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Pinning Opinion to the First Amendment Mat

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I. INTRODUCTION

While shaving with your favorite Norelco razor, you pick up the *New York Times* (*"The Times"*), glance at the sports commentary page, and spy the heading "Victor Kiam is a classic liar."[1]

You are Victor Kiam. You let loose a stream of four- and five-letter words and cry bloody libel. You know that libel is an accusation in writing or printing against someone's character that injures that person's reputation, either generally or with respect to occupation.[2] Will you be able to sue and recover against *The Times* in a defamation action?

Yes, is the most likely answer, based on the United States Supreme Court's recent decision in *Milkovich v. Lorain Journal Co.* (*"Milkovich"*).[3] Prior to this decision, a majority of lower courts had interpreted the Constitution to protect expressions found to be opinion.[4] The *Milkovich* Court, however, held that no separate opinion privilege existed in addition to established constitutional protections for free speech.[5] The Court's holding makes clear that the first amendment of the United States Constitution[6] does not provide to all statements of opinion an automatic shield from defamation actions.[7] Opinion that "reasonably implies false and defamatory facts" may be found libelous.[8]

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1. Victor Kiam, owner of the New England Patriots football team and frequent television promoter of his Remington shaving products company, was accused of calling a female reporter a "classic bitch." Reporters allegedly overheard Kiam make this comment following a Patriots game on September 23, 1990, in response to an incident that had occurred six days earlier. During a post-practice interview on September 17, 1990 in the Patriots' locker room, team members had allegedly sexually harassed Lisa Olson, a sportswriter for the *Boston Herald.* Afterward, Kiam publicly denied that he had called Ms. Olson a "bitch," but took out full-page advertisements in the *New York Times* and *Boston Globe* apologizing to her. Rawlings, *Make Kiam Pay For His Weaseling,* The Sporting News, Oct. 8, 1990, at 40.

2. BLACK'S LAW DICTIONARY 824 (5th ed. 1979).

3. 110 S. Ct. 2695 (1990).

4. *See* cases cited *supra* note 181 (holding expressions of opinion as protected); *infra* text accompanying notes 182-91.

5. 110 S. Ct. at 2707.

6. The first amendment of the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

7. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2705-06 (1990).

8. *See id.* at 2706-07. In cases involving a public official or public figure, courts may allow recovery if the plaintiff proves that the statement was made with actual malice — knowledge that the statement was false or with reckless disregard of whether it was false or not. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). In suits brought by private individuals, defendants may be found liable if the plaintiff makes some showing of fault. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). The nonpublic plaintiff may also recover

In *Milkovich,* the Court concluded that a sports writer's statements in a newspaper column implied that a high school wrestling coach had perjured himself in a judicial proceeding.[9] The Court held that the implication that the coach had committed perjury was sufficiently factual to be susceptible to being proven true or false, and might permit recovery for defamation.[10] Under this holding, Victor Kiam could sue *The Times* for libel if he shows that the newspaper's opinion implies false and defamatory facts capable of being disproven.[11]

This note will argue that the Supreme Court's narrowing of constitutional protection for statements of opinion and the application of its "opinion implicating fact" rule were erroneous. The Court timidly failed to sanction an exemption in defamation law for expressions deemed to be opinion — a privilege that has been approved by a majority of state courts and all federal appellate courts for the last sixteen years.[12] Further, the majority Court misanalyzed the editorial comments in the facts before it.[13] The Court should have found that the statements made by sportswriter J. Theodore Diadiun in the *News-Herald* contained qualifiers that would have cautioned any reasonable reader as to the truth of his implications.[14] Read in context, the statements could not reasonably be interpreted as implying a factual assertion, and were not actionable.[15]

Alternatively, the Court should have sanctioned judicial, if not constitutional, protection for certain types of opinion-based journalism. Because of the uniquely subjective and socially valuable content of reviews,[16] columns,[17] editorials,[18] and cartoons,[19] this author advocates

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punitive damages upon proving actual malice. *Milkovich,* 110 S. Ct. at 2704 (citing *Gertz,* 418 U.S. at 350).

9. 110 S. Ct. at 2707.

10. *Id.*

11. *See id.;* Goodale, *'Milkovich': A Modest Loss for the Press,* N.Y. L.J., June 27, 1990, at 2, col. 3. However, Kiam — a public figure — may recover damages only if the statement was made with knowledge that it was false or with reckless disregard for its falsity or truth. *See supra* note 8.

12. Greenhouse, *High Court Narrows Shield in Libel Law,* N.Y. Times, June 22, 1990, at A17, col. 4. *See also infra* notes 181-91 and accompanying text (citing state and federal decisions that have held opinion to be protected).

13. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2709 (1990) (Brennan, J., dissenting).

14. *Id.* at 2711.

15. *Id.* at 2710-11.

16. R. SMOLLA, LAW OF DEFAMATION § 6.12[8], at 6-50 (1990). *See also* Greer v. Columbus Monthly Publishing Corp., 4 Ohio App. 3d 235, 238, 448 N.E.2d 157, 161 (1982) (finding that reviews of theatre, film, and restaurants constitute the opinion of the reviewer).

17. *See* Ollman v. Evans, 750 F.2d 970, 986-87 (1984); *infra* text accompanying notes 366-77, 398-406.

18. *See id.* at 986; R. SMOLLA, LAW OF DEFAMATION § 6.12[4], at 6-45 to 6-46 (1990); *infra* text accompanying notes 366-77, 398-406.

19. *See* R. SMOLLA, LAW OF DEFAMATION § 6.12[4], at 6-45 (1990); King, *What's So*

that they should receive first amendment shelter or judicial leniency. Strong policy reasons support the adoption of this area of protection for newspapers and their contributing journalists.[20]

Finally, this note will discuss the implications and consequences of the Court's elimination of full constitutional protection for statements found to be opinion. The impact of the *Milkovich* decision on libel litigation and public expression of opinion is likely to be adverse and widespread.[21] Libel law experts predict that free journalistic writing will become chilled[22] or exaggerated,[23] defamation claims will proliferate[24] and proceed fully to costly trials,[25] resulting in many more defeats for the press,[26] and lay defendants may be subject to vengeful and meritless defamation suits.[27]

Funny About Washington?, N.Y. Times, Aug. 5, 1990, § 6 (Magazine), at 32, col. 4; *infra* text accompanying notes 374-77, 398-406.

20. *See* Gross, *Opinions Left Unprotected by Supreme Court Ruling*, Pa. L.J.-Rep., Aug. 6, 1990, at 4, col. 1; *infra* text accompanying notes 389-407 (policy reasons for protecting opinion-journalism).

21. *See infra* text accompanying notes 407-69 (impact of *Milkovich* decision on libel litigation and first amendment freedoms).

22. Sitomer, *Can 'Opinion' Be Libelous?*, Christian Sci. Monitor, Aug. 9, 1990, at 14, col. 2; King, *What's So Funny About Washington?*, N.Y. Times, Aug. 5, 1990, § 6 (Magazine), at 32, col. 5.

23. Greenhouse, *High Court Narrows Shield in Libel Law*, N.Y. Times, June 22, 1990, at A17, col. 6 (quoting Jane E. Kirtley, attorney and executive director of the Reporters Committee for Freedom of the Press).

24. Moore, *Press Clipping*, 22 NAT'L J. 3086 (1990) (stating that over the past twelve months, an embattled news media has "confronted legal challenges to their long-cherished independence," and that many media lawyers "worry that more such suits are in store"; and quoting Bruce Sanford, a Washington, D.C. media lawyer at the Cleveland-based law firm of Baker & Hostetler, as stating that the *Milkovich* decision "has already spawned new libel cases, in large part because its language isn't clear"); Marcus & Pink, *Statements of Opinion Can Be Libelous, Court Rules; Expressions With 'False and Defamatory' Facts Not Automatically Shielded, Justices Find*, Wash. Post, June 22, 1990, at A4, col. 1 (libel law experts warn that the *Milkovich* ruling could encourage more plaintiffs to bring libel suits); Resnick, *Florida Case Tests Libel Ruling*, Nat'l L.J., Sept. 24, 1990, at 27, col. 3 (quoting Bruce Sanford, who predicts further litigation against newspaper editorials); Streitfeld, *Author Sues Over Negative Review; Criticism Was Libelous, D.C. Writer Charges*, Wash. Post, Aug. 24, 1990, at C1, col. 1 (legal experts agree that courts will probably see heavy traffic in libel cases after *Milkovich*).

25. Streitfeld, *Author Sues Over Negative Review; Criticism Was Libelous, D.C. Writer Charges*, Wash. Post, Aug. 24, 1990, at C1, col. 1 (quoting Bruce Sanford: "It's going to spawn at least a decade of expensive and extraordinarily time-consuming litigation for the courts"); Moore, *Press Clipping*, 22 NAT'L J. 3086 (1990). *See* Goodale, *'Milkovich': A Modest Loss for the Press*, N.Y. L.J., June 27, 1990, at 2, col. 4-5; Levine, *Fear and Libel in the Newsroom*, Tex. Law., Aug. 13, 1990, at 22.

26. Moore, *Press Clipping*, 22 NAT'L J. 3086 (1990).

27. *See* Hentoff, *Wrestling With the First Amendment*, Wash. Post, June 30, 1990, at A19.

II. BACKGROUND

A. *Milkovich v. Lorain Journal Co.: Statement of the Facts*

Michael Milkovich,[28] now retired, was the head wrestling coach at Maple Heights High School in Ohio.[29] On February 9, 1974, Milkovich's team was involved in a fracas at a home wrestling match with a team from Mentor High School.[30] Allegedly, a Maple Heights wrestler fouled and apparently injured a Mentor High wrestler during a match.[31] When officials awarded the match to the injured Mentor wrestler by forfeiture, Milkovich became visibly upset and made "hand gestures" to show his disgust.[32] Immediately afterward, two Maple Heights wrestlers left their bench and attacked at least one Mentor wrestler.[33] As a result, wrestlers and fans of both teams left their seats, and a melee began.[34] Milkovich was in the middle of the altercation at all times, either attempting to separate fighting wrestlers or observing the confusion.[35] Four Mentor wrestlers suffered injuries and had to be taken to the hospital for treatment.[36] Photographs of the events showed Milkovich watching the fracas.[37]

To investigate the incident, the Ohio High School Athletic Association (OHSAA) held a hearing, at which Milkovich and H. Don Scott, then superintendent of Maple Heights Public School, testified.[38] After the hearing, OHSAA placed the Maple Heights team on probation for a year and disqualified the team for the 1975 state tournament.[39] OHSAA also censured Milkovich for his actions during the fight.[40]

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28. During Milkovich's tenure as a wrestling coach, he achieved a record of 265 wins and 25 losses. He won ten state titles, finished second in the state of Ohio nine times, and placed third in the state twice. He coached 480 champion wrestlers, and coached the world championship team against the Soviet Union. He received a National Coach of the Year Award, a congressional record citation, a United States Wrestling Federation Award, and was inducted into the Helms Foundation [national] Amateur Wrestling Hall of Fame. Brief of Respondents at 1-3, Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990) (No. 89-645).

29. Maple Heights is a town near Cleveland, Ohio. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 27, col. 1.

30. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2698 (1990); Brief of Respondents at 4, *Milkovich* (No. 89-645).

31. Brief of Respondents at 4, *Milkovich* (No. 89-645).

32. *Id.*

33. *Id.*

34. *Id.*

35. Brief of Respondents at 4, *Milkovich* (No. 89-645).

36. *Id.*

37. *Id.* at 6.

38. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2698 (1990).

39. *Id.*

40. *Id.* The Ohio Athletic Commission's written censure of Milkovich, issued on March 5, 1974, read:

From the reports studied by the State Board they were of the unanimous opinion that

Subsequently, several wrestlers and their parents brought suit against OHSAA in the Court of Common Pleas, Franklin County, Ohio, seeking a restraining order against OHSAA's ruling on the ground that they had been denied due process in the OHSAA proceeding.[41] Both Milkovich and Scott testified at the court hearing.[42] Milkovich testified that he saw no fighting or unruliness on the part of any Maple Heights wrestler.[43] On January 7, 1975, the court reversed OHSAA's probation and ineligibility orders on procedural due process grounds.[44]

The day after this decision, sportswriter J. Theodore Diadiun's column appeared in the Willoughby *News-Herald,* a local newspaper serving Lake County, Ohio.[45] The *News-Herald* is owned by Lorain Journal Company and has a circulation of approximately 27,000.[46] The column bore the heading "Maple beat the law with the 'big lie.' "[47] Beneath this heading was Diadiun's photograph and the words "TD Says."[48] The carryover page headline announced " . . . Diadiun says Maple told a lie."[49] Diadiun had attended the wrestling match, interviewed spectators regarding the incident, and read press accounts of the melee.[50] He had also been present at the OHSAA proceeding.[51] He did not attend the court hearing, but interviewed Dr. Harold Meyer, the Commissioner of OHSAA, who had been present.[52] Based on Dr. Meyer's suspicious reaction to Milkovich's court testimony,[53] and Diadiun's own perception of

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> you were derelict in your responsibility to insure that members of your wrestling team conducted themselves the way high school athletes are expected to. There was a distinct feeling that if you had taken proper precautions your team would have not become involved with the Mentor High wrestlers. Coaches have a great responsibility in crowd control and it all begins with, first of all, controlling yourself and members of your team and if this is done in a proper manner crowd control then becomes a very minor problem.

Brief of Respondents at 5, *Milkovich* (No. 89-645).

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

42. *Id.*

43. Brief of Respondents at 6, *Milkovich* (No. 89-645).

44. *Id.* at 7.

45. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2698 (1990); Brief of Respondents at 7, *Milkovich* (No. 89-645).

46. Brief of Respondents at 3, 7, *Milkovich* (No. 89-645). J. Theodore Diadiun, a sports reporter, had followed Milkovich's coaching career since 1967. *Id.* at 4.

47. 110 S. Ct. at 2698. *See* Scott v. News-Herald, 25 Ohio St. 3d 243 app. at 277, 496 N.E.2d 699 app. at 727 (1986).

48. 110 S. Ct. at 2698. The letters "TD" are J. Theodore Diadiun's initials.

49. *Id.*

50. Brief of Respondents at 4, *Milkovich* (No. 89-645).

51. *Id.* at 5.

