, 816 P.2d at 774.

40. *Id.* *See infra* notes 77-90 and accompanying text.

the United States Supreme Court's comment in *Falwell* that the First Amendment does not protect all forms of speech and press.[41] The court in *Spence* relied on its interpretation of *Chaplinsky v. New Hampshire*[42] in declaring *Hustler*'s article to be unprotected from an action for defamation.[43] The Wyoming Supreme Court emphasized that certain types of speech were considered by the United States Supreme Court in *Chaplinsky* to be outside the scope of the First Amendment:

> These include the lewd and obscene, the profane, the libelous, and . . . those which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[44]

The court in *Spence* next cited *Milkovich* as rejecting a defense for statements of opinion and supporting the proposition that all statements are actionable if they are derogatory to such a degree that they lower a person's reputation in the community.[45] The court declared that only when an opinion was a "fair comment" would it be privileged.[46] The Court in *Milkovich* had explained that to qualify

41. *Spence*, 816 P.2d at 774. The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for the redress of grievances." U.S. CONST. amend. I.

42. 315 U.S. 568 (1942).

43. *Spence*, 816 P.2d at 774-75. Justice Richard V. Thomas, specially concurring, stated that although Spence was indeed a public figure based on his representation of Dworkin, the rationale of *Chaplinsky* did not protect published expressions whose sole purpose was to injure another through insults. Justice Thomas suggested that the technical requirement of "actual malice" created by the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), should apply only to statements of fact. Justice Thomas added that when a defendant claims his statement is opinion, the traditional definition of malice should be applied regardless of whether the plaintiff is a public or a private figure. *Spence*, 816 P.2d at 779-81 (Thomas, J., concurring).

44. *Id.* at 775 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

45. *Id.* The court stated:

> Under the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. . . . The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false or defamatory.

Id. (quoting RESTATEMENT (SECOND) OF TORTS § 566, cmt. a (1977)).

46. *Id.* at 775-76.

under the fair comment privilege, the opinion had to be honest, deal with a matter of public concern, be based on true or privileged facts, and not be expressed only to inflict injury.[47]

The majority in *Spence* questioned whether the explicit epithets directed toward Spence could be seen as a fair comment on matters of public concern, honestly held, and not simply designed to harm Spence.[48] Furthermore, the court noted that the article may have falsely stated Spence's possible gain from his client's lawsuit because he had assigned his fee to a charitable organization.[49]

The court in *Spence* expressed concern about granting someone like Larry Flynt a free license to defame people simply because they are public figures.[50] The court solved the dilemma by limiting such criticism to only those public figures who resolve important public questions, shape events of societal concern, and place themselves voluntarily in the center of a controversy.[51] The court in *Spence* declined to hold that a lawyer could become this type of defamable public figure through his professional representation of clients involved in famous, sensational, or unpopular litigation.[52] The court feared that these clients would be deprived of necessary and desired legal representation if free speech were read as meaning "the freedom to intimidate, destroy, and defame an advocate" representing a client.[53]

The court in *Spence* concluded that Spence was a public figure for at least some limited purposes.[54] However, the court was not convinced that Spence was a public figure in his representation of Andrea Dworkin.[55] The court concluded that Spence would not be a public figure if his only involvement in the controversy was as an attorney. This issue was remanded to the district court so that *Hustler*

47. *Id.* at 775 (quoting *Milkovich*, 497 U.S. at 13-14).

48. *Id.* at 775-76.

49. *Id.* at 776.

50. *Id.* The majority stated that "Larry Flynt is not free to arise each morning and select a public figure to attack and defame for no reason at all." *Id.*

In his concurrence, Justice Thomas stated that no one is entitled under the First Amendment to "impugn another with whatever lewd, obscene, and profane vilification, revilement, defilement or slur one chooses." *Id.* at 780 (Thomas, J., concurring).

51. *Id.* at 776 (citing Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1966) (Warren, C.J., concurring)).

52. *Id.* at 776-77. The Wyoming Court reasoned that a private professional, even one of limited "fame," should be free to serve anyone who needs advice or help without any concern of being a target for defamation. *Id.* at 776.

Justice Richard J. Macy, in a concurring opinion, advocated allowing a jury to decide whether an individual is a public or private figure unless it is obvious enough for a court to decide as a matter of law. *Id.* at 782 (Macy, J., concurring).

53. *Id.* at 777.

54. *Id.* at 776.

55. *Id.*

and Spence could present evidence.[56]

In a dissenting opinion, Justice Michael Golden argued that contrary to their assertion, the majority had improperly applied *Milkovich*.[57] Justice Golden viewed the majority opinion as a near-complete dismantling of the established constitutional privilege of free expression, particularly for anyone who expressed his message through epithets.[58] Justice Golden declared that the *Hustler* article was a fully protected, nondefamatory opinion based on the requirement, expressed by the United States Supreme Court in *Milkovich*, that the statements at issue either imply or state false facts to be actionable.[59] To support his contention, Justice Golden cited previous cases in which the United States Supreme Court had found that statements which are simply rhetorical hyperbole or loose, figurative language are not actionable.[60] Furthermore, Justice Golden asserted that even if the article was not completely protected, the district court's grant of summary judgment was correct because Spence was a public figure who had failed to provide any evidence of the existence of "actual malice" in *Hustler*'s publication of the column.[61]

Justice Golden rejected the majority's analysis under the fair comment privilege and the "fighting words" doctrine enunciated in *Chaplinsky*.[62] Instead, Justice Golden applied a four-factor test, comparable to the one created in *Milkovich*, to decide whether the *Hus-*

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56. *Id.* at 776-77.

57. *Id.* at 783 (Golden, J., dissenting).

58. *Id.* at 792 (Golden, J., dissenting).

59. *Id.* at 783-84 (Golden, J., dissenting).

60. *Id.* at 784. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56-57 (1988) (holding that a plaintiff cannot recover under an action for intentional infliction of emotional distress if the statement "could not reasonably be understood as describing actual facts about him"); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 284 (1974) (holding that words used in "a loose, figurative sense" cannot support an action for defamation); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (explaining that a statement is not actionable if "even the most careless reader [would] perceive that the [statement] was no more than rhetorical hyperbole").

61. *Spence*, 816 P.2d at 783, 791-92 (Golden, J., dissenting).

62. *Id.* at 784-85 (Golden, J., dissenting). Justice Golden explained that the fair comment privilege was replaced by a series of First Amendment decisions, beginning with *Sullivan* and continuing until *Milkovich*. *Id.* at 784 (Golden, J., dissenting). Similarly, the decision in *Chaplinsky* had never previously been applied so to deny protection to defamatory vulgar statements. Indeed, as Justice Golden noted, courts have held that epithets and insults did not fall under *Chaplinsky*. *See id.* at 785 (Golden, J., dissenting). *See, e.g.*, Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974) (holding that an isolated street epithet, "chickenshit," in referring to an assailant, cannot constitutionally support a criminal contempt conviction because it did not constitute an immediate threat to the administration of justice); Lewis v. City of New Orleans, 415 U.S. 130, 133 (1974) (reaffirming that a statute criminalizing "opprobrious" statements is not narrowly tailored under *Chaplinsky*); Gooding v. Wilson, 405 U.S. 518, 523-25 (1972) (holding that *Chaplinsky* only allowed states to statutorily punish "fighting words" and not merely "opprobrious" language).

tler column implied or stated any false facts about Spence.[63] First, Justice Golden reasoned that because the readers of *Hustler* expect strong, vulgar, and biased opinions, it would be unreasonable to view the statements about Spence as an accurate factual account.[64] Second, Justice Golden presented a thorough collection of historical, literary attacks on the character of lawyers to demonstrate that such criticisms are a natural and accepted practice in our society.[65] Third, Justice Golden reaffirmed the widely advanced precedent that epithets, such as "asshole," have no factual meaning and therefore are not actionable.[66] Lastly, Justice Golden dismissed the possibility of *Hustler* falsely misstating any facts.[67] Justice Golden categorized all of the statements of which Spence had complained as either (1) directed only to Dworkin, (2) simple, critical opinions of lawyers which are historically accepted, or (3) opinions based on disclosed true facts.[68]

Finally, Justice Golden stated that Spence was undoubtedly a public figure based on Spence's own admissions and descriptions regarding his fame and expertise.[69] Justice Golden noted that at the beginning of oral arguments before the Wyoming Supreme Court,

63. *Spence*, 816 P.2d at 785 (Golden, J., dissenting). Justice Golden listed the factors to be considered as: (1) the challenged statement judged in the context of the entire article; (2) the broad, social context under which the challenged statement is viewed; (3) the common meaning of the exact words used; and (4) whether the statement can objectively be found true or false. *Id.*

Justice Macy, dissenting in part, agreed with this test and its application to a majority of the challenged statements but decided that the case should be remanded to allow the district court to factually determine whether the rest of the statements asserted or implied false facts. *Id.* at 781 (Macy, J., dissenting in part). These other statements dealt with the value judgments of lawyers, Spence's phony image, Spence's hypocrisy as to values, and the suit by Dworkin as being a nuisance suit. *Id.* at 782 (Macy, J., dissenting in part).

64. *Id.* at 786 (Golden, J., dissenting).

65. *Id.* at 786-88 (Golden, J., dissenting). Justice Golden analogized between the public hatred for umpires and that for attorneys and noted that the tradition of insulting umpires has made them virtually defamation-proof. *Id.* at 787-88 (Golden, J., dissenting). *See* Parks v. Steinbrenner, 520 N.Y.S.2d 374, 377 (N.Y. App. Div. 1987) (deciding that criticism of an umpire, viewed within its historical context, "would be perceived by the average reader as a statement of opinion, and not fact").

66. *Spence*, 816 P.2d at 788-90 (Golden, J., dissenting).

67. *Id.* at 790 (Golden, J., dissenting).

68. *Id.*

69. *Id.* at 790-91 (Golden, J., dissenting). Pursuant to a request by *Hustler* magazine, Spence specifically admitted to being a public figure. Petition for Certiorari at 24-25, *Spence* (No. 91-1213).

Additionally, Spence mentioned in the interrogatories the book that he had published before being named "Asshole of the Month," *Gunning For Justice*, which recounts his victories in some of the most famous cases in recent memory, such as Karen Silkwood's suit against Kerr-McGee. Spence also related how his success translates into a large contingent fee arrangement, and he provided a lengthy list of national appearances he had made. *Spence*, 816 P.2d at 790-91 (Golden, J., dissenting).

Spence's counsel had confirmed Spence's public figure status.[70] Justice Golden further reasoned that Spence was comparable in national prominence to trial attorney William Kunstler, who has been judged to be a public figure for all purposes.[71] Justice Golden acknowledged the majority's concern about attorneys being designated as public figures because of their representation of a controversial client.[72] However, he concluded that the United States Supreme Court's decision in *Gertz v. Robert Welch, Inc.*[73] adequately handled the situation.[74] The Court in *Gertz* had held that in private figure defamation cases, a state may apply its own standard of liability, as long as it is not strict liability, instead of the *Sullivan* requirement that the plaintiff demonstrate "actual malice."[75] Justice Golden declared that *Gertz* did not apply in *Spence* because of the overwhelming evidence that Spence was a public figure for all purposes.[76]

BACKGROUND

At common law, any unprivileged publication of false and defamatory statements was actionable if it damaged another person's reputation.[77] This common-law rule included any opinion that implied

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70. *Id.* at 791 (Golden, J., dissenting). Spence's counsel wrote a letter on December 22, 1987, to the counsel for *Hustler* magazine, stating in part:

> In summary, we will acknowledge that Mr. Spence is a public figure but make legal arguments that the current extremely rigid proof required in such cases need not apply due to the nature of the attack made upon him. . . . Consequently, we do not believe that most of the discovery you have sought is relevant and therefore take the position that we will not make their production, for the most part, that you have requested.

Petitioner's Brief in Support of Petition for Re-Hearing at 7-8, Spence v. Flynt, 816 P.2d 771 (filed Aug. 22, 1991).

71. *Spence*, 816 P.2d at 791 (Golden, J., dissenting). *See* Ratner v. Young, 465 F. Supp. 386, 399-400 (D.V.I. 1979) (noting that Kunstler was one of the best lawyers in the United States, and that even Kunstler's attorney had admitted that Kunstler was a public figure on a national scale).

72. *Id. See supra* notes 52-53 and accompanying text.

73. 418 U.S. 323 (1974).

74. *Spence*, 816 P.2d at 791 (Golden, J., dissenting). The United States Supreme Court decided that Elmer Gertz was a private figure based on his lack of participation beyond his client representation, the fact that he never spoke to the press about his case, and the lack of any other effort to attract public attention or to enter the public controversy that swirled around him. Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).

75. *Id.* at 347.

76. *Spence*, 816 P.2d at 791.

77. Milkovich v. Lorain Journal Co., 497 U.S. 1, 11 (1990). Certain statements were considered to be actionable *per se* at common law. These statements included the imputations of a criminal act or conviction, impotence, unchastity, or a presently existing infectious, loathsome, and contagious disease, unfitness to hold an office or be engaged in a certain business, trade, or profession, or any other assertions which subject another individual to disgrace, contempt, or ridicule or which tend to prejudice him in his professional pursuits. Crozman v. Callahan, 136 F. Supp. 466, 469, 469 n.8

underlying false facts, even if the opinion could not be disproved, as long as it subjected another person to hatred, contempt, or ridicule.[78] However, by the early 1800s, most courts allowed a defendant to avoid civil liability by demonstrating that his statement was true.[79]

The common law also allowed a defendant to establish "privileges," which would overcome a showing of defamation.[80] These privileges were established because courts realized that speech beneficial to society was being hindered by the speaker's fear of being unable to demonstrate its truth.[81] One of these privileges was the fair comment privilege, which was created to accommodate a defendant's right to express his views regarding public affairs and the public's right to learn about these affairs.[82]

Section 606 of the Restatement of Torts states the general requirements under the fair comment privilege:

> (1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,
>
> (a) is upon
>
> (i) a true or privileged statement of fact, or
>
> (ii) upon facts otherwise known or available to the recipient as a member of the public, and
>
> (b) represents the actual opinion of the critic and
>
> (c) is not made solely for the purpose of causing harm to the other.[83]

However, false statements of fact implied from an opinion could still expose a speaker to liability.[84]

Under the fair comment privilege, the defendant had the burden of proving the four requirements of section 606.[85] Whether the statement was rational, necessary, or prejudicial was irrelevant.[86] Once

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(W.D. Okla. 1955). *See* McGuire v. Jankiewicz, 290 N.E.2d 675, 676 (Ill. Ct. App. 1972) (recognizing that a statement which prejudices another's professional or trade reputation is actionable *per se*).

78. RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 242 (1988) [hereinafter SMOLLA].

79. David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493, 501 (1990).

80. *Id.* At this time, defamation was a strict liability tort. *Id.*

81. *Id.*

82. Jeffrey E. Thomas, Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CAL. L. REV. 1001, 1002 (1986). *See* Yetman v. English, 811 P.2d 323, 325-26 (Ariz. 1991) (stating that the common law recognized the importance of unrestricted discussion of political, social, economic, literary, and artistic issues).

83. RESTATEMENT (FIRST) OF TORTS § 606 (1938).

84. *Milkovich*, 497 U.S. at 13 (citing RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977)).

85. Thomas, 74 CAL. L. REV. at 1002.

86. *Id.*

the defendant proved the requisite four elements, then the statement was protected.[87] The fair comment privilege was an effort to effectively balance the democratic requirement of vigorous public debate against the equally important need for citizens to redress their injuries caused by invidious speech.[88] However, the privilege proved to be inadequate in furthering society's valuable interest in maintaining discussion of important issues.[89] The United States Supreme Court recognized the societal need to avoid self-censorship by allowing constitutional protection for some false statements of fact and for statements of opinion.[90]

CONSTITUTIONAL LIMITATIONS ON THE COMMON LAW

In *New York Times Co. v. Sullivan*,[91] a unanimous Court concluded for the first time that the First Amendment should be applied in defamation actions.[92] The First Amendment protections for speech and press were held to place some limits, through the Fourteenth Amendment, on state defamation laws, at least where a public official sues a "citizen critic."[93]

In *Sullivan*, the Montgomery, Alabama, City Police Commissioner, L.B. Sullivan, alleged that a newspaper advertisement printed

87. *Id.*

88. *Milkovich*, 497 U.S. at 14.

89. Gordon Shneider, *Model for Relating Defamatory Opinions to First Amendment Protected "Ideas,"* 43 ARK. L. REV. 57, 93 (1990).

90. *Id.*; Thomas, 74 CAL. L. REV. at 1003. The focus then switched from the common-law emphasis on the defendant's mental state of malice toward the plaintiff to a constitutional requirement of actual malice based on the defendant's mental state as to the factual truth of his statements. Shneider, 43 ARK. L. REV. at 93.

91. 376 U.S. 254 (1964).

92. New York Times Co. v. Sullivan, 376 U.S. 254, 256, 264 (1964). Justices Hugo Black and Arthur Goldberg, in separate concurring opinions, declared that a state is completely prohibited by the First and Fourteenth Amendments from awarding damages to public officials based on defamation actions against newspapers and "citizen critics." *Id.* at 293 (Black, J., concurring); *id.* at 298 (Goldberg, J., concurring).

The Court previously had adopted the view that defamatory language was not covered by the First Amendment. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); *see infra* note 226 and accompanying text. In Beauharnais v. Illinois, 343 U.S. 250 (1952), the Court held that states could define libel as they deemed necessary as long as it related to "peace and well-being of the state." *Beauharnais*, 343 U.S. at 258.

93. *Sullivan*, 376 U.S. at 264. In holding Alabama's libel law unconstitutional, the Court analogized its effect to that of the Sedition Act of 1798, which was an early attempt to stifle criticism about the government. Although the Sedition Act expired before ever being struck down, the Court in *Sullivan* determined that it has always been viewed as violative of the First Amendment. *Id.* at 273-76.

Sullivan attempted to argue that the constitutional limits implicitly placed on the Sedition Act only applied to the federal government and not the states. The Court refuted this argument by stating that the First Amendment limits inherently on the Sedition Act also were applied to the states through the Fourteenth Amendment. The Court concluded that whatever a state may not do through a "Sedition Act" criminal libel statute, that state also may not do through its civil libel law. *Id.* at 276-77.

in the *New York Times* had libeled him by asserting that the Montgomery Police had made various attempts to terrorize Martin Luther King, Jr., and his followers.[94] Following the refusal of the *New York Times* to print a retraction, Sullivan filed a libel suit in an Alabama state court.[95] The trial court instructed the jury that the article was "libelous per se" and unprivileged; therefore, all the jury needed to find was that the *New York Times* had published an article "of and concerning" Sullivan.[96] The Alabama Supreme Court affirmed the trial court's judgment, reasoning that although the advertisement did not name Sullivan personally, the criticism of the police was transferred to Sullivan and was an attack on his reputation.[97] The United States Supreme Court granted certiorari and reversed the judgment because the state court had failed to recognize the defendants' freedoms of speech and of the press as required by the First and Fourteenth Amendments.[98]

Justice William Brennan, writing for the Court, reasoned that the First Amendment reflected this nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, [including] vehement, caustic, and sometimes unpleasantly sharp attacks on . . . public officials."[99] To safeguard the "breathing space" necessary to avoid self-censorship and maintain the desired free debate, the Court in *Sullivan* found it essential to protect "erroneous statements honestly made."[100]

However, the Court was not prepared, even under the facts of *Sullivan*, to eradicate all protection of public officials' reputational interests.[101] Instead, the Court created a qualified immunity for the "citizen critic."[102] A public official can recover damages for a defam-

94. *Id.* at 256-58. Besides the *New York Times*, the other defendants in this case were Ralph D. Abernathy, Fred L. Shuttlesworth, S.S. Seay, Sr., and J.E. Lowery. New York Times Co. v. Sullivan, 144 So. 2d 25, 29 (Ala. 1962), *rev'd*, 376 U.S. 254 (1964).

95. *Sullivan*, 376 U.S. at 261.

96. *Id.* at 262. Alabama libel law provided for strict liability with "truth" being an affirmative defense that the publisher or speaker had the burden of proving. *Id.* at 267.

97. *Sullivan*, 144 So. 2d at 39.

98. *Sullivan*, 376 U.S. at 264.

99. *Id.* at 270. In Rosenblatt v. Baer, 383 U.S. 75 (1966), the Supreme Court concluded that because the determination of public official status is a privilege question, the trial court should make the determination itself based on the evidence available. *Rosenblatt*, 383 U.S. at 88. The Court reasoned that this requirement both lessens the chance of a jury punishing an individual simply for unpopular ideas and assures a record of court findings for an appellate court in reviewing constitutional decisions. *Id.* at 88 n.15.

100. *Sullivan*, 376 U.S. at 271-72, 278-79.

101. *Id.* at 279-80.

102. *Id.* at 282-83 (quoting Coleman v. MacLennan, 98 P. 281 (Kan. 1908)).

atory falsehood regarding his official conduct if he "proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[103] Furthermore, the public official must establish this "actual malice" with "convincing clarity."[104]

In *Curtis Publishing Co. v. Butts*,[105] a sharply divided United States Supreme Court extended the *Sullivan* "actual malice" requirement beyond criticisms of public officials.[106] The Court stated that "actual malice" must be proven in libel actions "involving 'public men' — whether they be 'public officials' or 'public figures' — [to] afford the necessary insulation for the fundamental interest which the First Amendment was designed to protect."[107]

In *Curtis Publishing Co.*, the *Saturday Evening Post* published an article that accused the Athletic Director at the University of Georgia, Wally Butts, of conspiring to fix the annual football game against the University of Alabama by disclosing some of his team's plays.[108] Butts brought a diversity libel suit in the United States District Court for the Northern District of Georgia.[109] A jury awarded him $60,000 in general damages and another $3,000,000 in punitive

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103. *Id.* at 279-80. In using the word "malice," the Court did not intend to refer to the old, common-law meaning of hate or ill-will. Justice Potter Stewart, dissenting in another case, announced his displeasure with the Court's word choice, stated, "Although I joined the Court's opinion in [*Sullivan*], I have come greatly to regret the use in that opinion of the phrase, 'actual malice,' . . . In common understanding, malice means ill will or hostility . . . [but the 'actual malice' standard of *Sullivan*] has nothing to do with hostility or ill will." Herbert v. Lando, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting).

What the reckless disregard requirement for "actual malice" means "cannot be fully encompassed in one infallible definition." Saint Amant v. Thompson, 390 U.S. 727, 730 (1968). However, reckless disregard has been held to mean that the defendant made false statements with a "high degree of awareness of their probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). Another definition offered by courts is that the defendant had "in fact entertained serious doubts as to the truth of his publication." *Saint Amant*, 390 U.S. at 731. Under either definition, "actual malice" is essentially "a purely subjective state of mind." Lester v. Powers, 596 A.2d 65, 71 (Me. 1991).

104. *Sullivan*, 376 U.S. at 285-86. *See* Deutcsh v. Birmingham Post Co., 603 So. 2d 910, 911 (Ala. 1992) (recognizing that public officials must demonstrate "clear and convincing" evidence that actual malice was present), *cert. denied*, 113 S. Ct. 976 (1993).

The Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), renamed "convincing clarity" as "clear and convincing." *Id.* at 331-32.

105. 388 U.S. 130 (1967).

106. Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring); *see infra* note 118-19 and accompanying text.

107. *Curtis Publishing*, 388 U.S. at 165 (Warren, C.J., concurring).

108. Butts v. Curtis Publishing Co., 225 F. Supp. 916, 917 (N.D. Ga. 1964), *aff'd*, 351 F.2d 702 (5th Cir. 1965), *and aff'd sub nom.*, Associated Press v. Walker, 388 U.S. 130 (1967).