52. *Id.* at 6.

53. *Id.* Dr. Meyer reportedly stated, "I can say that some of the stories told to the judge sounded pretty darned unfamiliar. It certainly sounded different from what they told us." Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2699 n.2 (1990). Dr. Meyer also told

the falsity of Milkovich's testimony at the OHSAA proceeding,[54] Diadiun wrote the following excerpted passages in his column:

> . . . [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School . . . .
>
> It is simply this: If you get in a jam, lie your way out.
>
> If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> Anyone who attended the meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
>
> But they got away with it.
>
> Is that the kind of lesson we want our young people learning from their high school administrators and coaches?
>
> I think not.[55]

Diadiun, "I don't know what we're supposed to do in this judicial system. Just tell your side and the hell with the truth." Brief of Respondents at 6, *Milkovich* (No. 89-645).

54. Brief of Respondents at 5, *Milkovich* (No. 89-645).

55. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2698 (1990). The entire text of Diadiun's article reads:

> Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.
>
> It's not final yet — the judge granted Maple only a temporary injunction against the ruling — but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.
>
> But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.
>
> When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.
>
> There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way — many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.
>
> Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.
>
> A lesson which, sadly, in view of the events of the past year, is well they learned early.
>
> It is simply this: If you get in a jam, lie your way out.
>
> If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> The teachers responsible were mainly head wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.
>
> Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor [sic], and resulted in first the Maple Heights team, then many of the partisan crowd

On April 30, 1975, Milkovich brought a defamation action against Lorain Journal Company, the *News-Herald,* and Diadiun.[56] Milkovich alleged that the headline of Diadiun's article and nine passages, including those listed above, accused Milkovich of committing the crime of perjury.[57] Milkovich also complained that the article had damaged him directly in his lifetime occupation of coach and teacher, and thus constituted libel per se.[58]

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attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

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

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

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

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

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

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

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

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

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

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

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

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

But they got away with it.

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

I think not.

Scott v. News-Herald, 25 Ohio St. 3d 243 app. at 277-78, 496 N.E.2d 699 app. at 727-28 (1986).

56. *Milkovich,* 110 S. Ct. at 2699. *See generally* Brief of Respondents, *Milkovich* (No. 89-645).

57. *Milkovich,* 110 S. Ct. at 2699.

58. *Id.* at 2699-700.

B. Procedural History

1. Initial Proceedings and Remand

Milkovich filed his defamation action against the *News-Herald* and its reporter in the Court of Common Pleas, Lake County, Ohio.[59] That court entered a directed verdict against Milkovich on the ground that he had failed to prove actual malice as required by *New York Times Co. v. Sullivan* (*"New York Times"*).[60] The Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded, holding that there was sufficient evidence of actual malice to go to the jury.[61] The Ohio Supreme Court dismissed the newspaper's appeal for lack of a substantial constitutional question, and the United States Supreme Court denied Lorain Journal's petition for writ of certiorari.[62]

On remand, the Court of Common Pleas entered summary judgment for Lorain Journal Company, relying in part on *Gertz v. Robert Welch, Inc.* (*"Gertz"*).[63] The trial court held that the Diadiun article was an opinion protected from libel action by constitutional law,[64] and that Milkovich had failed to produce sufficient evidence to raise a genuine issue of material fact with regard to actual malice.[65] This time, the court of appeals affirmed.[66] The Ohio Supreme Court reversed, holding that the column was not constitutionally protected opinion.[67] Again, the United States Supreme Court denied certiorari.[68]

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59. *Id.* at 2699.

60. *Id.* at 2700 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

61. *Id. See* Milkovich v. Lorain Journal Co., 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979).

62. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2700 (1990) (citing Lorain Journal Co. v. Milkovich, 449 U.S. 966 (1980)). The United States Supreme Court denied *certiorari* without a written opinion, and Justice Brennan dissented on the ground that the first amendment protected Diadiun's article. *Lorain Journal Co.*, 449 U.S. at 966. Justice Brennan wrote: "This holding is clearly contrary to the First Amendment and to the relevant precedents of this Court. I had supposed it was settled that newspapers are privileged to publish their views of the facts, so long as those views are not recklessly or knowingly false. It matters not that such views may conflict with those of a court, for the press is free to differ with judicial determinations. In the libel area, neither a court nor any other institution is the 'recognized arbiter of the truth,' as the court below asserted." *Id.* at 969 (Brennan, J., dissenting).

63. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2700 (1990) (citing *Gertz*, 418 U.S. 323 (1974)).

64. *Id.*

65. Brief of Respondents at 8, *Milkovich* (No. 89-645).

66. *Milkovich*, 110 S. Ct. at 2700.

67. Milkovich v. News Herald, 15 Ohio St. 3d 292, 473 N.E.2d 1191, 1196-97 (1984), *overruled*, Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

68. Lorain Journal Co. v. Milkovich, 474 U.S. 953 (1985). Justice Brennan, joined by Justice Marshall, dissented from the majority's denial of writ of certiorari. Justice Brennan stated that Milkovich was both a public official and a public figure under the Supreme Court's established precedent, and noted that both the trial court and the court of appeals had found

2. Proceedings on Second Remand

On the second remand, the trial court stayed the proceedings pending the Ohio Supreme Court's decision in *Scott v. News-Herald* (*"Scott"*),[69] a related defamation suit involving the same claims, issues, and column as those in the *Milkovich* case.[70] The action was filed by the superintendent of Maple Heights Public School, H. Don Scott, regarding Diadiun's statement: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."[71] Both the trial and appellate courts had ruled against Scott.[72] In a reversal of its earlier position in the *Milkovich* cases, the Ohio Supreme Court upheld a lower court's grant of summary judgment against Scott, concluding that the column at issue was protected as opinion under the first amendment.[73]

The Ohio Court of Appeals considered itself bound by the *Scott* decision and entered summary judgment for the newspaper and Diadiun.[74] Following the outcome in *Scott,* the appellate court ruled that "it has been decided, as a matter of law, that the article in question was constitutionally protected opinion."[75] The Ohio Supreme Court dismissed Milkovich's appeal for want of a substantial constitutional question.[76] The United States Supreme Court granted certiorari to consider the Ohio courts' recognition of a constitutionally required opinion exception to the application of its defamation laws,[77] and reversed.[78] The Supreme Court remanded to the Ohio Court of Appeals, because the Ohio Supreme Court had previously dismissed the appeal.[79]

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insufficient evidence for a jury to conclude that the column was published with actual malice. *Id.* at 953, 957-62; Brief of Respondents at 8, *Milkovich* (No. 89-645).

69. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

70. Scott v. News-Herald, 25 Ohio St. 3d 243, 243-44, 496 N.E.2d 699, 700-01 (1986).

71. *Id.* at 244, 251, 496 N.E.2d at 701, 706. Scott had attended the wrestling match in February and testified with Milkovich at the hearings before OHSAA and the Court of Common Pleas. *Id.* at 243, 496 N.E.2d at 700.

72. *Id.* at 244, 496 N.E.2d at 701.

73. *Id.* at 254, 496 N.E.2d at 709.

74. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2701 (1990).

75. Milkovich v. News Herald, 46 Ohio App. 3d 20, 23, 545 N.E.2d 1320, 1324 (1989).

76. *Milkovich,* 110 S. Ct. at 2701; Milkovich v. News Herald, 43 Ohio St. 3d 707, 540 N.E.2d 724 (1989).

77. 110 S. Ct. at 2701.

78. *Id.*

79. Letter from Jacqueline M. Panza to W. Chelsea Chen (Oct. 22, 1990) (discussing Defendant-Appellees' motions and briefs in Milkovich v. The News-Herald). Jacqueline Panza is a paralegal who works with her husband Richard D. Panza, a partner at Wickens, Herzer & Panza, counsel for Lorain Journal Company.

III. THE COURT'S REASONING

A. History of Defamation Law

1. Requirement of Actual Malice

Writing for the majority in *Milkovich,*[80] Chief Justice William Rehnquist began by tracing the development of English-American defamation law.[81] Beginning in the sixteenth century, common law afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements.[82] The protection of one's reputation and good name was considered so important that plaintiffs needed to allege only an unprivileged publication of false and defamatory matters in order to state a cause of action for defamation.[83] Defamation law always distinguished between the publication of defamatory statements of fact and derogatory expressions of opinion.[84] Both fact and opinion, however, could be found actionable.[85] An expression of opinion — even if incapable of being proven or disproven — could be defamatory if it was sufficiently derogatory so as to harm another's reputation.[86]

Chief Justice Rehnquist then discussed the courts' developing concerns that burdensome defamation laws could stifle valuable public debate.[87] To protect intuitive, evaluative statements that could not be

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80. Justices White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy joined Chief Justice Rehnquist's opinion. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990).

81. Defamation is comprised of the twin torts of libel and slander. Libel is generally in written or printed form, while slander is usually oral. Libel was originally criminal, whereas slander was not, because of the belief that defamation via the written word was more permanent and thus constituted a greater wrong. W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 111, at 771, § 112, at 785-87 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 568 (1977).

In either form, defamation is "an invasion of the interest in reputation and good name." W. PROSSER & W. KEETON, *supra,* at 771. Since it involves the opinion that others in the community hold about the plaintiff, defamation requires that something be communicated to a third person. Publication is the technical term given to this communication. W. PROSSER & W. KEETON, *supra,* at 771, 797. A defamatory communication is one that tends to harm another's reputation by lowering him in the estimation of the community or deterring third persons from associating or dealing with him. RESTATEMENT (SECOND) OF TORTS § 568 (1977). At common law, the individual's interest in the enjoyment and maintenance of a good reputation was considered so socially significant that courts held a defendant who intentionally published defamatory material to a standard of strict liability, without consideration of fault. W. PROSSER & W. KEETON, *supra,* § 113, at 804.

82. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2702 (1990). Early courts sought to allow individuals to vindicate their good name, and to afford them redress for harm caused by such statements.

83. *Id.*

84. W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 113A, at 813 (1984). According to Prosser and Keeton, the distinction is an important one.

85. *Milkovich,* 110 S. Ct. at 2702.

86. *Id.* at 2702-03. *See also* R. SMOLLA, LAW OF DEFAMATION § 6.02[1], at 6-4 (1990).

87. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2703 (1990).

proven true or false, American courts gradually afforded limited protection to opinion through the recognition of a fair comment privilege.[88] This principle aimed to protect valuable interests in reputation, while providing sufficient breathing space for vigorous public discourse and potentially caustic free expression.[89]

In the 1960s, the Supreme Court placed the common law's fair comment and opinion defenses on constitutional footing under the rubric of the first amendment.[90] In *New York Times Co. v. Sullivan,*[91] the Supreme Court held that the first amendment limited the application of state defamation law.[92] Under *New York Times* and *Curtis Publishing Co. v. Butts* (*"Butts"*),[93] which followed three years later, public officials[94] and public figures[95] seeking damages for defamation had to prove actual malice — knowledge that the statement was false or made with reckless disregard of whether it was false — in order to recover.[96]

In *Gertz,*[97] the Supreme Court in dictum[98] seemed to provide absolute first amendment immunity from defamation actions for all opinions.[99] Additionally, the Court held that the first amendment did not permit the imposition of liability, without a showing of fault, on a public medium that published a defamatory statement concerning private individuals and private matters.[100] The decision in *Philadelphia Newspapers,*

88. R. SMOLLA, LAW OF DEFAMATION § 6.02[1], at 6-4 to 6-5 (1990). Over time, the fair comment privilege encompassed opinions about matters of public concern based on true facts, whether the opinion was "reasonable" or not. *See generally* RESTATEMENT (SECOND) OF TORTS § 566 comment a (1977).

89. *See* 110 S. Ct. at 2703; R. SMOLLA, LAW OF DEFAMATION § 6.01, at 6-4 (1990).

90. R. SMOLLA, LAW OF DEFAMATION § 6.02[4][a], at 6-8 to 6-9, § 6.03[1], at 6-11 (1990). In *New York Times,* the Court constitutionalized the fair comment privilege, stating that "[s]ince the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact." *Id.* at 6-11 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 292 n.30 (1964)).

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

92. *New York Times,* 376 U.S. at 283.

93. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

94. *New York Times,* 376 U.S. 254, 279 (1964).

95. Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, J., concurring).

96. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2703 (1990) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

97. *Gertz,* 418 U.S. 323 (1974).

98. The oft-quoted *Gertz* dictum reads: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (footnote omitted).

99. R. SMOLLA, LAW OF DEFAMATION § 6.03[3], at 6-12 (1990).

100. W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 113, at 807 (5th ed. 1984). If a private individual sought to recover punitive damages, however, the plaintiff had to show actual malice. *Gertz,* 418 U.S. at 350.

Inc. v. Hepps (*"Hepps"*)[101] imposed a further constitutional requirement upon plaintiffs to bear the burden of showing falsity, as well as fault, before recovering damages.[102]

2. Protection for Rhetorical Hyperbole

The Chief Justice then reviewed the Supreme Court's recognition of constitutional immunity from liability for opinion involving statements of rhetorical hyperbole under defamation law.[103] In *Greenbelt Cooperative Publishing Association, Inc. v. Bresler* (*"Bresler"*),[104] the Court determined that the printed term "blackmail," describing a real estate developer's negotiating position, was constitutionally protected opinion.[105] The Court reasoned that the published reports were accurate and full, and that even the most careless reader would have recognized that the word was merely rhetorical hyperbole, or a "vigorous epithet" used by those who deemed the developer's negotiating position highly unreasonable.[106] The context in which the words appeared dispelled any impression that the developer had committed a crime.[107] Thus, no liability may be imposed for language that is rhetorical, hyperbolic, and incapable of being construed as actual fact.[108]

For similar reasons, the Court in *Hustler Magazine, Inc. v. Falwell* (*"Falwell"*)[109] concluded that the first amendment precluded the plaintiff from recovering for statements in a magazine parody, because the statements could not reasonably be interpreted as stating actual facts about him.[110] The parody portrayed Reverend Jerry Falwell as having engaged in a drunken incestuous encounter with his mother in an outhouse.[111]

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

102. *Id.* at 776.

103. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2704-05 (1990). *See also* W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 111, at 776 (5th ed. 1984).

104. Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970). Bresler, the plaintiff real estate developer, had engaged in negotiations with a local city council for zoning variances on land he owned. Simultaneously, he was negotiating with the city in its attempt to purchase other land from him. The concurrent negotiations gave both sides bargaining power. A local newspaper accurately reported a public debate at a city council meeting, where some people had denounced Bresler's negotiating demands as "blackmail." *Id.* at 6-7.

105. *Bresler,* 398 U.S. at 13-14.

106. *Id.* at 14.

107. R. SMOLLA, LAW OF DEFAMATION § 6.03[2], at 6-12 (1990).

108. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2704-05 (1990); R. SMOLLA, LAW OF DEFAMATION § 6.03[2], at 6-12 (1990).

109. 485 U.S. 46 (1988). In *Falwell,* Jerry Falwell, a nationally known minister and commentator on politics and public affairs, was parodied in an advertisement published in *Hustler,* a nationally circulated magazine. *Id.* at 47-48.

110. *Falwell,* 485 U.S. at 50.

111. *Id.* at 48. Specifically, the inside front cover of the November 1983 issue of *Hustler Magazine* contained a parody of an advertisement for Campari Liqueur, entitled "Jerry

Similarly, the Court in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin* (*"Letter Carriers"*)[112] held that the word "scab," used in a loose and figurative sense to describe non-union employees, represented lusty and imaginative expression, and could not sustain an action for defamation.[113] Reaffirming the dictum in *Gertz,* the Court determined that such words were protected by the first amendment because no reader would have understood the statement to be charging the employees with a criminal offense.[114] For similar reasons, epithets such as "stupid son of a bitch,"[115] "bleached blond bastard,"[116] "fucker,"[117] and "nothing but a Lee Harvey Oswald and a Jack Ruby"[118] are not actionable, no matter how offensive or vulgar.[119]

3. Standard of Review

Finally, the *Milkovich* Court turned to the standard of appellate review required for libel actions.[120] In *Bose Corp. v. Consumers Union of United States, Inc.* (*"Bose"*),[121] the Court referred to the *Gertz* dictum with approval, and held that appellate courts were required to make an independent examination of the record.[122] The Court concluded that this requirement would prevent abrogation of free expression.[123]

Falwell talks about his first time." It was modeled after actual Campari ads that interviewed celebrities about their "first times" — sampling the liqueur. In an alleged "interview," interpreting "first time" in a sexual sense, Falwell states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The parody portrayed Falwell and his mother as drunk and immoral, and suggested that Falwell was a hypocrite who preached only when he was drunk. In small print at the bottom of the page, the ad contained the disclaimer, "ad parody — not to be taken seriously." *Id.*

112. 418 U.S. 264 (1974).

113. *Id.* at 285-86.

114. *Id.* at 284-86. *See also* R. SMOLLA, LAW OF DEFAMATION § 6.03[4], at 6-14 to 6-15 (1990). In *Letter Carriers,* a union newsletter published the names of plaintiffs and other employees under the heading "List of Scabs," because they had not joined the union. Directly above the list appeared a particularly derogatory passage, attributed to Jack London, defining the term "scab." The following are excerpts from this passage: "After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab. A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles .... A SCAB is a traitor to his God, his country, his family and his class." *Letter Carriers,* 418 U.S. at 267-68.

115. Moriarty v. Lippe, 162 Conn. 371, 294 A.2d 326, 333 (1972).

116. Notarmuzzi v. Shevack, 108 N.Y.S.2d 172, 174 (1951).

117. Spence v. Washington Post Co., 8 Med. L. Rep. (BNA) 2296 (D.C. Sup. Ct. 1982).

118. Stanley v. Taylor, 4 Ill. App. 3d 98, 278 N.E.2d 824, *cert. denied,* 409 U.S. 983 (1972).

119. R. SMOLLA, LAW OF DEFAMATION § 6.12.[10], at 6-52 (1990).

120. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2705 (1990).

121. 466 U.S. 485 (1984).

122. *Id.* at 499.

123. *Id.*

B. *The Majority's Reasoning*

1. No Wholesale Protection for Opinion

In explaining the Court's refusal to recognize first amendment protection for defamatory opinion as opposed to fact, Chief Justice Rehnquist declared that the *Gertz* dictum was not intended to create a wholesale defamation exemption for all expressions of opinion.[124] In dictum, the *Gertz* Court wrote: "Under the First Amendment there is no such thing as a false idea."[125] According to Chief Justice Rehnquist, such an interpretation ignored the fact that statements of opinion often imply assertions of objective fact capable of being proven false.[126] The *Milkovich* Court held that simply couching statements in terms of opinion did not dispel implications of a false assertion of fact.[127]

2. Balancing Reputation Against Free Speech

The Court's holding resulted from its balancing of the first amendment's guarantee of "free and uninhibited discussion" of public issues, and society's strong interest in preventing and redressing attacks on reputation.[128] In *New York Times,*[129] the Court had held that erroneous statements were inevitable in free debate, and that they had to be protected if freedoms of expression were to have the "breathing space" they need to survive.[130] The *Milkovich* Court concluded, however, that the right to protection of one's reputation from unjustified invasion and wrongful injury reflected the basic concept of every person's essential dignity, and outweighed the interest in enlightened debate.[131] Furthermore, the Court found that the requisite breathing space was adequately secured by existing constitutional doctrine without the creation of an "artificial dichotomy between 'opinion' and fact."[132]

The Court then cited cases that, in its view, provided sufficient constitutional safeguards for free speech and press.[133] For instance, *Hepps*[134] required that statements on matters of public concern be prova-

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124. *Id.* at 2705.

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

126. 110 S. Ct. at 2705.

127. *Id.* at 2705-06.

128. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990) (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966)).

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

130. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

131. 110 S. Ct. at 2708 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92-93 (1966) (Stewart, J., concurring)).

132. *Id.* at 2706.

133. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706-07 (1990).

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

ble as false before media defendants can be liable under state defamation law.[135] The *Bresler-Falwell-Letter Carriers* line of cases provided protection for statements of rhetorical hyperbole that no reader could reasonably interpret as stating facts about an individual.[136] The Court reasoned that the culpability requirements of the *New York Times, Butts,* and *Gertz* cases further ensured that debate on public issues was "uninhibited, robust, and wide-open."[137] The difficulty that plaintiffs had in showing actual malice served as a barrier to recovery, and effectively limited the number of successful defamation actions.[138]

Thus emerged the Court's new rule that, where a statement of opinion on a matter of public concern reasonably implies false and defamatory facts about an individual, and the implication is sufficiently factual to be susceptible to being proven true or false, the individual may recover against the author or publisher of the opinion under defamation law.[139]

3. Application of the Rule

Applying this standard to the facts of the *Milkovich* case, Chief Justice Rehnquist addressed the question of whether a reasonable factfinder could conclude that Diadiun's statements imply an assertion that Milkovich perjured himself in a judicial proceeding.[140] When couched in this way, the answer was quite clear.[141] The Court simply held that the statements were not rhetorical hyperbole, which would negate a reader's impression that Diadiun seriously believed Milkovich had committed perjury.[142] Second, the majority found that the general tenor of the article did not dispel the impression that Diadiun was serious in his allegation.[143]

Next, the Court briefly turned to whether Diadiun's implication that

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135. 110 S. Ct. at 2706.

136. *Id.*

137. *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

138. Note, *The Art of Insinuation: Defamation by Implication,* 58 FORDHAM L. REV. 677 (1990); Goodale, *'Milkovich': A Modest Loss for the Press,* N.Y. L.J., June 27, 1990, at 2, col. 4. According to one commentator, however, the actual malice requirement could become an all-too-easy barrier for a public figure plaintiff to overcome, in light of the intense scrutiny of press newsgathering activities that the Supreme Court has recently engaged in. *See* Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Reporter, Aug. 6, 1990, at 8, col. 5 (referring to Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989), in which the Supreme Court sustained a $200,000 jury award against an Ohio newspaper for failing to include relevant information in a political story).

139. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706-07 (1990).

140. *Id.* at 2707.

141. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 27, col. 4.

142. 110 S. Ct. at 2707.

143. *Id.*

Milkovich had committed perjury was verifiable.[144] The majority found that the connotation that Milkovich had committed perjury was sufficiently factual and thus capable of being proven true or false.[145] The majority noted that a comparison of Milkovich's testimony before the OHSAA and court hearings would determine if Milkovich had lied.[146] The comparison could utilize objective evidence in the form of transcripts and witnesses present at the hearing.[147] Since Diadiun's statements could be verified, the Court concluded they were not subjective assertions.[148] Instead, they were articulations of an objectively verifiable event,[149] and once proven false, permitted the imposition of liability.[150]

Thus, the Court focused more closely on the facts that a reader might infer from a challenged statement, and the precise words used, rather than its overall context.[151] Instead of distinguishing between fact and opinion, the majority shifted the primary inquiry to whether a reader could infer a factual allegation, capable of being proven false, from the opinion.[152] This query easily transforms a formerly protected opinion into a potentially actionable statement.[153] Further, the majority's approach widens the perimeters of an unprotected category, instead of confining them within narrower limits to ensure that protected expression will not be inhibited.[154]

IV. ANALYSIS

A. Protected Opinion

Courts and libel experts have defined opinion in many ways. One scholar describes opinion as "an inference from facts [that] can be more or less accurate but not true or false."[155] Thus, expressions of opinion are distinguishable from communications of fact, where truth and falsity

144. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (quoting Scott v. News-Herald, 25 Ohio St. 3d 243, 252, 496 N.E.2d 699, 707).

149. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990).

150. *See* 110 S. Ct. at 2707.

151. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 27, col. 1.

152. *See* Warren, Heinke & Sager, *Not as Bad as It Looks,* Nat'l L.J., July 30, 1990, at 13, col. 2.

153. *See generally* Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 28, col. 1.

154. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2709 (1990) (Brennan, J., dissenting) (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505 (1984)).

155. Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas,"* 43 ARK. L. REV. 57, 64-65 (1990).

matter greatly.[156] Truthful statements of fact are never actionable under defamation law,[157] but false statements of fact have negligible social value and receive no constitutional protection.[158] By contrast, the actionability of opinions cannot be determined by reference to their falsity or truth.[159] Instead, as this note suggests, courts should examine the broader social context of an opinion in order to assess its societal and constitutional value.[160]

Over the years, the common law has recognized and protected from defamation liability three kinds of opinion.[161] The first is quasi-opinion, which comprises statements of rhetorical hyperbole, ambiguity, and satire.[162] These include comments such as those at issue in the *Bresler-Falwell-Letter Carriers* line of cases.[163]

The second type of protected opinion is a conclusion drawn in the communicator's mind from factual information, and often shielded by the defense of factual truth.[164] These comprise both conclusions "based more upon personal taste than a measurable assertion based upon specific facts,"[165] and statements "not of purely personal taste . . . relat[ing] to an objective set of standards that can be supported by specific facts."[166] Examples of personal conclusions are "statements . . . [regarding] [w]hat ought to be done, the propriety or aesthetic or moral worth of an act or object."[167] Examples of objective opinions are communications indicating that a restaurant's food is unwholesome, or that a historical writing is

156. *Id.* at 64.

157. *See id.* at 64 n.20.

158. *See id.* at 64.

159. *See* Jamerson v. Anderson Newspapers, Inc., 469 N.E.2d 1243, 1252 (Ind. Ct. App. 1984) (citing Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976)); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 648 P.2d 321, 330 (N.M. Ct. App. 1982).

The *Milkovich* rule conflicts with this theory because it bases defamation liability on the implication of false fact. Chief Justice Rehnquist held that statements of opinion that imply assertions of objective fact, capable of being proven *false,* are actionable. *See supra* text accompanying notes 126-27, 139.

160. *See infra* text accompanying notes 362-88 (discussing fourth *Ollman* factor as test for protected opinion).

161. Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas,"* 43 ARK. L. REV. 57, 70-71 (1990).

162. *Id.* at 72.

163. *See supra* text accompanying notes 103-19 (*Bresler-Falwell-Letter Carriers* line of cases).

164. Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas,"* 43 ARK. L. REV. 57, 86-87 (1990).

165. *Id.* at 90.

166. *Id.*

167. Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 648 P.2d 321, 330 (N.M. Ct. App. 1982) (quoting R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS § IV.2, at 155-56 (1980)).

inadequately supported by research.[168]

A third form of opinion has received protection from defamation liability under the common law privilege of fair comment.[169] Recognizing the overriding social value of discussion of important issues, courts have protected opinions derived from statements of fact.[170] These include opinions made in political debates and those that criticize government officials.[171] Due to inherent confusions and limitations in these analyses, one expert has concluded that common law analysis is inadequate by itself to protect communications of high societal value.[172]

Recently, lower courts had sheltered newspapers from defamation liability by protecting opinion as distinguished from fact.[173] If a published statement were found to be solely an expression of the writer's opinion, rather than an affirmation of verifiable fact, then the statement was protected by the first amendment's guarantee of free speech and press.[174] The *Milkovich* decision eliminated this absolute privilege for all opinion, and adopted an approach not based on a fact-opinion distinction.[175] Under the new standard, a published statement is actionable, even if expressed as an opinion, if it is found to reasonably imply false and defamatory facts about its subject.[176]

B. The Court's Cowardly Opinion

The majority and dissenting opinions in *Milkovich* agreed that no separate or additional constitutional protection existed for an entire category of statements characterized as opinion rather than fact.[177] In the dissent's words, the Court "dispels any misimpression that there is a so-called opinion privilege *wholly in addition* to the protections" already guaranteed by the first amendment.[178] The Court determined that protection for statements of pure opinion is dictated by "*existing* [f]irst

168. Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas,"* 43 ARK. L. REV. 57, 90 (1990).

169. *Id.* at 91.

170. *Id.* at 91-92.

171. *Id.* at 91.

172. *Id.* at 94.

173. Relying principally on *Gertz,* 418 U.S. 323 (1974), the courts in every federal circuit and at least 36 states have held expressions of opinion to be protected under the first amendment. Brief of Respondents at 21-22, *Milkovich* (No. 89-645).

174. *Id.* at 21-22 nn.8-9.

175. *See* Warren, Heinke & Sager, *Not as Bad as It Looks,* Nat'l L.J., July 30, 1990, at 13, col. 2 (stating that the Supreme Court's focus in determining the actionability of a published opinion is on an element of the plaintiff's prima facie case — whether there is a false statement of fact — rather than on the more metaphysical concept of whether a statement is an opinion).

176. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706-07 (1990).

177. 110 S. Ct. at 2707-08; *id.* at 2708 (Brennan, J., dissenting).

178. *Id.* at 2708 (Brennan, J., dissenting) (original emphasis).

[a]mendment doctrine."[179]

The Court's holding in *Milkovich* conflicts with numerous lower court decisions.[180] Over the last sixteen years, courts in every federal circuit and at least thirty-six states have held expressions of opinion to be protected under the first amendment.[181] For example, the Second Cir-

179. *Id.* (original emphasis).

180. Levine, *Fear and Libel in the Newsroom,* Tex. Law., Aug. 13, 1990, at 22 (stating that editorial writers have "decried the apparent abandonment of fifteen years of precedent").

181. Brief of Respondents at 21-22, *Milkovich* (No. 89-645); Comment, *Statements of Fact, Statements of Opinion, and the First Amendment,* 74 CALIF. L. REV. 1001, 1009 n.52 (1986). *See, e.g.,* Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, (1st Cir. 1988) (concluding that the headline "Little Amazons Attack Boys" to describe eight- to twelve-year-old girls was constitutionally protected opinion, and could not possibly be false), *cert. denied,* 488 U.S. 82 (1988); Church of Scientology of California v. Cazares, 638 F.2d 1272 (5th Cir. 1981) (holding that statements describing a church as a "rip-off, money motivated operation" and its religious faith as "anti-Christ and Satanic," when read in their proper context, constituted mere opinions and were therefore non-actionable; Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.), *cert. denied,* 479 U.S. 883 (1986) (finding that any implication in a magazine article that revenge motivated plaintiff governor's prosecution of a felon was opinion and thus absolutely protected under the first amendment); Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983) (concluding that the negative inference of "shadier practitioners" to describe a lawyer was protected as an expression of opinion based on true statements of fact); Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), *cert. denied,* 471 U.S. 1127 (1985) (*see infra* note 196); Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 448 A.2d 1317 (1982) (holding that a reporter's descriptions of a developer's poor construction work as a "sore spot" and "ghost town" were pure expressions of opinion, since a reasonable person could only view them as such, and therefore they were unqualifiedly protected by the first amendment under *Gertz*); Caron v. Bangor Publishing Co., 470 A.2d 782, 784 (Me. 1984) (finding that an editorial on the subject of "fat cops," stating that plaintiff policeman "carries too much mass to be . . . an effective cop" would not reasonably be construed to imply undisclosed defamatory facts, and was thus a constitutionally protected expression of opinion based on disclosed nondefamatory facts), *cert. denied,* 467 U.S. 1241 (1984); Henry v. Halliburton, 690 S.W.2d 775 (Mo. 1985) (*en banc*) (concluding that, when considered under the totality of the circumstances, the words "fraud" and "twister" to describe insurance agents were expressions of opinion, and not actionable). *See also* Avins v. White, 627 F.2d 637, 642 (3d Cir.), *cert. denied,* 449 U.S. 982 (1980); Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979); Biggs v. Village of Dupo, 892 F.2d 1298 (7th Cir. 1990); Koch v. Goldway, 817 F.2d 507, 508 (9th Cir. 1987); Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983); Keller v. Miami Herald Publishing Co., 778 F.2d 711 (11th Cir. 1985); Moffat v. Brown, 751 P.2d 939, 944 (Alaska 1988); MacConnell v. Mitten, 131 Ariz. 22, 638 P.2d 689 (1981); Bland v. Verser, 299 Ark. 490, 774 S.W.2d 124, 125-26 (1989); Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 552 P.2d 425, 427, 131 Cal. Rptr. 641, 643 (1976); Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1358 (Colo. 1983); Bucher v. Roberts, 198 Colo. 1, 3-5, 595 P.2d 239, 241-42 (1979); Riley v. Moyed, 529 A.2d 248 (Del. 1987); Scandinavian World Cruises (Bahamas) Ltd. v. Ergle, 525 So. 2d 1012 (Fla. Dist. Ct. App. 1988); Lampkin-Asam v. Miami Daily News, Inc., 408 So. 2d 666, 667 (Fla. Dist. Ct. App. 1981), *review denied,* 417 So. 2d 329 (Fla.), *dismissing appeal from, cert. denied,* 459 U.S. 806 (1982); Catalano v. Pechous, 83 Ill. 2d 146, 159, 419 N.E.2d 350, 356-57 (1980), *cert. denied,* 451 U.S. 911 (1981); Mittelman v. Witous, 135 Ill. 2d 220, 552 N.E.2d 973 (Ill. 1988); Jamerson v. Anderson Newspapers, Inc., 469 N.E.2d 1243, 1252 (Ind. App. 1984); Jones v. Palmer Communications, Inc., 440 N.W.2d 884 (Iowa 1989); Yancey v. Hamilton, 786 S.W.2d 854 (Ky. 1989); Mashburn v. Collin, 355 So. 2d 879, 884-85 (La. 1977); Bussie v. Lowenthal, 535 So. 2d 378, 380-81 (La.

cuit held in *Mr. Chow of New York v. Ste. Jour Azur, S.A.*[182] that expressions of opinion clearly were constitutionally protected.[183] Similarly, the Ohio Supreme Court in *Scott v. News-Herald*[184] declared that expressions of opinion are generally granted absolute immunity from defamation liability under the first amendment.[185] In *Steinhilber v. Alphonse,*[186] the New York Court of Appeals held that it was a settled rule that expressions of opinion, "false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions."[187]

For similar reasons, the California Supreme Court in *Baker v. Los Angeles Herald Examiner*[188] protected statements published in a review of a television show as expressions of opinion rather than fact.[189] In *Carr v. Warden,*[190] the California Court of Appeal found that an allegedly defamatory statement made by a city councilmember was an expression of opinion rather than fact, and thus non-actionable.[191]

1988); True v. Ladner, 513 A.2d 257, 261-62 (Me. 1986); Hearst Corp. v. Hughes, 297 Md. 112, 466 A.2d 486 (1983); Aldoupolis v. Globe Newspaper Co., 398 Mass. 731, 500 N.E.2d 794, 796 (1986); Myers v. Boston Magazine, 380 Mass. 336, 403 N.E.2d 376, 377-78 (1980); Gernander v. Winona State Univ., 428 N.W.2d 473, 475 (Minn. App. 1988); Johnson v. Delta-Democrat Publishing Co., 531 So. 2d 811 (Miss. 1988); Frigon v. Morrison-Maierle, Inc., 233 Mont. 113, 760 P.2d 57 (1988); Turner v. Welliver, 226 Neb. 275, 411 N.W.2d 298, 309-10 (1987); Nevada Indep. Broadcasting Corp. v. Allen, 99 Nev. 404, 664 P.2d 337 (1983); Nash v. Keene Publishing Corp., 127 N.H. 214, 498 A.2d 348, 351 (1985); Pease v. Telegraph Publishing Co., 121 N.H. 62, 65, 426 A.2d 463, 465-66 (1981); Kotlikoff v. Community News, 89 N.J. 62, 65, 444 A.2d 1086, 1087, 1089-90 (1982); Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 516 A.2d 220, 231 (1986); Saenz v. Morris, 106 N.M. 530, 746 P.2d 159 (1987); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 291, 648 P.2d 321, 330 (1981), *cert. quashed,* 98 N.M. 336, 648 P.2d 794 (1982); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 380, 366 N.E.2d 1299, 1306, 397 N.Y.S.2d 943, 950 (1977), *cert. denied,* 434 U.S. 969 (1977); Steinhilber v. Alphonse, 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986); Renwick v. News and Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593, 604 (1983), *rev'd on other grounds,* 310 N.C. 312, 312 S.E.2d 405 (1984), *cert. denied,* 469 U.S. 858 (1984); Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587, 593 (Okla. 1982), *cert. denied,* 459 U.S. 923 (1982), *reh'g denied,* 459 U.S. 1059 (1982); Baker v. Lafayette College, 516 Pa. 291, 532 A.2d 399 (1987); Healey v. New England Newspapers, Inc., 520 A.2d 147, 150-51 (R.I. 1987); Carroll v. Times Printing Co., 14 Media L. Rep. (BNA) 1210 (Tenn. 1987); Leader v. WSM, Inc., 10 Media L. Rep. (BNA) 1343 (Tenn. Cir. Ct. 1984); Casso v. Brand, 776 S.W.2d 551 (Tex. 1989); Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 75 (W. Va. 1981).

182. 759 F.2d 219 (2d Cir. 1985).

183. *Id.*

184. 496 N.E.2d 699 (Ohio 1986).

185. *Id.* at 705.

186. 68 N.Y.2d 283, 501 N.E.2d 550 (N.Y. 1986).

187. *Steinhilber,* 68 N.Y.2d at 286, 501 N.E.2d at 550 (quoting Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, 380, 397 N.Y.S.2d 943, 366 N.E.2d 1299 (1977), *cert. denied,* 434 U.S. 969 (1977)).

188. 42 Cal. 3d 254, 228 Cal. Rptr. 206, 721 P.2d 87 (1986), *cert. denied,* 479 U.S. 1032 (1987).

189. *Id.* at 259, 269, 228 Cal. Rptr. at 208, 215, 720 P.2d 89, 96-97.

190. 159 Cal. App. 3d 1166, 206 Cal. Rptr. 162 (1984).

191. *Id.* at 1169, 206 Cal. Rptr. at 163.

In denying the existence of a separate constitutional exemption from libel actions for opinion, the *Milkovich* Court cowered behind existing constitutional doctrine, instead of forging a needed area of constitutional protection for newspapers and their writers.[192] Choosing to disagree with the vast majority of courts in the United States, the *Milkovich* Court shied away from construing the Constitution to provide broader first amendment protection to newspapers beleaguered by libel and defamation lawsuits.[193] In explanation, the Court gave weak policy reasons for its refusal to recognize this additional shield. It based its holding on four words: "mistaken reliance on . . . dictum."[194]

According to the Court, the opinion exception to defamation law was the result of mistaken reliance by lower courts on dictum of the *Gertz* case.[195] Writing for the *Gertz* majority, Justice Powell stated:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.[196]

The *Milkovich* Court equated the word "opinion" in the second sentence with the term "idea" in the first sentence, claiming that the language merely reiterates Justice Holmes' classic "marketplace of ideas" concept.[197] The Court asserted that an interpretation of the *Gertz* dictum that created a wholesale exemption in defamation law for anything labeled opinion would contradict the tenor and context of the passage, and also ignore the fact that expressions of opinion may often imply an asser-

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192. Concededly, the facts of the *Milkovich* case — involving an accusation that the plaintiff had lied under oath — were particularly weak ones upon which to raise an opinion defense. Levine, *Fear and Libel in the Newsroom,* Tex. Law., Aug. 13, 1990, at 22.

193. According to libel experts, the United States is experiencing a great proliferation of highly publicized libel actions brought against media defendants — including newspapers — by well-known figures seeking enormous awards of money. Elected officials, public interest advocates, entertainers, corporate presidents, and private individuals have all contributed to the recent increase in the number of libel suits. In the words of a prominent media lawyer, "[w]hat we're seeing is an entirely new era in libel cases." Defendants range from national news conglomerates to local news outlets to the more sensational tabloids. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. PA. L. REV. 1 & n.2, 3, 5 n.26 (1983). *See infra* note 409 (list of recent libel claims).

194. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706 (1990). *See* Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 27, col. 1.

195. 110 S. Ct. at 2705-06.

196. *Gertz,* 418 U.S. at 339-40.

197. 110 S. Ct. at 2705 (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Discussing the "marketplace of ideas" concept in his dissent, Holmes opined that "the ultimate good desired is better reached by free trade in ideas . . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams,* 250 U.S. at 630.

tion of objective fact capable of being proven false.[198]

Reading the *Gertz* passage to equate the words opinion and idea in the second sentence, however, could support an interpretation that the Court meant to protect all expressions of opinion, no matter how pernicious.[199] According to one scholar, "opinion can serve as a synonym [for ideas]. Indeed Justice Powell used the word 'opinion' interchangeably with the word 'idea.' "[200] One dictionary defines the word "idea" as a "formulated thought or *opinion.*"[201] If the two terms are considered synonomous, then the first sentence can be interpreted to mean that the Constitution recognizes no opinion as false or actionable. Taken together, the first and second sentences could imply that "false" opinions are not actionable because they will be corrected by competing opinions in the "marketplace" of ideas.[202] Thus, all opinions would enjoy an absolute constitutional privilege.

This broad interpretation is limited, however, by contextual considerations.[203] In context, the *Gertz* dictum asserts that ideas are considered of such value that they may need constitutional protection.[204] Where opinions constitute subjectively held views of these valued ideas, they would receive first amendment protection under *Gertz* if inadequately protected.[205] Not all communications are of equal value, however; thus, some are not entitled to the same protection as others under the Constitution.[206] Historical evidence fails to indicate that the Constitution was intended to protect opinions without reference to their social importance.[207] This note advocates that expressions of opinion, when socially valuable in context, require constitutional protection.

This proposed contextual approach derives partly from the *Gertz* dictum. Justice Powell based his proposition in *Gertz* on a concept that Thomas Jefferson enunciated in his first inaugural speech: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety

198. 110 S. Ct. at 2705.

199. *See Gertz,* 418 U.S. at 339-40 (dictum); Ollman v. Evans, 750 F.2d 970, 975-76 (1984).

200. Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas,"* 43 ARK. L. REV. 57, 65 (1990). In another portion of his address, Jefferson spoke of a "contest of *opinion*" in referring to the conflict between the philosophical *ideas* of the Federalists and the Republicans during the 1800 presidential election. *Id.* at 65-66 (emphasis added).

201. WEBSTER'S NEW COLLEGIATE DICTIONARY 597 (9th ed. 1987) (emphasis added).

202. *Ollman,* 750 F.2d 970 at 975-76.

203. Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas,"* 43 ARK. L. REV. 57, 68-69 (1990).

204. *Id.* at 69.

205. *Id.*

206. *Id.* at 64.