109. *Id.* at 916-17.

damages.[110] After the Court decided *Sullivan*, Curtis Publishing filed a motion for a new trial with the district court.[111] The district court rejected the motion and application of *Sullivan* to the case.[112] The court found that Butts was not a public official and that there was "ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not."[113]

Curtis appealed the district court's denial of the motion to the United States Court of Appeals for the Fifth Circuit.[114] In affirming the district court's decision, the Fifth Circuit did not reach the constitutional issue raised by *Sullivan*.[115] Instead, the Fifth Circuit held that Curtis should have been aware when it filed its pleadings of the possibility that *Sullivan* would apply.[116] The United States Supreme Court granted certiorari and ultimately affirmed the decision of the district court.[117]

Chief Justice Earl Warren, in a concurring opinion, applied *Sullivan*.[118] He stated that individuals who are "intimately involved in the resolution of important public questions, or by reason of their

110. *Id.* at 917. The trial judge lowered the total damages award to $460,000 by remittitur. *Id.* at 922.

111. Butts v. Curtis Publishing Co., 242 F. Supp. 390, 391 (N.D. Ga. 1964), *aff'd*, 351 F.2d 702 (5th Cir. 1965), *and aff'd sub nom.*, Associated Press v. Walker, 388 U.S. 130 (1967). Even though its attorney was aware of the progress of *Sullivan*, Curtis Publishing only raised the defense of substantial truth at trial against Butts. Curtis Publishing Co. v. Butts, 351 F.2d 702, 710 (5th Cir. 1965), *aff'd sub nom.*, Associated Press v. Walker, 388 U.S. 130 (1967).

112. *Butts*, 242 F. Supp. at 393-95.

113. *Id.* Although the University of Georgia is a state university, Butts was an employee of a private corporation, the Georgia Athletic Association, instead of the state itself. *Id.* at 394.

114. *Curtis Publishing*, 351 F.2d at 705, 707.

115. *Id.* at 709-13.

116. *Id.* at 710. The defendant's motion for a rehearing was denied. *Id.* at 702.

117. *Curtis Publishing*, 388 U.S. at 140 (Harlan, J., plurality opinion).

118. *Id.* at 164 (Warren, C.J., concurring). Justice John Marshall Harlan, joined by Justices Tom C. Clark, Potter Stewart, and Abe Fortas, did not want to extend *Sullivan* to public figures. Instead, he proposed creating two separate levels of protection for public officials and public figures, with a plaintiff having to prove "highly unreasonable conduct constituting an extreme departure from the standards of . . . responsible publishers." *Id.* at 133, 155 (Harlan, J., plurality).

Chief Justice Earl Warren, along with Justices William Brennan and Byron White, advanced the application of *Sullivan* to public figures. *Id.* at 162-64 (Warren, C.J., concurring); *id.* at 172 (Brennan, J., concurring in part and dissenting in part). This became the "majority" approach adopted by the Court when Justices Hugo Black and William Douglas, although remaining completely devoted to their *Sullivan* view of a more expansive protection for expression, agreed with Chief Justice Warren. They did this "[i]n order for the Court to be able at this time to agree on [a disposition of] this important case based on the prevailing constitutional doctrine expressed in New York Times Co. v. Sullivan." *Id.* at 170 (Black, J., concurring in part and dissenting in part).

fame, shape events in areas of concern to society at large," should be subject to the same defamation limits as public officials.[119] Chief Justice Warren reasoned that the *Sullivan* standard should apply to public figures precisely because they are not subject to the restraints of the political process, and "public opinion may be the only instrument by which society can attempt to influence their conduct."[120]

PROCEDURAL PROTECTIONS IN DEFAMATION ACTIONS

In *Philadelphia Newspapers, Inc. v Hepps*,[121] the United States Supreme Court clarified the burden of proof that a libel plaintiff must satisfy.[122] In *Hepps*, Maurice S. Hepps brought a defamation suit in a Pennsylvania state court based on a series of articles that insinuated that Hepps, his franchise corporation, and his franchisees were linked to organized crime.[123] The trial court ruled that the statutory presumption of a statement's falsity violated the First Amendment, and instructed the jury that Hepps had the burden of proving that the articles were false.[124] Because Hepps could not disprove his connections to organized crime, the jury found for the defendants.[125] On appeal, the Pennsylvania Supreme Court reversed and remanded for a new trial, holding that placing the burden of proof as to the truth of the statement on the defendant was constitutional.[126] After granting the publisher's writ of certiorari, the United States Supreme

119. *Id.* at 164 (Warren, C.J., concurring). Chief Justice Warren stated that any "differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred." *Id.* at 163 (Warren, C.J., concurring).

120. *Id.* at 164 (Warren, C.J., concurring). Chief Justice Warren argued:

> [I]t is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication; both to influence policy and to counter criticism of their views and activities.

Id.

121. 475 U.S. 767 (1986).

122. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69, *appeal dismissed and cert. denied*, 475 U.S. 1134 (1986).

123. *Id.* at 769-70.

124. *Id.* at 770. Pennsylvania followed the common-law presumption that a defamatory statement was false and placed the burden of proving the statement's truthfulness on the defendant. *Id.* Section 8343 of title 42 of the Pennsylvania Consolidated Statutes provides in relevant part: "(b) BURDEN OF DEFENDANT.-In an action for defamation, the defendant has the burden of proving, when the issue is properly raised: (1) The truth of the defamatory communication." 42 PA. CONS. STAT. § 8343(b)(1) (1982).

125. *Hepps*, 475 U.S. at 770-71.

126. Hepps v. Philadelphia Newspapers, Inc., 485 A.2d 374, 377, 385-87 (Pa. 1984), *rev'd*, 475 U.S. 767, *appeal dismissed and cert. denied*, 475 U.S. 1134 (1986). Pursuant to a Pennsylvania statute, Hepps could directly appeal to the state supreme court. *See id.*

Court reversed the Pennsylvania Supreme Court decision and remanded the case to the trial court to enforce the decision.[127]

The majority opinion in *Hepps*, written by Justice Sandra Day O'Connor, held that the plaintiff bears the burden of proving both fault and falsity of the defendant's statement in a defamation action.[128] The Court stated that the holding in *Gertz v. Robert Welch, Inc.*[129] had previously overruled the common-law presumption of falsity.[130] The Court reasoned that if the plaintiff is a public figure or public official, and the speech is of public concern, then the *Sullivan* rationale applies, and the plaintiff must prove that the statements at issue are false as well as made with "actual malice."[131] The Court

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127. *Id.* at 779.

128. *Id.* at 776. The majority stated:

> [A] jury is obviously more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statements at issue if convinced that the relevant statements were false. As a practical matter, then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted.

Id. at 778. *See* W. Page Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1236 (1976) (stating that placing the burden of proving falsity on the plaintiff is "a logical and appropriate consequence of the second requirement that the plaintiff establish the defendant's culpable state of mind"); Mark A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 856-57 (1984) (indicating that it is clear that a public figure plaintiff must prove falsity, although the question of whether a private figure plaintiff must do the same is less clear).

129. 418 U.S. 323, 347 (1974).

130. *Hepps*, 475 U.S. at 776. In *Gertz*, the Court held that in private figure defamation cases, a state can apply its own standard of liability, as long as it is not strict liability, instead of the *Sullivan* requirement that the plaintiff demonstrate "actual malice".

However, the presumption of falsity may be constitutional in a case where there is no matter of public concern. *Id.* at 775-76. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (recognizing that speech of purely private concern is entitled to less First Amendment protection).

131. *Hepps*, 475 U.S. at 773, 775. Before *Hepps*, the *Sullivan* decision had nearly always been construed by the Supreme Court, lower courts, and commentators as requiring public figures to establish that a defamatory statement was false. *See, e.g., Herbert*, 441 U.S. at 176 (noting that the burden placed on a plaintiff is now expanded to include proving falsity in connection with some degree of culpability); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490 (1975) (recognizing that, in *Sullivan* and cases that followed, the defense of truth was found to be constitutionally required, and public figure plaintiffs are required to demonstrate both falsity and fault to recover); *Garrison*, 379 U.S. at 74 (recalling that "we held in [*Sullivan*] that a public official might be allowed the civil remedy only if he establishes that the utterance was false"); Goldwater v. Ginzburg, 414 F.2d 324, 338 (2d Cir. 1969)(stating that for public figure cases, the Supreme Court in *Sullivan* abandoned the common-law principle of presumed falsity and placed the burden of proof upon the plaintiff), *cert. denied*, 396 U.S. 1049 (1970); Beckham v. Sun News, 344 S.E.2d 603, 604-05 (S.C.) (expressing that plaintiff's burden of proving falsity necessarily follows from his burden of demonstrating "actual malice" because there must have been a falsehood before any knowing or reckless disregard of falsity can be established), *cert. denied*, 479 U.S. 1007 (1986); Franklin & Bussel, 25 WM. & MARY L. REV. at 852-54 (asserting that a line of Supreme Court decisions, start-

explained that placing the burden of proving truth on the defendant "deters such speech because of the fear that liability will unjustifiably result."[132] Furthermore, the Court noted that "such a 'chilling' effect would be antithetical to the First Amendment's protection of true speech on matters of public concern."[133]

Public officials and public figures received additional protection in defamation actions under Rule 56 of the Federal Rules of Civil Procedure[134] in *Anderson v. Liberty Lobby, Inc.*[135] and *Celotex Corp.*

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ing with *Sullivan*, have clearly established that truth is a constitutional defense as a matter of law). *But see* Corabi v. Curtis Publishing Co., 273 A.2d 899, 911 (Pa. 1971) (arguing that *Sullivan* only required that a "plaintiff must adduce sufficient evidence to rebut any assertion of the defense of truth by the defendant, and neither absolved the defendant from proving truth nor placed a burden on the plaintiff to affirmatively aver and prove falsity").

132. *Hepps*, 475 U.S. at 777.

133. *Id.* The Court thought that because the decision of which party has the burden of proving falsity is important "only when the evidence is ambiguous," it is indeterminable whether this holding affects more "true" speech or "false" speech. However, the Court stated that it

> believe[s] that the Constitution requires us to tip [the balance] in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.

Id. at 776-77.

The Court recognized that its holding also will protect some false speech that cannot be proven, but stated that "[the] First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 778 (quoting *Gertz*, 418 U.S. at 341).

134. *See infra* notes 137-59 and accompanying text. The proper application of Rule 56 by a court can preserve the constitutional protections created by *Sullivan*. JEROME A. BARRON & C. THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 352 (1979).

Rule 56 of the Federal Rules of Civil Procedure provides in relevant part:

> (c) . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> . . . .
>
> (e) . . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FED. R. CIV. P. 56 (c), (e).

Wyoming Rule of Civil Procedure 56 is nearly identical to the corresponding Federal Rule of Civil Procedure 56 and, therefore, applications of the federal rule should be highly persuasive. Kimbley v. City of Green River, 642 P.2d 443, 445 n.3 (Wyo. 1982). Rule 56 of the Wyoming Rules of Civil Procedure provides in relevant part:

> (c) *Motion and proceedings thereon.*- . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

v. Catrett.[136]

In *Celotex Corp.*, Myrtle Catrett, as administratrix of the estate of her husband, filed a wrongful death action in September, 1980, in the United States District Court for the District of Columbia.[137] Catrett alleged that her husband's death had partially resulted from exposure to Celotex products containing asbestos.[138] The district court held that there was no evidence of exposure to the defendant's asbestos within the statutory period and, consequently, granted Celotex's motion for summary judgment.[139] The United States Court of Appeals for the District of Columbia reversed.[140] The D.C. Circuit declared that Celotex's motion was "fatally defective" because it failed to provide any evidentiary support.[141] The court stated that "[t]he party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact."[142] The United States Supreme Court granted certiorari and reversed, holding that the D.C. Circuit's decision was inconsistent with Rule 56(c).[143]

Then-Justice William Rehnquist, writing for the Court in *Celotex Corp.*, declared that a moving party's burden of proof under Rule 56 is fulfilled if he establishes that the opposing party has failed to produce evidence which supports an essential element of his claim.[144]

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no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

. . . .

(e) *Form of affidavits; further testimony; defense required.*- When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

WYO. R. CIV. P. 56 (c), (e).

135. 477 U.S. 242 (1986).

136. 477 U.S. 317 (1986).

137. Celotex Corp. v. Catrett, 477 U.S. 317, 319 (1986).

138. *Id.*

139. *Id.* at 320.

140. Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 183 (D.C. Cir. 1985), *rev'd*, 477 U.S. 317 (1986).

141. *Id.* at 184.

142. *Id.*

143. Celotex Corp. v. Catrett, 474 U.S. 944 (1985) (granting certiorari); *Celotex Corp.*, 477 U.S. at 319, 322. The Court interpreted Rule 56(c) to require summary judgment to be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

144. *Id.* at 322-23, 325. This is true because a complete failure of proof as to an essential element of the nonmoving party's case necessarily renders immaterial all the other facts. *Id.* at 323.

The Court stated that the moving party should not be required to negate the opposing party's claim or to even produce any affirmative evidence to prove the nonexistence of a valid claim.[145] Once the moving party has pointed out the absence of evidence supporting the opposing party's claim, the opposing party should be required to come forward with "specific facts showing that there is a genuine issue for trial."[146] Otherwise, a summary judgment should be granted as a matter of law under Rule 56(c).[147]

In *Anderson, The Investigator* magazine ran a collection of articles that portrayed Liberty Lobby, Inc., a nonprofit citizens' lobby, as a neo-Nazi, racist, Fascist, and anti-Semitic organization.[148] A libel suit was filed against several parties, including publisher Jack Anderson, in the United States District Court for the District of Columbia.[149] After discovery, the district court granted Anderson's motion for summary judgment, concluding that no actual malice could exist as a matter of law based on the evidence.[150] The D.C. Circuit held that Liberty Lobby was not required to prove actual malice with convincing clarity at the summary judgment stage.[151] The United States Supreme Court granted certiorari to resolve a conflict among the circuits on this issue.[152] The Court reversed and held that the requirement of clear and convincing evidence of "actual malice," as established in *Sullivan*, must be applied in considering a motion for summary judgment.[153]

Justice Byron White, writing for the Court, stated that the substantive law aids in identifying the material facts, and the evidentiary burden then aids in determining whether those facts are genuinely at issue.[154] The Court maintained that a genuine issue would exist only

145. *Id.*

146. *Id.* at 324.

147. *Id.* at 322. Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

148. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 205 (D.D.C. 1983), *aff'd*, 746 F.2d 1563 (D.C. Cir. 1984), *and vacated*, 477 U.S. 242 (1986).

149. *Id.*

150. *Id.* at 209-10.

151. Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1570 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986). The court stated that imposing a higher evidentiary burden would result in a preliminary determination of the weight of both sides rather than simply whether the case should proceed any further. *Id.*

152. Anderson v. Liberty Lobby, Inc., 471 U.S. 1134 (1985) (granting certiorari); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 244 (1986).

153. *Anderson*, 477 U.S. at 244.

154. *Id.* at 248.

if a reasonable jury would be able to find for the nonmoving party.[155] The Court declared that a public figure's increased burden of proving actual malice at trial must be considered in judging a motion for summary judgment.[156] The Court stated that a trial court, in deciding whether to allow a case to proceed to the jury, "must bear in mind the actual quantum and quality of proof necessary to support liability" under *Sullivan*.[157]

According to the Court, the requirement of specific facts under Rule 56(e) means that the plaintiff cannot simply rely on the allegations or denials of the pleadings, but must provide specific facts indicating the existence of a genuine issue.[158] The Court further stated that the facts presented by the plaintiff must provide affirmative evidence sufficient to enable a jury to reasonably decide that the plaintiff has satisfied all the requirements to recover.[159]

CONSTITUTIONAL PROTECTION FOR RHETORICAL HYPERBOLE

In *Greenbelt Cooperative Publishing Ass'n v. Bresler*,[160] the United States Supreme Court stated that the First Amendment protected "vigorous epithets" and "rhetorical hyperbole."[161]

In *Bresler*, Charles Bresler was negotiating with the Greenbelt City Council for zoning deviations that would have allowed for the construction of high-density housing on his land.[162] Concurrently, the city was attempting to buy a plot of land from Bresler on which to build a new high school.[163] These joint negotiations created a local controversy, and the City Council called numerous meetings.[164] The *Greenbelt News Review*, a weekly newspaper, published two consecu-

155. *Id.* The Court stated, "Just as the 'convincing clarity' requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment." *Id.* at 254. *Cf. Celotex Corp.*, 477 U.S. at 326 (stating that the standards are the same for judgments *sua sponte* and summary judgment motions).

156. *Anderson*, 477 U.S. at 255-56.

157. *Id.* at 254.

158. *Id.* at 256.

159. *Id.* at 252. The Court declared that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.*

160. 398 U.S. 6 (1970).

161. Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970). At least one state supreme court has interpreted the United States Supreme Court exception for "rhetorical hyperbole" to apply only when the statement, considered in context, was clearly understood as an exaggeration, not literal fact. *See* Kolegas v. Heftel Broadcasting Corp., No. 72793, 1992 Ill. Lexis 202, at *16-17 (Ill. Dec. 4, 1992) (citing *Bresler*, 398 U.S. at 14; Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 284-86 (1974)).

162. *Bresler*, 398 U.S. at 7.

163. *Id.*

164. *Id.*

tive articles regarding these meetings and used the word "blackmail" numerous times to describe Bresler's negotiations.[165] The reference to the word "blackmail" was not consistently offset with quotation marks and was included in a subheading.[166] Bresler responded by filing a libel suit, and a jury awarded him $17,500 in compensatory and punitive damages.[167] The Maryland Court of Appeals affirmed the judgment.[168] The United States Supreme Court granted certiorari and reversed the lower court's decision.[169]

Justice Potter Stewart, writing for the Court, held that the newspaper's use of the word "blackmail" was not meant to actually accuse Bresler of a crime.[170] Because the article stated the underlying facts of the negotiations accurately and fully, the Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."[171]

In *Old Dominion Branch No. 496 v. Austin*,[172] the United States Supreme Court cited *Bresler* in holding that some assertions, taken within their proper context, are incapable of reasonably being taken literally as serious statements of fact.[173] In *Old Dominion Branch*, a local union attempted to convince nonunion mail carriers, including

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165. *Id.* at 7-8.

166. *Id.*

167. *Id.* at 8.

168. Greenbelt Coop. Publishing Ass'n v. Bresler, 252 A.2d 755, 786 (Md. 1969), *rev'd*, 398 U.S. 6 (1970).

169. Greenbelt Coop. Publishing Ass'n v. Bresler, 396 U.S. 874 (1969) (granting certiorari); *Bresler*, 398 U.S. at 8-10. The Court concluded that the jury instruction violated *Sullivan* by basing liability on falsehood and general malice. *Bresler*, 398 U.S. at 9-10.

170. *Id.* at 14. The Court stated, "[I]t was Bresler's public and wholly legal negotiating proposals that were being criticized." *Id.*

171. *Id.* The Court explained that "the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime." *Id. See* Curtis Publishing Co. v. Birdsong, 360 F.2d 344, 348 (5th Cir. 1966) (holding that "no person of ordinary intelligence could believe that the [quoted epithet 'bastard'] . . . was accusing every member of the Mississippi Highway Patrol who was on duty at Oxford of having been born out of wedlock").

172. 418 U.S. 264 (1974).

173. Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 285-86 (1974). The *Old Dominion* case was an action under the National Labor Relations Act ("NLRA") and not the First Amendment, but the Court interpreted the NLRA so that it avoided any possible conflict with the First Amendment. Therefore, the decision in *Old Dominion* is viewed as being representative of the Court's First Amendment jurisprudence. SMOLLA, *supra* note 78, at 246. However, the Court expressed that "[i]n view of our conclusion that the publication here was protected under the federal labor laws, we have no occasion to consider the First Amendment arguments advanced by appellants." *Old Dominion*, 418 U.S. at 283 n.15.

the plaintiffs, to join the union.[174] On three separate occasions, the labor union newsletter printed the plaintiffs' names on a "List of Scabs."[175] Plaintiff Henry Austin told the Richmond Postmaster and the President of Branch No. 496 that he would file suit if he was called a "scab" again, even though he was unsure of the word's meaning.[176] In response to Austin's confusion, the union printed another newsletter defining a "scab" as a "two-legged animal" having a "corkscrew soul, a water brain, [and] a combination backbone of jelly and glue."[177] The definition ended:

> The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer. "Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class."[178]

Shortly after this newsletter was published, the plaintiffs filed suits for libel under a Virginia "insulting words" statute.[179] The jury awarded each plaintiff $55,000 in compensatory and punitive damages.[180] The Virginia Supreme Court affirmed, and the United States Supreme Court reversed.[181]

The Court recognized that before a plaintiff must prove "actual malice," there must initially be a false statement of fact.[182] Justice Thurgood Marshall, writing for the Court, declared that the only fac-

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174. *Id.* at 267.

175. *Id.*

176. *Id.*

177. *Id.* at 268.

178. *Id.* (emphasis omitted).

179. *Id.* at 268-69, 269 n.3. The statute provided that "[a]ll words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable." VA. CODE ANN. § 8-630 (1957).

180. *Old Dominion*, 418 U.S. at 269.

181. Old Dominion Branch No. 496 v. Austin, 192 S.E.2d 737, 744 (Va. 1972), *rev'd*, 418 U.S. 264 (1974); *Old Dominion*, 418 U.S. at 270. The United States Supreme Court held that a federal labor law preempted a state judgment against the union for publishing the maligning newsletter. *Id.* at 282-83. Executive Order No. 11491 provided in relevant parts:

> 1. *Policy.* (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right . . . .
>
> 19. *Unfair labor practices.* (a) Agency management shall not-
>
> (1) interfere with, restrain, or coerce an employee in the exercise of rights assured by this Order;
>
> (2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

Exec. Order No. 11491, *reprinted in* 5 U.S.C. § 7101 (1988).

182. *Old Dominion*, 418 U.S. at 284.

tual statement in the newsletter was the claim that the plaintiffs were scabs.[183] Justice Marshall stated that the other language used in the labor article was obviously loose and figurative.[184] Justice Marshall cited *Bresler* for the proposition that words, that are used in "a loose, figurative sense" and are opinions and not factual charges cannot sustain causes of action based on falsehood.[185] Justice Marshall concluded that the labor article was an example of "rhetorical hyperbole" used to show the union's ardent disagreement with anyone who resists unionization.[186]

REQUIREMENT OF "ACTUAL MALICE" IN EMOTIONAL DISTRESS ACTIONS

Recently, a unanimous United States Supreme Court in *Hustler Magazine v. Falwell*[187] held that the First and Fourteenth Amendments prevented a public figure from recovering damages for intentional infliction of emotional distress without a showing of "actual malice."[188] The Court also stated that outrageous, intentionally injurious epithets often may be privileged statements.[189]

Jerry Falwell filed suit against *Hustler* because of the magazine's parody of a Campari Liqueur advertisement labeled "Jerry Falwell talks about his first time."[190] Copying the format and style of the Campari advertisements verbatim, *Hustler* printed a mock interview with Falwell in which he "stated" that his "first time" was a drunken, incestuous meeting in an outhouse with his mother.[191] The parody then suggested that Falwell was a hypocrite who could only "lay down all that bullshit" when he was drunk.[192] The magazine printed a small disclaimer at the bottom of the page, which stated that the ad was "not to be taken seriously," and the magazine's table of contents listed the parody as "Fiction; Ad and Personality

183. *Id.*

184. *Id.*

185. *Id.* at 284-87. The Court declared, "There is no evidence that anyone took literally the use of the word 'traitor.' " *Id.* at 285 n.16.