207. *Id.* at 68-69.

with which *error of opinion* may be tolerated where reason is left free to combat it."[208] Jefferson wished to preserve the battle of important ideas, or opinion in a non-trivial context.[209]

Although Powell's proposition was dictum[210] in *Gertz,* the *Milkovich* Court should have elevated to constitutional principle the distinction between false fact and socially valuable opinion, and should have held that the first amendment protected those expressions of opinion. If it had done so, the Court would have constitutionalized a systematic approach adopted by a large majority of lower courts that had brought order to defamation law.[211] The *Milkovich* holding may restore disorder to an area of law that had become orderly and predictable.[212]

Furthermore, Chief Justice Rehnquist had stated in his *Falwell* opinion[213] that a core first amendment value is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.[214] Justice Rehnquist had also noted that the freedom to speak one's mind is not only an aspect of individual liberty — and thus a good in itself — but also is essential to the common quest for truth and the vitality of society as a whole.[215] Therefore, Justice Rehnquist's declared interest in ensuring the free exchange of ideas and opinions weakens the force of the majority's holding in *Milkovich.*

C. The Majority Court's Erroneous Conclusion

1. The Four-Part Test in *Ollman*

Leaving aside the Court's disappointing failure to sanction constitutional protection for statements deemed to be opinion, the Court errone-

208. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339, 340 & n.8 (emphasis added).

209. Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas,"* 43 ARK. L. REV. 57, 66 (1990).

210. Goodale, *'Milkovich': A Modest Loss for the Press,* N.Y. L.J., June 27, 1990, at 2, col. 4; Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 27, col. 1.

211. Greenhouse, *High Court Narrows Shield in Libel Law,* N.Y. Times, June 22, 1990, at A17, col. 6 (comments of Bruce W. Sanford, a media lawyer representing the Scripps-Howard newspaper chain and the Society of Professional Journalists).

212. *Id. See also* Note, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation,* 63 S. CAL. L. REV. 435, 436 (1990) (stating that, following the decision in *New York Times,* the Supreme Court paved a tortuous course of decisions in attempting to apply first amendment principles to the law of defamation, and created a complex set of vaguely defined categories, which commentators have fiercely criticized over the years); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. PA. L. REV. 1, 14 (1983) (referring to the confusion in the law of defamation).

213. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

214. *Id.* at 50.

215. *Id.* at 50-51 (quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 503-04 (1984)).

ously analyzed the facts in the *Milkovich* case. The majority should have concluded, as the dissent did,[216] that no reasonable reader could have found that Diadiun's opinions implicated false and defamatory assertions of fact about Milkovich.[217] Under the majority's rule, Diadiun's statements implying that Milkovich had lied were patently conjecture.[218] As such, they necessarily fell into the *Bresler-Falwell-Letter Carriers*[219] category of rhetorical hyperbole, and were entitled to full constitutional protection.[220]

In its analysis, the majority declined to embrace *Ollman v. Evans,*[221] an influential[222] District of Columbia Circuit court case that the *Milkovich* dissent cited with approval.[223] The *Ollman* court determined the actionability of a statement based on its context and a resulting distinction between fact and opinion.[224] For more than a decade, a majority of lower courts have employed the indicia set forth in *Ollman* to distinguish between statements of defamatory fact and constitutionally protected opinion as a matter of law.[225]

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216. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2708 (1990). Justice William Brennan dissented, joined by Justice Thurgood Marshall. *Id.*

217. 110 S. Ct. at 2709 (Brennan, J., dissenting).

218. *Id.* at 2710.

219. *See supra* text accompanying notes 103-19 (regarding *Bresler-Falwell-Letter Carriers* line of cases).

220. 110 S. Ct. at 2709 (Brennan, J., dissenting). *See* Goodale, *'Milkovich': A Modest Loss for the Press,* N.Y. L.J., June 27, 1990, at 1, col. 2 to 2, col. 3.

221. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1127 (1985). In *Ollman,* the plaintiff, a professor of political science, was characterized by statements in a syndicated newspaper column as an "outspoken proponent of political Marxism" with "no status within the profession," and a "pure and simple activist." *Id.* at 972-73. In a 6-5 vote that included seven separate opinions, the court held that all of the allegedly defamatory statements made by the columnists were absolutely privileged as opinion. *Id.* at 971.

222. *See* R. SMOLLA, LAW OF DEFAMATION § 6.08[3][a], at 6-28 (1990).

223. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2709 (1990) (Brennan, J., dissenting). Under the *Ollman* test, if a statement was found to be opinion, it received absolute constitutional protection. *Ollman,* 750 F.2d at 971.

Despite the differing views of context in the majority and dissenting opinions of *Milkovich,* the dissent characterized the majority's overall approach as consistent with the *Ollman* test. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 28, col. 1. In addition to its inquiry of how readers would have reasonably interpreted Diadiun's statements, the majority addressed only the first two *Ollman* factors — the statement's actual meaning and its verifiability. *See Milkovich,* 110 S. Ct. at 2707; Immuno A.G. v. Moor-Jankowski, 18 Media L. Rep. (BNA) 1625 (1991); *supra* text accompanying notes 140-50.

224. *Ollman,* 750 F.2d at 978-79. On the other hand, the *Milkovich* Court indicated, but did not specifically hold, that the fact-opinion distinction is a question of fact, rather than law. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 27, col. 1.

225. Milkovich v. Lorain Journal, 110 S. Ct. 2695, 2709 (1990) (Brennan, J., dissenting) (citing Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984); Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987); Janklow v. Newsweek, Inc., 788 F.2d

In *Ollman,* the Court of Appeals for the District of Columbia, sitting *en banc,* elaborated on a "totality of circumstances" approach,[226] under which an allegedly defamatory statement is examined in its totality in the context in which it was published.[227] The court identified four factors to be used in determining whether a statement is an expression of opinion, and thus non-actionable: (1) common usage or meaning of the specific language used; (2) verifiability; (3) immediate context in which the statement occurs, including content and cautionary language; and (4) the broader social context or setting in which the statement appears.[228] The fourth factor — broader social context — is arguably the most important of the four.[229] As will be discussed later, it favors lenient judicial treatment of statements of opinion found in certain contexts.[230]

The first factor analyzes the common usage or meaning of the alleg-

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1300 (8th Cir. 1986), *cert. denied,* 479 U.S. 883 (1986). *See also* cases cited *supra* note 181 (decisions holding opinion constitutionally protected); *supra* text accompanying notes 182-91.

226. Judge Starr's opinion for the court, and the concurring opinions of Judges Bork and MacKinnon, all emphasized flexible totality of circumstances approaches. Judge Starr's opinion argued that, to evaluate the totality of the circumstances, four factors should be assessed. *Ollman,* 750 F.2d at 979, 997 (Bork, J., concurring), 1016 (MacKinnon, J., concurring); R. SMOLLA, LAW OF DEFAMATION § 6.08[3][c], at 6-30 (1990).

Prior to the decision in *Ollman,* some courts had employed a three-prong totality of the circumstances approach for distinguishing between fact and opinion, derived from the Ninth Circuit's holding in Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980). The three factors to be analyzed are: (1) whether the statement can be understood in a defamatory sense based on the facts surrounding the publication, not just the words alone; (2) whether the statements were made in public debate, heated labor disputes, or other circumstances in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole; and (3) whether the language of the statements is cautiously phrased in terms of apparency or is of a kind typically generated in a spirited legal dispute in which judgment, loyalties and subjective motives of the parties are reciprocally attacked and defended in the media and other public forums. *Information Control,* 611 F.2d at 783-84. *See also* Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 131 Cal. Rptr. 641, 644, 552 P.2d 425, 428 (1976); Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 435 N.E.2d 1021 (Mass.), *cert. denied,* 459 U.S. 1037 (1982); Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 (Colo. 1983); From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 57 (Fla. Dist. Ct. App. 1981).

An alternate theory for analyzing the opinion privilege is found in the Restatement (Second) of Torts. *See infra* text accompanying notes 294-304.

227. R. SMOLLA, LAW OF DEFAMATION § 6.08[1], at 6-26 to 6-27 (1990). Under the totality of circumstances methodology, a court had to consider all the words used (not merely a particular phrase or sentence), cautionary terms that accompanied the statement, and all other circumstances surrounding the statement, including the medium used and the audience. *Id.* (citing Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984); Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 435 N.E.2d 1021, *cert. denied,* 459 U.S. 1037 (1982); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980)).

228. Ollman v. Evans, 750 F.2d 970, 979-84 (D.C. Cir. 1984).

229. Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* 58 FORDHAM L. REV. 761, 762 (1990).

230. *See infra* text accompanying notes 362-88 (fourth *Ollman* factor as proposed test).

edly defamatory words themselves.[231] The object is to determine whether the statement has a consistent, precise meaning and is thus likely to give rise to a clear factual implication.[232] According to the *Ollman* court, readers are considerably less likely to infer facts from an indefinite or ambiguous statement than from one with a commonly understood meaning.[233] Therefore, statements that can be interpreted or defined in various ways cannot support a defamation action.[234] Opinions labelling a political writer as a "fascist"[235] or a judge as "incompetent," for example, use words too vague and imprecise to give rise to a generally accepted core of meaning, and are thus inactionable.[236]

If the words convey a widely accepted meaning, however, the court looks to the provability of the statement.[237] This inquiry is the second factor of the *Ollman* test, analyzing verifiability — the extent to which the statement is capable of being proven or disproven objectively.[238] The reason for this inquiry is simply that a reader cannot rationally view an unverifiable statement as conveying actual facts.[239] The statement may

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231. *Ollman*, 750 F.2d at 979-80. *See also* R. SMOLLA, LAW OF DEFAMATION § 6.08[3][c][i], at 6-30 (1990). This factor has been referred to as the linguistic side of verifiability. Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1019 (1986).

232. *Ollman*, 750 F.2d at 980; R. SMOLLA, LAW OF DEFAMATION § 6.08[3][c][i], at 6-30 (1990). A classic example of a statement with a well-defined meaning is an accusation of a crime. Although the charge depends on normative social values, these standards are so commonly understood that reasonable readers may imply extremely damaging facts.

233. Ollman v. Evans, 750 F.2d 970, 980 (D.C. Cir. 1984).

234. *Id.* (citing Buckley v. Littell, 539 F.2d 882, 895 (2d Cir. 1976)).

235. In Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), the Second Circuit found that the use of "fascist" as a political label could not be regarded as having been proven to be a statement of fact, due to the great imprecision of the term's meaning and usage in political debate.

236. R. SMOLLA, LAW OF DEFAMATION § 6.08[3][c], at 6-31 (1990). *See also* Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 397 N.Y.S.2d 943, 947, 366 N.E.2d 1299, 1303 (1977), *cert. denied*, 434 U.S. 969 (1977); Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1017 (1986).

237. Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1017 (1986).

238. R. SMOLLA, LAW OF DEFAMATION § 6.08[3][c][ii], at 6-31 (1990). Some courts have sidestepped the opinion-fact dichotomy altogether and employed verifiability as the sole test in determining whether a statement is actionable. *See* Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977), *cert. denied sub nom.* Hotchner v. Doubleday & Co., 434 U.S. 834 (1977); Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317, 1319 (Conn. 1982); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976); McHale v. Lake Charles American Press, 390 So. 2d 556 (La. Ct. App. 1980), *cert. denied*, 452 U.S. 941 (1981). Most courts, however, examine the verifiability of a statement in conjunction with other factors to ascertain whether a statement should be protected as opinion. *See* R. SMOLLA, LAW OF DEFAMATION § 6.07[1], at 6-25 (1990); Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1018 (1986).

239. Ollman v. Evans, 750 F.2d 970, 981 (D.C. Cir. 1984).

be incapable of objective proof if it cannot be proven evidentially.[240] For example, a statement claiming that a Caucasian police officer harassed a black homeless person for social status reasons is very difficult to prove.[241] Alternatively, the statement may be unverifiable if the standards of comparison for the statement are ambiguous.[242] For instance, proving that an individual's behavior is "cruel" may be impossible because there is no universally accepted definition of cruelty.[243] Without objective proof, evaluating a statement's truthfulness becomes speculative and arbitrary.[244] A statement is therefore protected opinion if it cannot be proven objectively.[245]

The third prong of the *Ollman* test focuses on the literary context of the allegedly defamatory statement.[246] This inquiry examines the language surrounding the statement to determine how it would be understood.[247] As the *Ollman* court stated, readers will inevitably be influenced by the actual language accompanying the statement.[248] Any cautionary language surrounding a statement, such as "I think," "Isn't it true that . . . ?", or "in my opinion," warns the reader not to interpret the statement as factual.[249] The language of the entire column may signal that a particular statement that, by itself, appears factual, is actually a

240. Comment, *Statements of Fact, Statements of Opinion, and the First Amendment,* 74 CALIF. L. REV. 1001, 1019 (1986).

241. *Id.* at 1019-20, 1053. *See* Cibenko v. Worth Publishers, 510 F. Supp. 761 (D.N.J. 1981) (court dismissed after holding that the statement was an opinion).

242. Comment, *Statements of Fact, Statements of Opinion, and the First Amendment,* 74 CALIF. L. REV. 1001, 1019-20 (1986).

243. *Id.* at 1020.

244. *Id.*

245. *Id.*

246. Ollman v. Evans, 750 F.2d 970, 982 (D.C. Cir. 1984).

247. Comment, *Statements of Fact, Statements of Opinion, and the First Amendment,* 74 CALIF. L. REV. 1001, 1020 (1986).

248. *Ollman,* 750 F.2d at 982-83. *See also* R. SMOLLA, LAW OF DEFAMATION § 6.08[3][c][iii], at 6-32 (1990).

249. Comment, *Statements of Fact, Statements of Opinion, and the First Amendment,* 74 CALIF. L. REV. 1001, 1020 (1986). *See* Pease v. Telegraph Publishing Co., 121 N.H. 62, 426 A.2d 463, 465 (1981) (stating that cautionary language puts the reader on notice that what is being read is opinion and thus weakens any inference that the author possesses knowledge of damaging, undisclosed facts); Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 (Colo. 1983) (finding that when the reasonable reader encounters cautionary language, he tends to discount that which follows). *See also* R. SMOLLA, LAW OF DEFAMATION § 6.08[3][c][iii], at 6-32 (1990).