186. *Id.* at 285-86. The Court noted that the language was derisive and derogatory, but it asserted that this was exactly what the Court in *Gertz* meant to illustrate when it stated, "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 284 (quoting *Gertz*, 418 U.S. at 339-40).

187. 485 U.S. 46 (1988).

188. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48, 56 (1988).

189. *Id.* at 53-56.

190. *Id.* at 48.

191. *Id.* The actual Campari Liqueur advertisements include interviews with assorted celebrities that are filled with sexual double-entendres as they describe the first time they tried the product. *Id.*

192. *Id.*; SMOLLA, *supra* note 78, at 313.

Parody."[193]

After the issue went on sale to the public, Falwell filed suit in the United States District Court for the Western District of Virginia, claiming damages for invasion of privacy, libel, and intentional infliction of emotional distress.[194] At trial, the jury found that the parody "could not reasonably be understood as describing actual facts" about Falwell, and it denied recovery on the libel claim.[195] However, the jury awarded Falwell $200,000 in compensatory and punitive damages on his emotional distress claim.[196] *Hustler* appealed the jury award to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's judgment for emotional distress.[197] The United States Supreme Court then granted *Hustler*'s petition for certiorari to address this constitutional question.[198]

Chief Justice William Rehnquist, writing for the Court, declared that a public figure could not recover under the tort of intentional infliction of emotional distress without a showing of "knowing or reckless falsity" as required by *Sullivan*.[199] The Court stated that the *Sullivan* requirement must be met even though the public figure was injured by "the publication of an ad parody offensive to him and doubtless gross and repugnant in the eyes of most."[200]

The Court reasoned that "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment."[201] The Court noted that it had previously held in *Garrison v. Louisiana*[202] that even speakers or writers motivated by ill-will or hatred have the freedom to express their opinions.[203] The Court in *Falwell* concluded that although im-

193. *Falwell*, 485 U.S. at 48.

194. *Id.* at 48-49. Falwell's invasion of privacy claim also was dismissed on a directed verdict. *Id.* at 49.

195. *Id.* at 49, 57.

196. *Id.* at 49.

197. *Id.* at 1277. *Hustler*'s petition for a rehearing en banc was denied by a divided court. Falwell v. Flynt, 805 F.2d 484 (4th Cir. 1986).

198. Hustler Magazine, Inc. v. Falwell, 480 U.S. 945 (1987) (granting certiorari); *Falwell*, 485 U.S. at 46 (referring to the constitutional question being "novel").

199. *Falwell*, 485 U.S. at 50, 56. The Court insisted that "[t]his is not merely a 'blind application' of the [*Sullivan*] standard, it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* at 56.

200. *Id.* at 50.

201. *Id.* at 53.

202. 379 U.S. 64, 77-78 (1964).

203. *Falwell*, 485 U.S. at 53. In *Garrison*, the Court stated:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.

Garrison, 379 U.S. at 73.

proper motive may lead to liability in other legal areas, the First Amendment prohibits such a result in evaluating the public discussion of public figures.[204] The Court recognized the important role that political parody and satire have played in formulating public debate.[205] The Court acknowledged that *Hustler*'s parody was only a distant relation of this more valued form of political satire.[206] However, the Court noted that society must necessarily tolerate the satire in which *Hustler* specializes to ensure protection for political satire.[207]

THE FIGHTING WORDS DOCTRINE

In *Chaplinsky v. New Hampshire*,[208] the United States Supreme Court created the "fighting words" exception to the First Amendment's protection of freedom of speech, while affirming a man's conviction under a state statute for using offensive language.[209] Walter Chaplinsky was a Jehovah's Witness who was proselytizing on the streets of Rochester, New Hampshire.[210] After the City Marshal had

204. *Falwell*, 485 U.S. at 53. The Court explained that malice must be expected in the area of political satire. It acknowledged that the work done by political satirists and cartoonists is "often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided . . . . [But f]rom the viewpoint of history it is clear that our political discourse would have been considerably poorer without [these satirists and cartoonists]." *Id.* at 54-55.

205. *Id.* The Court lauded Thomas Nash's attacks on Boss Tweed, as well as presidential political cartoons that had lampooned George Washington, Abraham Lincoln, Teddy Roosevelt, and Franklin D. Roosevelt. *Id.*

206. *Id.* at 55.

207. *Id.* at 55-56. The Court declared that *Hustler*'s humor would hardly be missed in the arena of public debate if another principled standard was available to differentiate between the types of satire. However, the Court found no such standard and rejected Falwell's suggestion of "outrageous" as the appropriate standard:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. [This] runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Id. at 55.

208. 315 U.S. 568 (1942).

209. Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942); 3 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.33, at 192-93 (1986) [hereinafter ROTUNDA]. Chaplinsky had violated a New Hampshire statute that provided in full:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

1926 N.H. Laws ch. 378, § 2.

210. *Chaplinsky*, 315 U.S. at 569-70.

received several complaints from citizens, he warned Chaplinsky that trouble might ensue.[211] Subsequently, a disturbance among some citizens occurred, and a traffic officer directed Chaplinsky to the local police station, presumably for his protection.[212] On the way, Chaplinsky and the officer met the City Marshal who again warned Chaplinsky to get off the streets.[213] Chaplinsky responded by calling him "a God damned racketeer and a damned Fascist."[214]

Chaplinsky was arrested and convicted by the municipal court of Rochester, New Hampshire, for breaching a state statute that provided, "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name."[215] Chaplinsky appealed to the Superior Court for Stafford County, which held a de novo jury trial where Chaplinsky again was found guilty.[216] The New Hampshire Supreme Court affirmed.[217] Chaplinsky appealed to the United States Supreme Court and argued that the New Hampshire statute was vague, indefinite, and unreasonably restrictive of his freedoms of expression and religion.[218]

Justice Frank Murphy, writing for the Court, affirmed Chaplinsky's conviction.[219] The Court declared that New Hampshire had an overriding interest in maintaining public peace.[220] Therefore, New Hampshire could constitutionally prohibit "words likely to cause an average addressee to fight."[221] In dicta, Justice Murphy defined these "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[222] Justice Murphy reasoned that such words are not protected by the First Amendment because their "slight social value as a step to truth . . . is

211. *Id.* at 570.

212. *Id.* Chaplinsky had not been told at this time that he was under arrest. *Id.*

213. *Id.* at 570.

214. *Id.* at 569-70. Chaplinsky also accused the entire city government of being involved with Fascism. *Id.* at 569. Chaplinsky disagreed with this description of the situation. He testified that he had asked City Marshal Bowering to arrest the people making the disturbance, but Bowering responded by cursing. Chaplinsky admitted to calling Bowering a Fascist, but he denied using the Deity's name. *Id.* at 570.

215. *Id.* at 569.

216. *Id.* Chaplinsky objected to the trial court's exclusion, as immaterial, of his testimony of religious purpose, police neglect, and treatment by the crowd. *Id.* at 570.

217. State v. Chaplinsky, 18 A.2d 754, 763 (N.H. 1941), *aff'd sub nom.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

218. *Chaplinsky*, 315 U.S. at 569.

219. *Id.* at 574.

220. *Id.* at 572-73.

221. *Id.* at 572.

222. *Id.*; 3 ROTUNDA, *supra* note 209, § 20.38, at 193 (stating that Justice Murphy's comments were dicta).

clearly outweighed by the social interest in order and morality."[223] The Court stated that Chaplinsky's epithets were not protected communication because, "[they] are . . . likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[224]

OPINIONS ON OPINION

In *Gertz v. Robert Welch, Inc.*,[225] Justice Lewis Powell, in dicta, suggested that

> [u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[226]

In *Gertz*, the defendant printed an article in *American Opinion* magazine, which accused Elmer Gertz of being a "Leninist" and part of a communist conspiracy against the police.[227] At trial, Gertz attested to his prominent reputation and stature in Chicago as an attorney.[228] Nevertheless, Gertz was found not to be a public figure.[229]

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223. *Id.*

224. *Id.* at 572, 574. The Supreme Court has since limited the applicability of the *Chaplinsky* "fighting words" doctrine to its original purpose of protecting against breaches of the peace. Epithets, like those used in *Chaplinsky*, can only be prohibited if they will be likely to cause the "listener" to respond with violence. Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 534 (1980). *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 523 (1972) (holding that a statute criminalizing opprobrious or abusive language was not sufficiently limited to only "fighting words"); Cohen v. California, 403 U.S. 15, 20 (1971) (holding that a jacket bearing the words "Fuck the Draft" did not constitute "fighting words"); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949) (stating that only speech that creates a "clear and present danger" is unprotected under the First Amendment).

225. 418 U.S. 323 (1974).

226. *Gertz*, 418 U.S. at 339-40 (quoting *Sullivan*, 376 U.S. at 270; *Chaplinsky*, 315 U.S. at 572); Edward M. Sussman, Milkovich *Revisited: 'Saving' the Opinion Privilege*, 41 DUKE L.J. 415, 424 (1991) (stating that this portion of the Court's opinion was dictum).

227. Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 998 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *and rev'd*, 418 U.S. 323 (1974).

228. *Id.* at 998. Gertz had represented several people who drew media attention, was the author of numerous books and articles, appeared frequently on television and radio, and was heavily involved in community affairs. *Id.*

229. *Id.*

The jury awarded Gertz $50,000 in damages.[230] However, the trial judge set aside this award by granting a judgment notwithstanding the verdict.[231] The United States Court of Appeals for the Seventh Circuit affirmed.[232] The United States Supreme Court granted certiorari and reversed.[233] The Court held that a state can apply its own standard of liability in private figure defamation cases, as long as it is not strict liability, instead of the *Sullivan* requirement that the plaintiff demonstrate "actual malice."[234]

The Court in *Gertz* also has been interpreted as acknowledging the existence of a constitutional privilege for opinion statements.[235] Justice Powell's statement in dicta led many lower courts to make an initial inquiry into whether statements involved in libel actions were fact or opinion.[236] Opinions were deemed to be absolutely protected under the First Amendment.[237] Factual statements were still suscep-

230. *Id.*

231. *Id.* at 1000. In granting the judgment notwithstanding the verdict, the district court noted that although Gertz may not have been a public figure, the court was required to apply the *Sullivan* standard because the article was of public interest. *Id.* at 999-1000. *See* Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967) (holding that the First Amendment precludes state tort liability without proof of "actual malice" as required by *Sullivan*).

232. Gertz v. Robert Welch, Inc., 471 F.2d 801, 808 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

233. *Gertz*, 418 U.S. at 352. The Court reversed on the grounds that Gertz's numerous activities did not make him a public figure and that *Sullivan* did not apply to private individuals. *Id.*

234. *Id.* at 347.

235. *Id.* at 339-40; RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977); Lund v. Chicago & N.W. Transp., 467 N.W.2d 366, 369 (Minn. App. 1991). *See, e.g.*, Woods v. Evansville Press, 791 F.2d 480, 487 (7th Cir. 1986) (citing *Gertz* for the proposition that "statements of opinion, no matter how pernicious, are absolutely privileged under the first amendment"); Bose Corp. v. Consumers Union, 692 F.2d 189, 193-94 (1st Cir. 1982) (citing *Gertz* for the proposition that opinions are neither true nor false, and therefore not actionable), *aff'd*, 466 U.S. 485 (1984); Church of Scientology v. Cazares, 638 F.2d 1272, 1286 (5th Cir. 1981) (recognizing that *Gertz* requires a plaintiff to prove the defamatory statement was not opinion); Avins v. White, 627 F.2d 637, 642 (3d. Cir.) (citing *Gertz* in stating that expressions of "pure" opinion are not actionable because ideas themselves cannot be false), *cert. denied*, 449 U.S. 982 (1980); Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (6th Cir. 1978) (citing *Gertz* in declaring that "it is now established as a matter of constitutional law that a statement of opinion about matters which are publicly known is not defamatory."), *cert. denied*, 440 U.S. 960 (1979).

236. Sussman, 41 DUKE L.J. at 426. *See, e.g.*, Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.) (recognizing the emphasis in *Gertz* on making the fact-opinion distinction), *cert. denied*, 479 U.S. 883 (1986); Ollmann v. Evans, 713 F.2d 838, 877 (D.C. Cir. 1983) (per curiam) (stating that *Gertz* mandated a distinction between fact and opinion).

237. *See, e.g.*, Lewis v. Time Inc., 710 F.2d 549, 553 (9th Cir. 1983) (stating that opinions are protected because they cannot be considered false under *Gertz*); *Bose Corp.*, 692 F.2d at 193-94 (asserting that the Court in *Gertz* "implie[d] that an opinion can be neither true nor false as a matter of constitutional law"); *Avins*, 627 F.2d at 642 (declaring that "pure" opinion cannot be the subject of a defamation suit because ideas cannot be false).

tible to a libel action if they were false and defamatory.[238]

In *Milkovich v. Lorain Journal Co.*,[239] the United States Supreme Court concluded that the language used in *Gertz* was simply a reformulated version of Justice Oliver Wendell Holmes's "marketplace of ideas" theory, and that it did not establish a separate and complete constitutional privilege from liability for opinion statements.[240]

In *Milkovich*, Michael Milkovich was coaching high school wrestling when his team was involved in a fight with another team.[241] After a hearing before the Ohio High School Athletic Association ("OHSAA"), Milkovich was censured, and the high school was given a one-year probation and disqualified from the upcoming state tournament.[242] The Court of Common Pleas for Franklin County overturned OHSAA's sanctions against the high school on due process grounds.[243] The School Superintendent, H. Donald Scott, and Milkovich testified at both the hearing and the judicial proceeding.[244] The day after the Court of Common Pleas overturned OHSAA's decision, Theodore Diadun, a local sportswriter, wrote a column which stated that both Milkovich and Scott had lied while under oath at the judicial proceeding.[245] The article was published in the *Lake County News-Herald*, a newspaper owned by the Lorain Journal Company.[246]

Following publication of the article by Lorain Journal, Milkovich filed a defamation action in the Court of Common Pleas for Lake County.[247] The court granted summary judgment in favor of Lorain.[248] The Ohio Court of Appeals affirmed and dismissed Milkovich's appeal.[249] The court held that, as a matter of law, the ar-

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238. Sussman, 41 DUKE L.J. at 426.

239. 497 U.S. 1 (1990).

240. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990). *See* Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1273 (N.Y.) (stating that the decision in *Milkovich* ended the misperception that opinions were absolutely constitutionally protected), *cert. denied*, 111 S. Ct. 2261 (1991).

The "marketplace of ideas" theory was created by Justice Oliver Wendell Holmes in a 1918 dissenting opinion. Justice Holmes opined that "the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

241. *Milkovich*, 497 U.S. at 3-4.

242. *Id.* at 4.

243. *Id.*

244. *Id.*

245. *Id.* at 4-5.

246. *Id.* at 4.

247. *Id.* at 6.

248. *Id.* at 10.

249. Milkovich v. News-Herald, 545 N.E.2d 1320, 1325 (Ohio Ct. App.), *dismissed*, 540 N.E.2d 724 (Ohio 1989), *and rev'd sub nom.*, 491 U.S. 1 (1990). The court based its decision on Scott v. News-Herald, 496 N.E.2d 699, 709 (Ohio 1986), in which the court

ticle was a constitutionally protected opinion.[250] The Ohio Supreme Court dismissed Milkovich's appeal, citing a lack of a substantial constitutional question.[251] The United States Supreme Court granted certiorari and reversed.[252]

Chief Justice Rehnquist, writing for the Court, rejected the need to create "an artificial dichotomy between 'opinion' and fact."[253] Instead, the Court declared that the freedom of speech and press is "adequately secured by existing constitutional doctrine."[254] The Court enumerated the existing protections that ensure that debate on public issues remains "uninhibited, robust, and wide open."[255] First, the Court retained the requirement that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law."[256] Second, the Court stated that the "actual malice" requirements established in *Sullivan*, *Butts*, and

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held that the opinions contained within the published column were absolutely protected under the First Amendment. *Milkovich*, 545 N.E.2d at 1324-25.

250. *Id.*

251. Milkovich v. News Herald, 540 N.E.2d 724 (Ohio 1989).

252. Milkovich v. Lorain Journal Co., 493 U.S. 1055 (1990)(granting certiorari); *Milkovich*, 497 U.S. at 10.

253. *Milkovich*, 497 U.S. at 19. *See* Jerry J. Phillips, *Opinion and Defamation: The Camel In The Tent*, 57 TENN. L. REV. 647, 647-48 (1990)(explaining that William Shakespeare provided the reason why one should not make a distinction between fact and opinion: "There is nothing either good or bad, but thinking makes it so."(quoting WILLIAM SHAKESPEARE, HAMLET, act 2, sc. 2, line 252)).

The Court in *Milkovich* summarized the law of fact versus opinion with regard to previous Court decisions as follows:

> [W]here a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*.

Milkovich, 497 U.S. at 20-21.

254. *Id.* at 19. The Court in *Milkovich* traced the history of the constitutional limitations on defamation. It noted the imposition of the "actual malice" standard in *Sullivan*, its expansion to public figures in *Curtis Publishing*, and the refusal to expand the doctrine to those deemed to still be private individuals in *Gertz*. It reaffirmed the requirement in *Hepps* that the plaintiff must prove falsity and fault before recovering under an action for defamation. The Court in *Milkovich* also recognized that previous Court decisions, including *Bresler* and *Old Dominion*, had declared some types of speech to be nonactionable. *Id.* at 14-17.

255. *Id.* at 20. Besides the three protections listed here, the Court also recognized that the heightened appellate review required by Bose Corp. v. Consumers Union, Inc., 466 U.S. 485 (1984), and *Sullivan* also "provides assurance that the foregoing determinations will be made in a manner so as not to 'constitute a forbidden intrusion of the field of free expression.'" *Id.* at 21 (quoting *Bose*, 466 U.S. at 499).

256. *Id.* at 19 (relying on *Sullivan* and *Hepps*). *See* Locricchio v. Evening News Ass'n, 476 N.W.2d 112, 129 (Mich. 1991) (noting that a plaintiff must prove a defendant's fault and a statement's falsity before recovering), *cert. denied*, 112 S. Ct. 1267 (1992).

Gertz increased the available protection for commentaries on issues of public concern that reasonably express defamatory and false facts about public officials or public figures.[257] Most importantly, the Court preserved the requirement that an actionable defamatory statement must assert a false statement of fact.[258] The Court reiterated its prior decisions in *Bresler*, *Old Dominion*, and *Falwell*, which protected statements that could not "reasonably [be] interpreted as stating actual facts" about a plaintiff.[259]

The Court analyzed *Milkovich* using a three-factor test to determine whether the column asserted or implied any facts. The Court asked: (1) 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 facts; (2) whether "the general tenor of the article negate[d] this impression"; and (3) whether the assertion was "sufficiently factual to be susceptible of being proved true or false."[260]

The Court determined that the article impliedly asserted objective facts that were defamatory.[261] The Court stated that the article alleging perjury could have been objectively verified by a simple comparison between the testimony before OHSAA and the later testimony before the court of common pleas.[262]

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257. *Id.* at 20.

258. *Id. See* Dodson v. Dicker, 812 S.W.2d 97, 98 (Ark. 1991) (recognizing that "the threshold question in defamation actions is not whether a statement could be considered an 'opinion' but rather whether a reasonable fact-finder could conclude that the statement implies an assertion of an objectively verifiable fact"); *In re* Westfall, 808 S.W.2d 829, 833 (Mo.) (holding that an inquiry into whether a statement is fact or opinion only obfuscates the issue), *cert. denied*, 112 S. Ct. 648 (1991); 600 West 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 934 (N.Y. 1992) (recognizing that it is only logical that before a plaintiff can prove a statement was false, there first must be a demonstrable statement of fact).

259. *Milkovich*, 497 U.S. at 20 (quoting *Falwell*, 485 U.S. at 50). The Court wanted to preserve the tradition of "imaginative expression," which it recognized in *Falwell* was a key contributor to our national discussion of issues. *Id.* (citing *Falwell*, 485 U.S. at 53-55).

260. *Id.* at 21. *See* Young v. American Mini Theatres, 427 U.S. 50, 66 (1976) (stating that the content of a statement determines whether it was "fighting words" or a protected epithet); Fortier v. IBEW, Local 2327, 605 A.2d 79, 80 (Me. 1991) (declaring that only a false statement of fact or opinion implying undisclosed defamatory facts may be actionable); Wellman v. Fox, 825 P.2d 208, 211 (Nev.) (stating that factual assertions will not be actionable unless there is no basis in truth), *cert. denied*, 113 S. Ct. 68 (1992).

Edward Sussman has noted the similarity between the *Milkovich* test and lower court tests used to uphold the absolute constitutional protection of opinions. Sussman, 41 DUKE L.J. at 427-28. *See Ollman*, 750 F.2d at 979 (implementing a four-part test to differentiate between fact and opinion); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980) (creating a three-part "totality of circumstances" test).

261. *Milkovich*, 497 U.S. at 21.

262. *Id.*

ANALYSIS

For nearly two hundred years, an individual's freedom to criticize was limited by whether his opinion was truthful and his motives were pure.[263] In the last thirty years, the freedom of the "citizen critic" has been expanded by the United States Supreme Court so that now public figures are required to prove that a statement actually expressed or implied facts, that these facts were false, and that the speaker knowingly or recklessly disregarded the falsity.[264] However, in *Spence v. Flynt*,[265] the Wyoming Supreme Court abandoned the protections of the First Amendment in favor of the common-law privilege of "fair comment."[266]

The Wyoming Supreme Court reversed the district court grant of summary judgment in favor of *Hustler* magazine for two reasons. First, the court was not convinced that Gerry Spence was a public figure who would have to prove "actual malice" to recover.[267] Second, the court reasoned that the United States Supreme Court decision in *Milkovich v. Lorain Journal Co.*,[268] which held that opinions are not absolutely protected by the First Amendment, supported the fair comment restrictions on motive.[269]

WHETHER GERRY SPENCE WAS A PUBLIC FIGURE WAS DECIDED UNDER THE WYOMING RULES OF CIVIL PROCEDURE

Under Rule 56 of the Wyoming Rules of Civil Procedure and Rule 56 of the Federal Rules of Civil Procedure, the defendant must initially prove that there is no genuine issue of fact which a jury would have to decide.[270] Although *Hustler* was not required to produce affirmative evidence, the magazine demonstrated that Spence was indeed a public figure.[271] In response to *Hustler*'s request for an admission, Spence freely stated that he was a public figure.[272] Notwithstanding this uncontested admission from Spence, his lawyer also conceded this status in a letter to the defendants, which limited

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263. *See supra* notes 77-90 and accompanying text.

264. *See supra* notes 92-262 and accompanying text.

265. 816 P.2d 771 (Wyo. 1991).

266. *See supra* notes 36-56 and accompanying text.

267. Spence v. Flynt, 816 P.2d 771, 777 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992).

268. 497 U.S. 1 (1990).

269. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990); *Spence*, 816 P.2d at 775-76. *See supra* note 47 and accompanying text.

270. *See supra* note 134 and accompanying text.

271. *See supra* notes 69-70, 145 and accompanying text.