Of course, cautionary language is not always dispositive. As Judge Friendly observed in Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980), one should not "escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think.' " Such labelling does, however, strongly militate in favor of the statement as opinion. Scott v. The News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

statement of opinion.[250] For example, in *Bresler,* the newspaper's description of the substance of the land developer's negotiating proposals plainly transformed the ostensibly factual allegation of "blackmail" into an expression of opinion.[251]

The fourth factor of the *Ollman* test looks at the broader social context, or medium, into which the statement fits.[252] Some types of writing, by custom or convention, signal to readers or listeners that what is being read is likely to be opinion, not fact.[253] Factors to be considered are the type of article, its placement in a newspaper,[254] and any public controversy in which the statement was made.[255] For example, when the statement occurs on the opinion-editorial (Op-Ed) page of a newspaper, it is more likely to be perceived as opinion than fact.[256] The Op-Ed page is known to be a forum for controversy, reserved for the expression of opinion.[257] Furthermore, it is well understood that editorial writers and commentators frequently "resort to the type of caustic bombast traditionally used in editorial writing to stimulate public reaction."[258]

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250. *Ollman,* 750 F.2d at 982 (citing Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)).

251. Ollman v. Evans, 750 F.2d 970, 982 (D.C. Cir. 1984). *See also* Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983) (holding that an allegedly defamatory statement that plaintiff doctor had "a theory to which [he was] willing to sacrifice a life" was protected as opinion, because of the author's contextual descriptions of the doctor's method of treatment and the circumstances of a patient's death).

252. *Ollman,* 750 F.2d at 983; R. SMOLLA, LAW OF DEFAMATION § 6.08[3][c][iv], at 6-33 (1990).

253. *Ollman,* 750 F.2d at 983. *See also* R. SMOLLA, LAW OF DEFAMATION § 6.08[3][c][iv], at 6-33 (1990). *Cf.* RESTATEMENT (SECOND) OF TORTS § 566, comment e (1977) (stating that some statements appear in the form of opinion, or even of fact, but cannot be reasonably interpreted to be meant literally and seriously, and are thus mere vituperation and abuse.)

254. Scott v. News-Herald, 25 Ohio St. 3d 243, 253, 496 N.E.2d 699, 708 (1986).

255. Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* 58 FORDHAM L. REV. 761, 779-80 (1990). For examples of social context categories that have been found to signal opinion, see Southern Air Transp., Inc. v. American Broadcasting Cos., 877 F.2d 1010, 1016 (D.C. Cir. 1989) (involving political debate over aid to Nicaraguan contras); Secrist v. Harkin, 874 F.2d 1244, 1249 (8th Cir.) (senatorial campaign), *cert. denied,* 110 S. Ct. 324 (1989); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1304-05 (8th Cir.) (political disputes and controversial criminal prosecutions on an Indian reservation), *cert. denied,* 479 U.S. 883 (1986); Catalfo v. Jensen, 657 F. Supp. 463, 468 (D.N.H. 1987) (political primary); Steinhilber v. Alphonse, 68 N.Y.2d 283, 287-88, 501 N.E.2d 550, 551, 508 N.Y.S.2d 901, 902 (1986) (union dispute); Henderson v. Times Mirror Co., 669 F. Supp. 356, 359 (D. Colo. 1987) (sports controversy — player's agent referred to as "sleaze bag" by football coach) *aff'd mem.,* 876 F.2d 1078 (10th Cir. 1989); Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1290 (4th Cir. 1987) (business competition); Deupree v. Iliff, 860 F.2d 300, 304 (8th Cir. 1988) (charged debate on topic of social controversy — sex education in schools).

256. Ollman v. Evans, 750 F.2d 970, 1012 n.3 (D.C. Cir. 1984) (MacKinnon, J., concurring).

257. *Id.* at 1010 (Bork, J., concurring).

258. *Id.* at 984 (quoting Nat'l Rifle Ass'n v. Dayton Newspapers, Inc., 555 F. Supp. 1299, 1309 (S.D. Ohio 1983)).

For these reasons, the court in *Loeb v. Globe Newspaper Co.*[259] found that a comment on a newspaper's editorial page was protected opinion, in light of the statement's specific context at issue.[260] In *Price v. Viking Penguin, Inc.*,[261] the court held that statements made in the course of a political debate are more likely to be understood as opinion.[262] Thus, in analyzing the distinction between fact and opinion, a court must take into account the setting and varying social conventions or customs inherent in different types of writing.[263]

2. Analysis of the *Milkovich* Facts Under *Ollman*

Under the four-prong *Ollman* test, the statements challenged in *Milkovich* were constitutionally protected opinion.[264] The first two factors — specific language and verifiability of the statement — taken alone would suggest the conclusion that Diadiun's column was factual.[265] Under the first prong, the specific language used in the allegedly defamatory statement — "Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth"[266] — is factual.[267] An analysis of its common meaning yields the conclusion that Milkovich committed perjury.[268] Specific allegations of criminal conduct[269] are potentially actionable, although the distinction between specific and general charges is often difficult to discern.[270]

Diadiun's allegation that Milkovich committed perjury is also verifiable.[271] Whether or not Milkovich lied at the court hearing can certainly be proven by a perjury action with evidence drawn from the transcripts

259. 489 F. Supp. 481 (D. Mass. 1980).

260. *Id. See also Ollman*, 750 F.2d at 984.

261. 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990).

262. *Id.* at 1433.

263. Ollman v. Evans, 750 F.2d 970, 984 (D.C. Cir. 1984).

264. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2709 (1990).

265. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory*, Nat'l L.J., Aug. 27, 1990, at 27, col. 3.

266. *See supra* note 55 (entire text of Diadiun's article).

267. Scott v. News-Herald, 25 Ohio St. 3d 243, 251, 496 N.E.2d 699, 707 (1986).

268. Perjury is defined as the "willful telling of a lie while under lawful oath." WEBSTER'S NEW WORLD DICTIONARY 1005 (3d ed. 1988).

269. A specific allegation of criminal conduct is a charge that could reasonably be understood as imputing specific criminal or other wrongful acts to an individual (e.g., alleging plaintiff to be a rapist). Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980).

270. *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 706. *See* R. SMOLLA, LAW OF DEFAMATION § 6.12[9], at 6-51 (stating that general references to the "repentance of criminals," or characterization of a book as a "fraud" on readers, were protected opinion, whereas criminal allegations phrased in relatively specific terms will usually not be construed as protected opinion).

271. *Scott*, 25 Ohio St. 3d at 253, 496 N.E.2d at 707.

and witnesses present at the hearing.[272] Under the verifiability criterion, the allegedly defamatory language is an objectively verifiable event.[273]

Although the first two factors suggest that Diadiun's comments are factual, the third factor points to the conclusion that the column is protected opinion.[274] In their larger context, the averred actionable statements are prefaced by cautionary terms, or language of apparency.[275] A large caption — "TD *Says*"[276] — precedes the article, indicating to even the most gullible reader that the article is opinion.[277] This assumption is supported by the carryover page headline: "*Diadiun says* Maple told a lie."[278] These signals effectively inform the reader that Diadiun's statements are merely his considered opinions.[279]

The language surrounding the allegedly defamatory statements also indicates the subjective basis behind Diadiun's writing.[280] For example, Diadiun states: "When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator."[281] The article emphasizes this concern that people in positions of authority, at any level, also hold positions of responsibility requiring truthfulness, should their authority be called into question.[282] In context, the issue was not the statement that Milkovich had lied at a legal hearing.[283] Rather, based on his attendance at the wrestling match and the OHSAA hearing, Diadiun believed that any position taken by Milkovich amounting to less than a full admission of culpability was a lie.[284]

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272. *Id.*

273. *Id.*

274. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 27, col. 3.

275. Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 & n.4 (Colo. 1983) (explaining that language of apparency, such as "in my opinion," gives the reasonable listener grounds to discount that which follows it). *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2712 (1990) (Brennan, J., dissenting). *See also* Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980) (finding that a statement phrased in language of apparency is less likely to be understood as a statement of fact than as a statement of opinion); Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 603, 131 Cal. Rptr. 641, 644, 552 P.2d 425, 429 (1976) (concluding that a letter that was cautiously phrased in terms of apparency did not imply factual assertions); Stewart v. Chicago Title Ins. Co., 151 Ill. App. 3d 888, 894, 503 N.E.2d 580, 583 (1987) (finding that a letter couched in language of opinion rather than firsthand knowledge did not imply factual assertions).

276. Scott v. News-Herald, 25 Ohio St. 3d 243, 277, 496 N.E.2d 699, 727 (1986).

277. *Id.* at 252, 496 N.E.2d at 707.

278. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2698 (1990) (emphasis added).

279. *Scott,* 25 Ohio St. 3d at 252, 496 N.E.2d at 707.

280. *Id.*

281. *See supra* note 55 (full text of Diadiun's article).

282. Scott v. News-Herald, 25 Ohio St. 3d 243, 252, 496 N.E.2d 699, 707 (1986).

283. *Id.* at 252, 496 N.E.2d at 707-08.

284. *Id.* at 252, 496 N.E.2d at 708.

Additionally, Diadiun acknowledges at the beginning of his article that the court hearing involved the issue of whether Maple was denied due process by OHSAA.[285] Although an average reader might not understand that a due process hearing probably would not involve questions relating to specific prior conduct beyond technical OHSAA procedures, Diadiun's caveat that due process was the actual issue is nevertheless a factor to be considered.[286] Taken in context, Diadiun's surrounding language transforms his ostensibly factual allegation of lying under oath into an expression of opinion.[287]

Under the fourth prong of the *Ollman* test, the broader context of Diadiun's statements signals to the reader that they are opinion rather than fact.[288] The article at issue was written by a sports reporter, rather than a law correspondent, and is prefaced by the byline: "By TED DIADIUN[,] News-Herald Sports Writer."[289] The column did not appear on the front page; rather, it appeared on the sports page — a traditional haven for persuasion, invective, and hyperbole.[290] Most readers would not expect a sports writer on the sports page to be very knowledgeable about procedural due process and perjury.[291] Any "legal conclusion" in such a context would therefore be construed as the writer's opinion.[292] Thus, while Diadiun's statements appear to be factual when analyzed under the first two factors alone, the third and fourth indicia dictate the conclusion that, based upon the totality of circumstances, the column is constitutionally protected opinion.[293]

3. The Restatement Test

After determining that a particular statement is opinion rather than fact, courts often apply a second framework of analysis before they will find the statement constitutionally protected.[294] Relying on the prece-

285. *See supra* note 55 (full text of Diadiun's article).

286. *Scott*, 25 Ohio St. 3d at 253, 496 N.E.2d at 708.

287. Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984). *See also* Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983).

288. *See* Scott v. News-Herald, 25 Ohio St. 3d 243, 253-54, 496 N.E.2d 699, 708 (1986).

289. *Id.* at 253, 496 N.E.2d at 708.

290. *Id.*

291. *Id.* at 253-54, 496 N.E.2d at 708.

292. *Id.* at 254, 496 N.E.2d at 708.

293. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2700 (1990); Scott v. News-Herald, 25 Ohio St. 3d 243, 254, 496 N.E.2d 699, 709 (1986). *See* Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory*, Nat'l L.J., Aug. 27, 1990, at 27, col. 3.

294. Ollman v. Evans, 750 F.2d 970, 984 (D.C. Cir. 1984). *See also* Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1012 n.70 (1986). The *Ollman* court supported the Restatement approach, but felt that its own four-prong test was sufficient in determining whether a statement implies the existence of undisclosed facts. The court reasoned that a separate inquiry into whether a statement, already

dential test set forth in the Restatement (Second) of Torts,[295] a court may determine the actionability of a statement by asking if it implies the existence of undisclosed defamatory facts as the basis for the opinion.[296] If it does not, the statement warrants constitutional protection.[297]

According to section 566 of the Restatement, a comment that implies the existence of undisclosed defamatory facts to justify the opinion expressed is called a "mixed" opinion, as distinguished from a "pure" opinion.[298] If the author of the opinion does not disclose the facts upon which the comment is based, or implies the existence of undisclosed defamatory facts that a reader infers, the opinion is "mixed" and may be objectionable.[299] Its objectionability depends on whether reasonable readers would have actually interpreted the statement to imply defamatory facts.[300] If no reader would do so, despite the writer's providing only a partial factual predicate or none at all, the opinion will not support a defamation action.[301]

In contrast, a "pure" opinion is made when the author states all the facts on which the opinion is based, or makes a comment knowing that his readers are already aware of the facts upon which the opinion is based.[302] By treating the underlying facts and the opinion separately, the

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classified in a painstaking way as opinion, implies allegedly defamatory facts, would be superfluous. *Ollman,* 750 F.2d at 985.

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

296. *Id. See also* R. SMOLLA, LAW OF DEFAMATION § 6.04, at 6-16.2 (1990).

The majority in *Milkovich* alluded to the Restatement test, stating that expressions of opinion may often imply an assertion of objective fact. According to the majority Court, even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. 110 S. Ct. at 2705-06.

The dissent in *Milkovich* also utilized the Restatement test (in addition to the *Ollman* factors). Analogizing to comment c of section 566, the dissent stated that clear disclosure of a comment's factual predicate precludes a finding that the comment implies other defamatory facts. Thus, an opinion — "I think Jones lied about his age just now" — that is preceded by supporting explanatory statements — "Jones' brother once lied to me; Jones just told me he was 25; I've never met Jones before and I don't actually know how old he is or anything else about him, but he looks sixteen" — does not imply defamatory facts. 110 S. Ct. at 2710 n.3. *See also* RESTATEMENT (SECOND) OF TORTS § 566 comment c, illustration 4 (1977).

297. RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977).

298. *Id.* at § 566 comments b-c; R. SMOLLA, LAW OF DEFAMATION § 6.04, at 6-16.2 to 6-17 (1990).

299. R. SMOLLA, LAW OF DEFAMATION § 6.04[2], at 6-17 (1990).

300. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2710 n.3 (1990) (Brennan, J., dissenting). While a complete disclosure of a comment's factual predicate precludes a finding that the comment implies other defamatory facts, it does not follow that a statement, preceded by only a partial factual predicate or none at all, necessarily implies other facts. The operative question remains whether reasonable readers would have actually understood the statement to imply defamatory facts. *Id.*

301. *Milkovich,* 110 S. Ct. at 2710 n.3 (Brennan, J., dissenting).