272. Petition for Writ of Certiorari to the Wyoming Supreme Court at 25, Spence v. Flynt, 816 P.2d 771 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992) (No. 91-1213).

discovery on the matter.[273] In the interrogatories of the plaintiff, Spence illustrated his public figure status by elaborating on his many accomplishments as a lawyer.[274] Finally, Spence's lawyer conceded in oral argument before the Wyoming Supreme Court that Spence was a public figure.[275]

In accordance with the United States Supreme Court decision in *Celotex Corp. v. Catrett*,[276] once *Hustler* had satisfied its burden of demonstrating that no issue of material facts existed, then Spence had to rebut *Hustler*'s proof by producing specific facts that a genuine issue did exist.[277] However, Spence never rebutted the evidence already presented by *Hustler* which established that he was a public figure.[278] In *Spence*, the court speculated that evidence could possibly arise at trial that would demonstrate that Spence was not a public figure while representing Andrea Dworkin in her litigation.[279] However, Federal Rule 56(e) does not allow a plaintiff to defeat summary judgment by simply resting on the pleadings and speculating about what may happen at trial.[280] A court should similarly not be allowed to engage in conjecture.[281] Rather, a court's proper role is to determine whether both genuine disputes as to material facts and "legitimate" factual inferences exist.[282]

As a public figure, Spence was required, in accordance with *Anderson v. Liberty Lobby*,[283] to produce sufficient evidence "such that a reasonable jury might find that actual malice had been shown with convincing clarity."[284] However, Spence failed to present any evidence showing that the *Hustler* column contained any false statements of fact.[285] Therefore, the district court was correct in concluding that summary judgment should have been entered against Spence.[286]

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273. *See supra* note 70 and accompanying text.

274. *Spence*, 816 P.2d at 790-91, 794-95 (Golden, J., dissenting); *see supra* note 69 and accompanying text.

275. *Spence*, 816 P.2d at 791; *see supra* note 70 and accompanying text.

276. 477 U.S. 317 (1986).

277. *See supra* note 146 and accompanying text.

278. Petition for Writ of Certiorari at 25, *Spence* (No. 91-1213).

279. *Spence*, 816 P.2d at 776. The majority in *Spence* may have actually taken a step beyond speculation in asserting that "we hold that a person situated, *as Spence is here*, is not subject to defamation without recourse." *Id.* at 777 (emphasis added).

280. *See supra* note 158 and accompanying text.

281. JEROME A. BARRON & C. THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 352 (1979).

282. *Id.*

283. 477 U.S. 242 (1986).

284. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

285. Petition for Writ of Certiorari at 28, *Spence* (No. 91-1213).

286. *See supra* notes 26-30 and accompanying text.

THE MISAPPLICATION OF *MILKOVICH*

The Wyoming Supreme Court in *Spence* claimed to follow *Milkovich* when it reversed a grant of summary judgment for *Hustler* magazine and ignored the established constitutional doctrine in favor of the common-law privilege of fair comment.[287] The court based this claim on language from the United States Supreme Court's decision in *Milkovich* where the Court quoted section 566 comment a to the Restatement (Second) of Torts.[288] However, the portion of *Milkovich* cited by the court in *Spence* was included in a section where the Court in *Milkovich* had recounted the historical development of defamation law.[289] This citation preceded the Court's discussion of *New York Times v. Sullivan*[290] and the limitations it placed on the previous common-law doctrines.[291] The Supreme Court's decision in *Milkovich* did not indicate support for the elimination of

287. *See supra* notes 45-47, 57-61 and accompanying text. Chief Justice Cardine also described *Milkovich* as "the most important decision . . . since New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)." *Spence*, 816 P.2d at 775.

Many other states' highest courts have accurately interpreted and applied *Milkovich*. *See* Deutcsh v. Birmingham Post Co., 603 So. 2d 910, 911-12 (Ala. 1992) (quoting *Milkovich* for the requirements that a public figure must prove that a statement asserted facts, was false, and was made with "actual malice" before recovering), *cert. denied*, 113 S. Ct. 976 (1993); Kolegas v. Heftel Broadcasting Corp., No. 72793, 1992 Ill. Lexis 202, at *15 (Ill. Dec. 4, 1992) (citing *Milkovich* for holding that the First Amendment protects statements that do not assert facts); Fortier v. IBEW, Local 2327, 605 A.2d 79, 80 (Me. 1992) (holding that a "statement is not actionable if it is clear the maker did not intend to state an objective fact but rather to present an interpretation of the facts"); Wellman v. Fox, 825 P.2d 208, 210, 211 (Nev.) (declaring that only statements, which assert false facts, are actionable), *cert. denied*, 113 S. Ct. 68 (1992); 600 West 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 934 (N.Y. 1992) (stating that the dispositive question in defamation actions is whether a reasonable person could have believed the defendant asserted any facts); Yetman v. English, 811 P.2d 323, 328 (Ariz. 1991) (noting that *Milkovich* requires courts in defamation actions to determine whether a statement "could reasonably be interpreted as stating actual facts," and whether that statement was provably false); Dodson v. Dicker, 812 S.W.2d 97, 98 (Ark. 1991) (recognizing that *Milkovich* established that the key question to resolve in defamation actions is "whether a reasonable fact-finder could conclude that the statement implies an assertion of an objective verifiable fact"); Lester v. Powers, 596 A.2d 65, 71 (Me. 1991) (citing *Milkovich* as supporting the nonactionability of statements that only make personal comments on objective facts); Locricchio v. Evening News Assoc., 476 N.W.2d 112, 131-32 (Mich. 1991) (citing *Milkovich* as illustrative of the requirement that a plaintiff must prove that a statement implies false facts), *cert. denied*, 112 S. Ct. 1267 (1992); *In re* Westfall, 808 S.W.2d 829, 833 (Mo.) (citing *Milkovich* as rejecting an absolute privilege for opinions and requiring an statement of objective fact), *cert. denied*, 112 S. Ct. 648 (1991); Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1273 (N.Y.) (declaring that "[t]he key inquiry [under *Milkovich*] is whether challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact"), *cert. denied*, 111 S. Ct. 2261 (1991).

288. *Spence*, 816 P.2d at 775.

289. *Milkovich*, 497 U.S. at 11-14.

290. 376 U.S. 254 (1964).

291. *Milkovich*, 497 U.S. at 14.

nearly thirty years of First Amendment protection in the area of defamation.[292] Rather, the Supreme Court strongly reaffirmed that, under its decisions from *Sullivan* through *Hustler Magazine v. Falwell*,[293] a public figure must prove that a false statement of fact was published with "actual malice."[294] Nonetheless, the court in *Spence* cast aside the protections of the First Amendment and reinstituted the old common-law privilege of "fair comment on matters of public concern."[295]

The court in *Spence* decided that society should only protect "the honest expression of opinion on matters of legitimate public interest . . . not made solely for the purpose of causing harm."[296] This statement demonstrates that the court in *Spence* allowed for the free expression of opinions about public figures, but this freedom was conditioned upon proper motives for the criticism.[297] However, the United States Supreme Court has consistently held that liability for defamation of a public figure depends on whether "actual malice," rather than hatred or ill-will, exists.[298] As the Supreme Court stated in *Greenbelt Cooperative Publishing Ass'n v. Bresler*:[299]

> [T]he great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred.[300]

The decision in *Spence* violated First Amendment protections established by the Supreme Court by imposing a "good faith" requirement on opinions.[301]

The court in *Spence* cited *Milkovich* for the propositions that no

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292. Edward M. Sussman, Milkovich *Revisited: 'Saving' the Opinion Privilege*, 41 DUKE L.J. 415, 442 (1991); *see supra* notes 254-59 and accompanying text.

293. 485 U.S. 46 (1988).

294. *Milkovich*, 497 U.S. at 19-20. *See Immuno AG.*, 567 N.E.2d at 1273 (recognizing that the Court in Milkovich "[left] in place all previously existing Federal constitutional protections, . . . and specifically including immunity for statements of opinions relating to matters of public concern that do not contain a provably false factual connotation").

295. *See supra* notes 36-40 and accompanying text. As Justice Michael Golden explained in his dissent, "[I]nexplicably, the majority eschews this principled and controlling analysis and instead creates its own methodology from the common law construct of 'fair comment' and the unrelated 'fighting words' doctrine of *Chaplinsky*." *Spence*, 816 P.2d at 784 (Golden, J., dissenting).

296. *Id.* at 775 (quoting *Milkovich*, 497 U.S. at 13-14).

297. *Id.* at 776-77.

298. *See supra* notes 103, 203-04 and accompanying text.

299. 398 U.S. 6 (1970).

300. Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 10-11 (1970) (quoting Garrison v. Louisiana, 379 U.S. 67, 73 (1964)).

301. *See supra* notes 201-07 and accompanying text.

defense exists for opinions and that a statement is actionable if it simply damages the plaintiff's reputation in the community.[302] Such an analysis was erroneous because it confused the question of whether opinions are absolutely privileged with the constitutional requirement of an assertion of fact.[303] The Court in *Milkovich* eliminated the notion that an "opinion defense" exists in defamation law under the First Amendment.[304] The Court concluded that opinions are not automatically privileged because they could still contain or imply an assertion of fact upon which an action could be based.[305] However, the Court in *Milkovich* also strongly reaffirmed the holding in *Philadelphia Newspapers, Inc. v. Hepps*[306] that only provably false assertions of fact can be actionable.[307] Therefore, before the court in *Spence* could conclude that *Hustler*'s column was defamatory, Spence needed to first prove that the column was provably false.[308]

PROPER APPLICATION OF *MILKOVICH*

HYPERBOLIC LANGUAGE

The court in *Spence* acknowledged that the United States Supreme Court in *Falwell* had advanced the proposition that "imaginative expression" and "rhetorical hyperbole" are protected from a defamation action.[309] Yet the court in *Spence* refused to provide this protection to *Hustler* magazine because Spence was not personally involved in the controversy.[310] This failure to apply *Falwell* was flawed

302. *See supra* note 45 and accompanying text.

303. *Milkovich*, 497 U.S. at 16-18. The Court specifically stated that the question was whether to recognize an opinion privilege, "in addition to the established safeguards discussed above [*Hepps*, *Bresler*, *Falwell*, and *Old Dominion*]." *Id.* at 17.

304. *Id.* at 18.

305. *Id.* at 18-19. Chief Justice William Rehnquist illustrated this point through the use of a hypothetical statement that "in my opinion John Jones is a liar." *Id.* at 18. Chief Justice Rehnquist stated that this implies that there are facts which lead a speaker to believe that Jones is a liar. *Id.*

306. 475 U.S. 767 (1986).

307. *Milkovich*, 497 U.S. at 19-20; *see supra* notes 130-35, 258, 260 and accompanying text. The majority in *Spence* quoted § 566 of the *Restatement (Second) of Torts*, comment a, as support for not requiring "that the communication be false as well as defamatory." *Spence*, 816 P.2d at 775. However, the court ignored the actual provision which states that "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." RESTATEMENT (SECOND) OF TORTS § 566 (1977).

308. Sussman, 41 DUKE L.J. at 442. The common-law presumption that defamatory statements are false was rejected by the Court in *Gertz* and replaced with the constitutional requirement from *Hepps* that a public figure must prove fault and falsity before recovering in a defamation action. *See supra* notes 130-31 and accompanying text.

309. *See supra* notes 37-38 and accompanying text.

310. *See supra* note 39 and accompanying text.

because the constitutional protection afforded in defamation actions is determinate on the type of speech used, not the status of the speech's target.[311]

The United States Supreme Court noted in *Milkovich* that the protection for imaginative hyperbole expressed in *Falwell* is still the constitutional standard to be applied.[312] Opinions which cannot " 'reasonably be interpreted as stating actual facts' about an individual" are not actionable.[313] Such nonactionable expressions of opinion under the First Amendment include epithets, vulgarities, and profanities.[314] The ad hominem nature of such words and phrases clearly distinguishes them as rhetorical hyperbole which cannot reasonably be understood, as a matter of law, as stating any facts or information.[315]

The United States Supreme Court has made it clear that the First Amendment must be interpreted as protecting speech resembling the rhetorical hyperbole, vigorous epithets, and lusty and imaginative expression evident in *Falwell*, *Old Dominion Branch No. 496 v. Austin*,[316] and *Bresler*.[317] In all three cases, the Court concluded that the unique language and setting would signal to the reasonable person that no factual assertions were being made about an individual.[318]

In *Bresler*, an implied accusation of "blackmail" was found to be

311. *Milkovich*, 497 U.S. at 16. The status of the target of the speech becomes an integral factual determination when a court is deciding whether the plaintiff is constitutionally required to prove "actual malice." *See Sullivan*, 378 U.S. at 279-80 (holding that a public official is required to prove "actual malice" before recovering under a defamation claim); *Butts*, 388 U.S. at 165 (Warren, C.J., concurring) (holding that public figures, like public officials, must prove "actual malice" before recovering for defamation); *Gertz*, 415 U.S. at 334, 343 (holding that the *Sullivan* requirement of actual malice need not be fulfilled by a private figure in order to recover for defamation).

312. *See supra* notes 253-60 and accompanying text.

313. *Milkovich*, 497 U.S. at 20 (quoting *Falwell*, 485 U.S. at 50).

314. *Spence*, 816 P.2d at 789 (Golden, J., dissenting). *See, e.g.*, McGuire v. Jankiewicz, 290 N.E.2d 675, 676 (Ill. Ct. App. 1972) (holding that calling an attorney an "asshole" might be objectionable, but it was not actionable defamation); Lund v. Chicago & N.W. Transp., 467 N.W.2d 366, 369 (Minn. Ct. App. 1991) (declaring that although "shitheads" is not complimentary in nature, neither does it suggest verifiable false facts about anyone); Curtis Publishing Co. v. Birdsong, 360 F.2d 344, 348 (5th Cir. 1966) (explaining that epithets are not actionable because they "[have] no real meaning except to indicate that the individual who used them was under a strong emotional feeling of dislike toward those about whom he used them"); Crozman v. Callahan, 136 F. Supp. 466, 468-69 (W.D. Okla. 1955) (stating that the common law has long denied recovery for insulting words which injure another's feelings, even if the words are "[y]ou fucking bastards").

315. *Spence*, 816 P.2d at 789 (Golden, J., dissenting).

316. 418 U.S. 264 (1974).

317. *Immuno AG.*, 567 N.E.2d at 1274.

318. *Id.*

protected as imaginative expression under the First Amendment.[319] In *Old Dominion*, the comparison of the plaintiffs to some of the most hated traitors in society's history was not enough to allow for a recovery for defamation.[320] Finally, in *Falwell*, the statement that a nationally-known evangelist was an incestuous drunk was privileged even though it was "outrageous."[321] Viewed against the backdrop of these cases, *Hustler*'s calling Spence an "asshole" and questioning his motives for representing Andrea Dworkin must be protected as "loose, figurative, hyperbolic language," and cannot be the basis for a libel claim.[322]

The court in *Spence* relied on *Chaplinsky v. New Hampshire*[323] in viewing *Hustler*'s various descriptions of Spence as actionable.[324] The court in *Spence* quoted the statement in *Chaplinsky* that insults and profane speech, among other things, are not safeguarded by the Constitution.[325] However, the application of *Chaplinsky* was limited by subsequent cases to its original purpose of outlawing only those words that are delivered face-to-face and cause an immediate breach of the peace.[326] Because *Hustler*'s epithets regarding Spence were made within a magazine article, there could not have been any threat of an immediate breach of the peace.[327] In the past twenty years, the United States Supreme Court has firmly established that constitutional protection extends to imaginative expression and rhetorical hyperbole.[328] A court may no longer exclude epithets from constitutional protection under the pretense of upholding *Chaplinsky*.[329]

GENERAL TENOR

Justice Golden correctly stated in his dissent that *Milkovich* required that the Wyoming Supreme Court examine the "Asshole of the Month" column as the reasonable reader of *Hustler* magazine.[330] This requirement indicates that *Chaplinsky* could not be applied in *Spence* because *Hustler*'s column would not cause a violent reaction in its audience.[331] *Hustler* magazine is directed at readers who are

319. *See supra* notes 170-71 and accompanying text.
320. *See supra* notes 178, 182-86 and accompanying text.
321. *See supra* notes 190-207 and accompanying text.
322. *Spence*, 816 P.2d at 789-90 (Golden, J., dissenting).
323. 315 U.S. 568 (1942).
324. *Spence*, 816 P.2d at 774-75.
325. *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).
326. *See supra* note 224 and accompanying text.
327. *See supra* notes 21-25 and accompanying text.
328. *See supra* notes 161-86 and accompanying text.
329. *Spence*, 816 P.2d at 785 (Golden, J., dissenting).
330. *Id.* at 786 (Golden, J., dissenting).
331. *See supra* note 224 and accompanying text.

often sympathetic with its views; this creates a context which invariably denies a statement of its defamatory meaning.[332] One must be cognizant of the fact that the average reader of *Hustler* expects the articles in the magazine to contain strong, opinionated views, and not factual accounts.[333] The editorial-type format of the "Asshole of the Month" column provides the average reader with notice of its nonfactual nature.[334] As well, because the column appears monthly, the average reader is also made aware of its opinionated nature.[335] As Justice Golden stated in his dissent, "The general tenor of the feature . . . emphasize[s] it is a vulgar 'expression of contempt' and not a serious statement of fact. Its scatological litany is more like an insult hurled across a barroom or schoolyard than a statement of fact."[336]

OBJECTIVE VERIFIABILITY

The court in *Spence* persisted in erroneously applying *Milkovich* when it stated that an "opinion could be actionable" even though it is impossible to objectively determine the truth or falsity of the statement.[337] Rather, the United States Supreme Court required demonstrable falsity in *Milkovich*.[338] In accordance with *Hepps*, a plaintiff has the burden of proving that the defamatory statement is false before being allowed to recover.[339] The court in *Spence* apparently relied on the common-law presumption that a defamatory expression is false, although the United States Supreme Court in *Hepps* rejected this presumption.[340]

The "Asshole of the Month" column at issue contended that Spence did not actually practice the traditional values which he purportedly preached.[341] Instead, the column contended that Spence was motivated by greed and had filed a baseless lawsuit for a client

332. Ault v. Hustler Magazine, 860 F.2d 877, 881 (9th Cir. 1988).

333. *Spence*, 816 P.2d at 786 (Golden, J., dissenting). The "Asshole of the Month" column is known to be one of the methods by which *Hustler* lampoons its critics and "enemies." Leidholdt v. L.F.P. Inc., 860 F.2d 890, 894 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989). The tone of the column is pointed and exaggerated, which indicates it is emotionally laden rhetorical hyperbole protected under the First Amendment. Dworkin v. L.F.P. Inc., 839 P.2d 903, 915 (Wyo. 1992).

334. *Spence*, 816 P.2d at 786 (Golden, J., dissenting) (citing Ollman v. Evans, 750 F.2d 970, 987 (D.C. 1985)).

335. *Id.*

336. *Id.*

337. *Spence*, 816 P.2d at 775. Chief Justice Cardine quoted § 566 of the *Restatement (Second) of Torts*, comment a; *see supra* note 45 for text. However, this section of the Restatement appeared in the court's discussion in *Milkovich* of common-law defamation. *See supra* notes 289-92 and accompanying text.

338. *Milkovich*, 497 U.S. at 16, 19-20; *see supra* notes 256-57 and accompanying text.

339. *See supra* notes 128-33 and accompanying text.

340. *See supra* notes 45-47, 130-33 and accompanying text.

341. *See supra* notes 23, 25 and accompanying text.

with views antithetical to his own.[342] However, the questioning of another's motives cannot be objectively verified and therefore cannot support an action for defamation.[343] Certainly, if *Hustler*'s opinion of Spence's motives stated or implied false facts, then Spence would have the basis for a lawsuit.[344]

However, *Hustler*'s opinion of Spence was based upon facts which were disclosed, true, and undisputed.[345] Spence did represent a client whose personal views were in conflict with his own philosophy of family values.[346] He did file a $150 million lawsuit on her behalf, and he asked for and received a fifty percent contingent fee in previous cases.[347] As stated in section 566 to the Restatements (Second) of Torts, comment c, "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is."[348]

The court in *Spence* questioned the truthfulness of *Hustler*'s report that Spence stood to gain $75 million from Dworkin's lawsuit against the magazine.[349] The court in *Spence* contended that Spence may have pledged his fee to a charitable cause.[350] In fact, Spence could not have assigned any portion of his fee from Dworkin's lawsuit to the charitable organization which he had founded.[351] Spence did not form the organization until after the article naming him the "Asshole of the Month" was published.[352] Therefore, it appears likely that *Hustler* had truthfully stated the possible windfall to Spence from Dworkin's suit.[353] According to the Court in *Milkovich*, a trial court may not decide whether *Hustler*'s opinion was an accurate assessment of Spence's motives for representing Dworkin.[354]

342. *See supra* notes 24-25 and accompanying text.

343. *See* Woods v. Evansville Press, 791 F.2d 480, 487 (7th Cir. 1986) (holding that the suggestion of impure motives by placing profit over religious belief is not objectively verifiable and, read in context, would not be understood as a statement of fact by the reasonable reader); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1304 (8th Cir.) (en banc) (holding plaintiff's motive was subjective, not objectively verifiable, and stating, "the singling out of an impermissible motive is a subtle and slippery enterprise, particularly when the activities of public [figures] are involved"), *cert. denied*, 479 U.S. 883 (1986).

344. *Milkovich*, 497 U.S. at 18-19.

345. *Spence*, 816 P.2d at 791 (Golden, J., dissenting).

346. *Id.* at 790 (Golden, J., dissenting).

347. *Spence*, 816 P.2d at 790 (Golden, J., dissenting).

348. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977).

349. *Spence*, 816 P.2d at 776.

350. *Id.*

351. *See supra* note 49 and accompanying text.

352. *See supra* note 49 and accompanying text.

353. *See supra* note 49 and accompanying text.

354. Sussman, 41 DUKE L.J. at 443.

CONCLUSION

In *Spence v. Flynt*,[355] there were no actionable facts, only *Hustler*'s interpretations of disclosed, true facts.[356] In accordance with the United States Supreme Court's decision in *Milkovich v. Lorain Journal Co.*,[357] those interpretations must be protected from an action for defamation. As Justice Frankfurter explained, "One of the prerogatives of American citizenship is the right to criticize public men and measures-and that means not only informed and responsible criticism but the *freedom to speak foolishly and without moderation*."[358]

As one commentator has warned, "The most powerful assaults on freedom of speech in America have always come not from bad people but from good people, people who would sanitize our speech to make it less sexist or sexual, less racist, less vulgar, less stinging."[359] In *Spence*, the Wyoming Supreme Court wanted to ensure that "Larry Flynt is not free to arise each morning and select a public figure to attack and defame for no reason at all."[360] In its attempt to protect Gerry Spence and lawyers like him, the Wyoming Supreme Court in *Spence* erroneously discarded thirty years of United States Supreme Court precedent and replaced it with the common-law privilege of "fair comment."

Because of the decision in *Spence*, public figures in Wyoming no longer need to demonstrate falsity or fault to recover. Insulting opinions are no longer protected by the First Amendment. Furthermore, Wyoming courts can disregard overwhelming evidence, even an admission, and deny a motion for summary judgment if they speculate that evidence may develop at trial.

The Wyoming Supreme Court is not exempt from the reach of the First Amendment, the decisions of the United States Supreme Court, or the procedural rules of Wyoming. Like its blindfolded symbol, justice must be administered by the Wyoming Supreme Court without regard to who the parties are. Regardless of whether one approves or disapproves of *Hustler*'s column, or whether "we would march our sons and daughters off to war to preserve" *Hustler*'s

355. 816 P.2d 771 (Wyo. 1991).

356. Jerry J. Phillips, *Opinion and Defamation: The Camel In The Tent*, 57 TENN. L. REV. 647, 666 (1990) (quoting Friedrich Nietzsche).

357. 497 U.S. 1 (1990).

358. Baumgartner v. United States, 322 U.S. 665, 673-74 (1944) (emphasis added).

359. RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 302 (1988).

360. Spence v. Flynt, 816 P.2d 771, 776 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992).

brand of "humor," *Hustler*'s right to express its opinion is clearly established under the First Amendment.[361]

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361. Young v. American Mini Theatres, 427 U.S. 50, 63, 70 (1976).