302. R. SMOLLA, LAW OF DEFAMATION § 6.04[1], at 6-16.2 (1990).

"comment" that the writer draws from those facts is always pure opinion and never actionable.[303] If the factual predicate for the opinion is true, the opinion, no matter how unfair, unreasonable, or outrageous, is itself immune from actionability.[304]

Under the Restatement test, Diadiun's commentary in *Milkovich* was pure opinion, in the form of conjecture, and thus inactionable.[305] Diadiun provided his readers with all the background facts necessary to support his assumption that Milkovich had lied at the court hearing.[306] Diadiun relayed to his readers his observations at the wrestling match-turned-melee, his impressions of Milkovich's testimony at the OHSAA hearing, and Dr. Meyer's comments following the hearing at the Court of Common Pleas.[307] Diadiun's opinion that Milkovich perjured himself at the court hearing arose from this factual predicate.[308] In context, his opinion could be reasonably interpreted only as an assumption that he had inferred from the stated facts.[309] Readers could infer only that Diadiun had drawn this inference.[310] Although Diadiun's opinion was ostensibly in the form of a factual statement, it was clear from the context that he intended to assert solely his personal observations on the facts he had stated.[311] Since Diadiun's inference appeared sincere and nondefamatory, neither he nor the *News-Herald* should be liable for damages under the Restatement analysis.[312]

Furthermore, Diadiun not only revealed the facts upon which he relied to formulate his opinion that Milkovich had lied, but he clearly indicated at which point he began to speculate.[313] After describing the events of the OHSAA hearing, Diadiun openly surmised when he began to rely on Dr. Meyer's statements.[314] Using words like "seemed," "probably," and "apparently,"[315] Diadiun plainly showed that he did not at-

303. *Id.* at 6-16.3.

304. *Id.* at 6-16.3 to 6-17.

305. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2711 (1990) (Brennan, J., dissenting). *See* Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 8, col. 3.

306. *Milkovich,* 110 S. Ct. at 2711 (Brennan, J., dissenting). *See supra* note 55 (full text of Diadiun's article).

307. *Milkovich,* 110 S. Ct. at 2711 (Brennan, J. dissenting). *See supra* note 55.

308. *See Milkovich,* 110 S. Ct. at 2711 (Brennan, J., dissenting); Brief of Respondents at 6, *Milkovich* (No. 89-645) (stating that Diadiun clearly remembered his conversations with Dr. Meyer following the court hearing); *supra* note 55 (full text of Diadiun's article).

309. *See Milkovich,* 110 S. Ct. at 2710-11.

310. *See generally* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2710 (1990).

311. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977).

312. *See* 110 S. Ct. at 2710-11 (Brennan, J., dissenting).

313. *Id.* at 2711.

314. *Id.*

315. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2711 (1990) (Brennan, J., dissenting). *See also supra* note 55 (full text of Diadiun's article).

tend the court hearing, and that he had no detailed secondhand account of Milkovich's court testimony.[316] Furthermore, he quoted a third party's version of the incidents and disclaimed any firsthand knowledge.[317] Readers could perceive that Diadiun's implication that Milkovich had lied arose from Diadiun's interpretation of why the trial court had reversed the OHSAA decision.[318] Since Diadiun's comment was pure conjecture, no reasonable reader could interpret it to assert, as fact, that Milkovich had perjured himself.[319] Thus, Diadiun's statements were neither defamatory nor objectionable.

4. Proper Analysis of the *Milkovich* Facts Under the Majority's Standard

Analysis of Diadiun's column under the rule enunciated by the *Milkovich* majority also results in the conclusion that the challenged statements could not reasonably be interpreted to state or imply defamatory facts.[320] Due to the kind of language that Diadiun used and the context in which it appeared, no reader could have reasonably concluded that his opinion stated or implied that Milkovich had committed perjury.[321] For instance, when Diadiun intimated that Milkovich had repeated, in court, a more plausible version of the misrepresentations he made at the OHSAA hearing, Diadiun preceded it with the term "apparently."[322] This cautionary language warns the reader that the statements are to be treated as opinion, not fact.[323]

Diadiun's exaggerated and emotional tone also warns readers to expect speculation and personal judgment.[324] For example, Diadiun opines that the board placed the Maple High School wrestling team on probation, "probably as much in distasteful reaction to the chicanery of [Milkovich] as in displeasure over the actual incident."[325] The words "distasteful," "chicanery," and "displeasure" are laden with moral outrage.[326] Never stating explicitly that Milkovich committed perjury,

316. *Id.* at 2711-12.
317. *Id.* at 2711.
318. *Id.* at 2712.
319. *Id.* at 2711.
320. Milkovich v. Lorain Journal, 110 S. Ct. 2695, 2709 (1990) (Brennan, J., dissenting).
321. *See id.* at 2709.
322. *Id.* at 2712. *See also supra* note 55 (full text of Diadiun's article).
323. *See generally* Comment, *Statements of Fact, Statements of Opinion, and the First Amendment,* 74 CALIF. L. REV. 1001, 1020 (1986).
324. *Id.* at 2712 (Brennan, J., dissenting).
325. *See supra* note 55 (full text of Diadiun's article).
326. Distasteful is defined as "unpleasant to taste; causing distaste; disagreeable"; the definition of chicanery is "the use of clever but tricky talk or action to deceive, evade, etc."; displeasure is defined as "dissatisfaction, disapproval, annoyance." WEBSTER'S NEW WORLD DICTIONARY 398, 242, 396 (3d ed. 1988).

Diadiun comments, "[a]nyone who attended the meet . . . knows in his heart" that Milkovich lied.[327] Like the *Bresler-Falwell-Letter Carriers*[328] cases, this statement is obvious hyperbole, since Diadiun does not profess to have researched the innermost feelings of everyone who attended the match.[329] The rhetorical and subjective tenor of Diadiun's assertions signals that specific statements which, standing alone, would appear to be factual, are actually expressions of opinion.[330]

Additionally, the overall context of Diadiun's statements clues readers to interpret them as speculative opinion, rather than factual assertions.[331] The format of the piece is a signed editorial column displaying a photograph of the columnist.[332] Both the title logo and the carryover headline incorporate the phrase "[Diadiun] Says."[333] Although signed columns may include statements of fact, they are also the "well recognized home of opinion and comment."[334] All of these indicators notify and remind readers that they are reading one man's commentary.[335] Thus, Diadiun's column merited full constitutional protection under the majority's articulated rule.[336]

D. The Court Should Have Protected Opinion in Commentary

1. Proposed Approaches

The *Milkovich* Court claimed that existing first amendment doctrine, with its protection of certain types of opinion such as rhetorical hyperbole, will sufficiently safeguard the free speech rights of newspapers and journalists.[337] While the rhetorical hyperbole standard admittedly serves as somewhat of a safe haven[338] against meritless defamation claims, it protects only opinion that is exaggerated, rhetorical, vulgar, or unlikely to be believed.[339] Many statements of opinion fall below this

327. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2712-13 (1990) (Brennan, J., dissenting).

328. *See supra* text accompanying notes 103-19 (regarding *Bresler-Falwell-Letter Carriers* line of cases).

329. *Id.* at 2713.

330. *See* Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1020 (1986).

331. *See id.* at 2712 (Brennan, J., dissenting).

332. *Id.* at 2713.

333. Scott v. News-Herald, 25 Ohio St. 3d 243, 277, 496 N.E.2d 699, 727.

334. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2713 (1990) (Brennan, J., dissenting) (quoting Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 227 (2d Cir. 1985)).

335. *Id.* at 2713 (Brennan, J., dissenting).

336. *Id.* at 2709 (Brennan, J., dissenting).

337. *Id.* at 2706; *id.* at 2708 (Brennan, J., dissenting).

338. Goodale, *'Milkovich': A Modest Loss for the Press*, N.Y. L.J., June 27, 1990, at 2, col. 4.

339. *See supra* text accompanying notes 103-19 (constitutional protection for expressions of rhetorical hyperbole).

standard and will be highly susceptible to a flood of litigation.[340]

Especially vulnerable to libel claims after *Milkovich* will be commentary, or "opinion-journalism."[341] Commentary comprises specific genres of literary writing that courts have found to signal opinion: editorials,[342] Op-Ed pieces,[343] newspaper columns,[344] letters to the editor,[345] humorous and satirical articles, restaurant reviews, campaign press releases, political cartoons,[346] sports columns, and first-person narratives in newspapers.[347] First amendment protections are particularly important

340. *See Suing the Reviewer,* Wash. Post, Aug. 26, 1990, at C6, col. 1 (stating that the danger of the *Milkovich* decision is the possibility that a flood of litigation will promptly emerge to test the new borders of libel). *See also supra* note 24 (predictions of *Milkovich's* impact).

341. Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 4, col. 2-3 (stating that the *Milkovich* decision puts into doubt areas of journalism previously considered "safe": criticism of esthetics, such as restaurant reviews; editorialization (i.e., serious comment on everyday affairs); and quotations of another's allegations); Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 27, col. 1 (stating that the impact of *Milkovich* will probably be greatest on material such as editorials, columns and letters to the editor); Moore, *Press Clipping,* 22 NAT'L J. 3086 (1990) (citing the *New York Times'* brief in support of a summary judgment motion in Moldea v. New York Times Co., No. 90-2053 (D.D.C. filed Aug. 23, 1990): "No review, whether of books, restaurants, or theater, nor many editorials or political columns, will be safe from rigid — and chilling — legal oversight"). For a contrary view, see Streitfeld, *Author Sues Over Negative Review; Criticism Was Libelous, D.C. Writer Charges,* Wash. Post, Aug. 24, 1990, at C1, col. 2 (quoting Henry R. Kaufman, general counsel for the Libel Defense Resource Center, predicting that "in those areas [like commentary] where there had been broad protection, one way or another there will continue to be protection").

Commentary is synonymous with "opinion-journalism." Interview with Timothy Alger, former Assistant Metropolitan Editor of the *Orange County Register,* in Los Angeles (Nov. 24, 1990).

342. Specifically, an editorial is an unsigned position piece, written by the newspaper's editorial staff, that states the newspaper's position on issues of controversy or endorsement of political figures. Interview with Timothy Alger, former Assistant Metropolitan Editor of the *Orange County Register,* in Los Angeles (Nov. 24, 1990).

343. R. SMOLLA, LAW OF DEFAMATION § 6.12[4], at 6-45 to 6-46 (1990) (stating that "[t]he Op-Ed page is one of the great American forums for the free exchange of vitriolic debate, and readers can be expected to discount the statements made in that context as more likely to be the stuff of opinion than fact"). The Op-Ed page contains signed pieces stating the views of outside authors or staff members. Interview with Timothy Alger, former Assistant Metropolitan Editor of the *Orange County Register,* in Los Angeles (Nov. 24, 1990). *See supra* notes 256-57 (*Ollman* decision describing Op-Ed pages as a forum for expression of opinion).

344. Entertainment reviews and columns commenting on local issues are generally written by staff members. Syndicated columnists ordinarily author pieces discussing national concerns. Interview with Timothy Alger, former Assistant Metropolitan Editor of the *Orange County Register,* in Los Angeles (Nov. 24, 1990).

345. *See* Immuno A.G. v. Moor-Jankowski, 18 Media L. Rep. (BNA) 1625, 1632-34 (1991) (explaining the public forum function of letters to the editor).

346. Like an editorial, a political cartoon is an opinion, not a statement of alleged fact. This makes it significantly different from a news report that purports to convey strictly fact. King, *What's So Funny About Washington?,* N.Y. Times, Aug. 5, 1990, § 6 (Magazine), at 29, col. 1.

347. *See* Ollman v. Evans, 750 F.2d 970, 986-87 (D.C. Cir. 1984); Note, *Fact and Opinion*

to the press in these areas, because journalists cover them extensively.[348] Under totality of circumstances tests like *Ollman,* lower courts had concluded that otherwise factual statements, when considered fully in the context of commentary, were protected opinion.[349]

The *Milkovich* rule, however, focuses on the issue of whether a reasonable factfinder could conclude that a statement implies defamatory facts.[350] Consequently, statements that would have been deemed opinion because of their context will now survive a defendant's motion for summary judgment, and may be found actionable.[351] It will be easy for courts to conclude in many cases that reasonable factfinders could infer defamatory facts from a challenged statement.[352] In the Eighth Circuit's words: "[a]s a practical matter, every opinion involves implied or asserted facts."[353] The new rule could have a chilling effect on columnists as well as publishers, who fear an entirely new class of lawsuits.[354]

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in Defamation: Recognizing the Formative Power of Context, 58 FORDHAM L. REV. 761, 778 (1990). *See, e.g.,* Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1290, 1300 (D.C. Cir. 1988), *cert. denied,* 109 S. Ct. 75 (1988) (newspaper column); Epstein v. Trustees of Dowling College, 152 A.D.2d 534, 543 N.Y.S.2d 691, 692 (N.Y. App. Div. 1989) (letters in student newspaper); Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015-16 (1st Cir. 1988), *cert. denied,* 109 S. Ct. 65 (1988) (humorous article in magazine); Catalfo v. Jensen, 657 F. Supp. 463, 465 (D.N.H. 1987) (magazine satire of political figure); Mr. Chow v. Ste. Jour Azur, S.A., 759 F.2d 219, 227-29 (2d Cir. 1985) (restaurant review); Mashburn v. Collin, 355 So. 2d 879, 888-89 (La. 1977) (restaurant review); Secrist v. Harkin, 874 F.2d 1244, 1249 (8th Cir. 1989), *cert. denied,* 110 S. Ct. 324 (1989) (campaign press release); Henderson v. Times Mirror Co., 669 F. Supp. 356, 357, 359-60 (D. Colo. 1987) (sports column); Scott v. News-Herald, 25 Ohio St. 3d 243, 251, 496 N.E.2d 699, 706-07 (1986) (sports column); McCabe v. Rattiner, 814 F.2d 839, 843 (1st Cir. 1987) (first-person narrative).

348. Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 4, col. 1.

349. Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* 58 FORDHAM L. REV. 761, 778-79 & nn.108-116 (1990).

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

351. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 28, col. 1. According to one author, the *Milkovich* Court's lack of clear rules for determining the actionability of a statement gives lower courts broad discretion to construe the reasonable-reader standard in favor of defamation plaintiffs. Furthermore, the majority's conclusion that a reasonable factfinder could determine that Diadiun's statements were actual assertions of fact was pro-plaintiff, and could lead some lower courts to liberally interpret the "reasonable factfinder" standard in favor of plaintiffs. *See The Supreme Court, 1989 Term—Leading Cases,* 104 HARV. L. REV. 219, 224 & n.56 (1990).

352. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 28, col. 1.

353. *Id.* (quoting Price v. Viking Penguin Inc., 881 F.2d 1426, 1433 (8th Cir. 1989)).

354. Sitomer, *Can 'Opinion' Be Libelous?,* Christian Sci. Monitor, Aug. 9, 1990, at 14, col. 2. *See* Marcus & Pink, *Statements of Opinion Can Be Libelous, Court Rules; Expressions With 'False and Defamatory' Facts Not Automatically Shielded, Justices Find,* Wash. Post, Jun. 22, 1990, at A4, col. 1 (quoting media law expert Bruce Sanford as saying, "Columnists might tend to look for the potential plaintiff before writing a column, and avoid people they feel will be litigious").

In order to preserve freedom of expression in the press, the Court should have carved out an exception for opinion in commentary.[355] The Court could have provided shelter for opinion-journalism in one of two ways. First, the Court could have interpreted the Constitution to protect commentary opinion under an expansion of the shield for rhetorical hyperbole.[356] Under this augmented exception, journalists who base their statements on conjecture or surmise would be immune to libel actions.[357] Just as the first amendment protects rhetorical hyperbole and imaginative expression because of their metaphorical, exaggerated, or even fantastic use,[358] so the Constitution should protect commentators who state certain facts and then leap to a conclusion.[359] Readers will perceive the writer's speculation from the emotional or rhetorical tone, mood, and

355. In *Scott v. News-Herald,* a concurring justice stated that the court had made it clear that opinions stated in a column, cartoon, or an editorial are constitutionally protected free speech. *Scott,* 25 Ohio St. 3d 243, 262, 496 N.E.2d 699, 715 (1986) (Wright, J., concurring).

356. *See* Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 8, col. 5. The dissent in *Milkovich* also advocated expanding the rhetorical hyperbole exception to give broader protection to allegedly defamatory opinion. Under the dissent's proposal, constitutional protection would be provided for what it described as conjecture. Conjecture alerts the audience that the statement is one of belief, not fact. The dissent appeared to conclude that the first amendment ought to protect a writer who, after stating certain facts, arrives at a conclusion. Gross, *supra.* In Justice Brennan's view, punishing conjecture protected reputation only at the cost of eradicating a genuinely useful mechanism for public debate. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2710 & n.5, 2715 (1990).

State and federal courts have held that readers can recognize conjecture that neither states nor implies any assertions of fact, in the same way that readers can recognize hyperbole. For example, in Potomac Valve & Fitting Co. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987), the court found that a disparaging statement readily appeared to be nothing more than the author's personal inference from the test results. The premises were explicit, and the reader was not at all required to share the author's conclusion. Similarly, the court in Dunlap v. Wayne, 105 Wash. 2d 529, 540, 716 P.2d 842, 849 (1986), concluded that [a]rguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves." Likewise, in Nat'l Ass'n of Gov't Employees, Inc. v. Cent. Broadcasting Corp., 379 Mass. 200, 226, 396 N.E.2d 996, 1000 (1979), the court found that, since listeners were told the facts upon which a radio talk show host based her conclusion, they could "make up their own minds and generate their own opinions or ideas which might or might not accord with [the host's]." *Milkovich,* 110 S. Ct. at 2712 n.7 (1990).

357. Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 8, col. 3. *See also* Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 28, col. 1.

358. *See* Ollman v. Evans, 750 F.2d 970, 982, 1000-01 (D.C. Cir. 1984). *See also* Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980); Myers v. Boston Magazine Co., 380 Mass. 336, 403 N.E.2d 376 (1980); Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 443 (10th Cir. 1983), *cert. denied,* 462 U.S. 1132 (1983); *supra* text accompanying notes 103-19 (protection for rhetorical hyperbole).

359. Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 8, col. 3.

format of the article.[360] Thus, a conclusion that "the mayor has deceived the public with his campaign promises," ostensibly implying a defamatory fact, should receive the same first amendment protection as an allegation that "the public deserves a better mayor," which expresses an idea.[361]

Alternatively, the Court could have adopted the *Ollman* test, emphasizing the fourth factor — broader social context — to give guidance to lower courts in their determination of libelous and non-libelous opinion.[362] Context is crucial, and can turn what, out of context, appears to be a factual statement into an opinion that is socially valuable and not actionable.[363] According to Justice Holmes: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used."[364] Arguably, context is the most important consideration in distinguishing between actionable statements of fact and constitutionally protected opinion.[365]

The literary genre or medium in which a particular statement appears dispositively influences a reader's understanding of the statement's meaning.[366] Since early colonial America, individuals have published and circulated sharp and acerbic commentary on issues of social and

360. *See* 110 S. Ct. at 2709; *supra* text accompanying notes 103-19 (protection for rhetorical hyperbole).

361. *See* Warren, Heinke & Sager, *Not as Bad as It Looks,* Nat'l L.J., July 30, 1990, at 14, col. 2.

362. *See* Comment, *Statements of Fact, Statements of Opinion, and the First Amendment,* 74 CALIF. L. REV. 1001, 1019, 1055-56 (1986) (stating that *Ollman* provides a lucid bright-line rule for distinguishing between defamatory statements and non-actionable opinion). *But see* Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule,* 72 GEO. L.J. 1817, 1846 (1984) (criticizing fact-opinion tests, such as that presented in *Ollman,* for providing minimal guidance to writers in structuring a statement to avoid liability for defamation; journalists must speculate where and when the works will be published, and guess which of the surrounding circumstances might be deemed relevant).

363. Ollman v. Evans, 750 F.2d 970, 1000 (D.C. Cir. 1984 (Bork, J., concurring).

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

365. *See* Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* 58 FORDHAM L. REV. 761, 784 (1990) (positing that courts should emphasize context — the third and fourth *Ollman* factors — when distinguishing actionable statements of fact from constitutionally protected opinion. This approach would take into account the formative effect that context has upon the meaning of a statement. Linguists and philosophers of language have stressed the formative power of context in determining the meaning of individual words and sentences. Because context shapes the meaning of individual words and sentences, it also influences their degree of precision or ambiguity, which is the focus of the first *Ollman* factor. Similarly, whether or not a statement is verifiable — the second *Ollman* factor — depends on the context in which the remark appears and the purpose for which it was formulated). *Id.* at 784-87.

366. *Ollman,* 750 F.2d at 982 (stating that, since readers are inevitably influenced by a statement's context, the distinction between fact and opinion can be made only in context); R. SMOLLA, LAW OF DEFAMATION § 6.12[4], at 6-45 to 6-46 (1990) ("[I]t is clear that the edito-

political interest.[367] Today, columnists and opinion writers carry on this socially valuable tradition of stimulating debate and persuading readers through the printed press.[368] Broad comprehension of this traditional function of opinion-journalism predisposes the average reader to regard what is found there to be opinion.[369] The reasonable person who reads a column on the editorial or Op-Ed page is fully aware that statements printed there are not "hard" news, like the statements found on the front page or in other news sections.[370] Readers expect that columnists will make strong statements, often phrased in a critical or polemical manner that does not seem balanced or fair.[371] This understanding is inherent in the notion of editorial contexts and other commentary.[372] Additionally, readers anticipate that commentators will express themselves in condensed form without providing every background fact, due to limitations of physical space.[373]

Opinion-journalism formats signal the reader to anticipate a departure from what is actually known by the author as fact.[374] Because of the uniquely subjective content of commentary, reasonable readers will recognize that statements made there are more likely to be opinion than fact.[375] The Supreme Court has held that the expression of editorial opinion is "entitled to the most exacting degree" of constitutional sheltering, because it "lies at the heart of [f]irst [a]mendment protection."[376] Thus, statements in the context of opinion-journalism that are unlikely to be perceived as fact should be nonactionable under the first amendment.[377] This rule would provide a clarifying guide for courts to distin-

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rial context is regarded by courts as a powerful element in construing as opinion what might otherwise be deemed fact").

367. *Ollman,* 750 F.2d at 986.

368. Ollman v. Evans, 750 F.2d 970, 986 (D.C. Cir. 1984).

369. *Id.* at 987.

370. *Id.* at 986.

371. *Id.*

372. *Id.* (citing Nat'l Rifle Ass'n v. Dayton Newspaper, Inc., 555 F. Supp. 1299, 1309 (S.D. Ohio 1983)).

373. Ollman v. Evans, 750 F.2d 970, 986 (D.C. Cir. 1984).

374. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2713 (1990).

375. R. SMOLLA, LAW OF DEFAMATION § 6.12[4], at 6-45 to 6-46 (1990). *See Ollman,* 750 F.2d at 984 (emphasizing the importance of focusing upon the reader's understanding of a particular type of writing).

376. FCC v. League of Women Voters, 468 U.S. 364, 375-76, 381 (1984)).

377. *But see Ollman,* 750 F.2d at 987 n.33 (expressly declining to hold that any statement on an editorial or Op-Ed page is constitutionally protected, for the reason that such a rule could too readily become a license to libel). This note does not advocate that every statement found in commentary should be automatically shielded by the first amendment. Under the proposed rule, an opinion is protected only if it appears in commentary whose overall context convinces a reasonable reader that the statements contained therein are more likely to be opinion rather than fact.

guish between defamatory and nondefamatory opinion.[378]

Under this approach, a court would give great weight to the commentary context of an allegedly defamatory statement in determining whether it was actionable.[379] A disputed statement could be interpreted only after explicit examination of its broader context.[380] Even if a writer fails to fully disclose facts that would warn the reader that an allegedly defamatory statement was a characterization, the type and placement of the writing may transform the statement into one readily understood as opinion.[381] If a court found that the context was commentary — one that a reasonable reader understood to contain opinion rather than fact — then, in the vast majority of cases, the particular statement would receive constitutional protection.[382]

In *Kotlikoff v. Community News,*[383] for example, the court found that a letter to the editor charging a mayor with covering up delinquent taxpayers was opinion, because the charges were made in an editorial forum context.[384] Similarly, in the context of a radio talk show called "Sound Off," the charge that a labor union was communist was held to be nonactionable opinion.[385] Only if the other *Ollman* factors strongly indicated the statement to be factual would a court refuse to protect it.

The contextual focus of the *Ollman* test ensures greater judicial protection for socially valuable opinions. These opinions particularly need shelter because they foster public debate and are susceptible to libel actions.[386] By giving weight to context, courts can provide greater leeway

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378. *Cf.* Ollman v. Evans, 750 F.2d 970, 987 n.33 (D.C. Cir. 1984) (conceding that a rule making any statement on an editorial or Op-Ed page constitutionally privileged opinion would have the advantage of simplicity and clarity).

379. *See* Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* 58 FORDHAM L. REV. 761, 763 (1990).

380. *Id.* at 784.

381. *Ollman,* 750 F.2d at 985.

382. *Cf.* Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule,* 72 GEO. L.J. 1817, 1851 (1984) (advocating that courts adopt a bright-line rule allowing the press to label an article as opinion in order to be afforded the absolute protection discussed in *Gertz.* Under this rule, a statement made in any column appearing on a clearly labeled editorial or opinion-editorial page of a newspaper would be protected, as would any statements made in articles individually labelled as opinion. Conversely, any column appearing without the opinion label would be treated as a statement of fact). The problem with this approach is that a publisher could easily label an entire newspaper as opinion, forcing courts to decide which labels are mere pretense. Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* 58 FORDHAM L. REV. 761, 778 n.115 (1990).

383. 89 N.J. 62, 444 A.2d 1086 (1982).

384. *Id.*

385. Nat'l Ass'n of Gov't Employees v. Cent. Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996 (1979), *cert. denied,* 446 U.S. 935 (1980).

386. Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984). *See also* Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 4, col. 1; *supra* note 341 (need to protect opinion-journalism).

to journalists and commentators in reporting controversial topics.[387] The quest for truth and knowledge may be fulfilled only if issues of public importance are brought to the public's attention through opinion-journalism.[388]

2. Policy Rationale

The core function of the first amendment is the preservation of the freedom to think and speak as one pleases[389] — the means essential to the discovery and spread of truth.[390] In *New York Times,* the Court reiterated that our society has a vital interest in allowing everyone to speak one's mind and newspapers to publish views on matters of public concern.[391] The *Gertz* holding assumed that information about matters that are communicated publicly through the media are normally of legitimate interest and importance to the general public.[392] Therefore, no information should be deemed not newsworthy unless, if true, its publication would constitute such an outrageous example of offensive conduct as to result in an invasion of privacy.[393]

The guarantee of an uninhibited press protects not only the interests of the media, but also those of the public.[394] In a government whose authority rests upon the consent of the governed, freedom of the press must be the most treasured principle.[395] The central purpose of freedom of speech is to give every voting member of the body politic the fullest possible participation in the understanding of the problems with which

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387. *Ollman,* 750 F.2d at 983.

388. *See id.*

389. Ollman v. Evans, 750 F.2d 970, 1002 (Bork, J., concurring). This has been referred to as the self-fulfillment function of free speech. In Professor Melville Nimmer's words, the "nature of man is such that he can realize the fulfillment of self only if he is able to speak without restraint." R. SMOLLA, LAW OF DEFAMATION § 1.07[2], at 1-19 (1990) (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH (1984)).

390. *Ollman,* 750 F.2d at 1002 (Bork, J., concurring) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

391. New York Times Co. v. Sullivan, 376 U.S. 254, 298-99 (1964).

392. W. PROSSER & W. KEETON, PROSSER & KEETON § 113, at 807-08 (5th ed. 1984).

393. *Id.* at 808.

394. Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule,* 72 GEO. L.J. 1817, 1851 (1984). *See* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (stating that first amendment guarantees "are not for the benefit of the press so much as for the benefit of all of us").

395. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2715 (quoting Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113, 115 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977)).

This is also known as the political self-governance function of free speech, as espoused by Dr. Alexander Meiklejohn. R. SMOLLA, LAW OF DEFAMATION § 1.07[3], at 1-19 to 1-20 (1990).

the citizens of a self-governing society must deal.[396] A broadly defined freedom of the press assures the maintenance of our political system and an open society.[397]

The commentary and editorial pages of newspapers play a significant role in providing the public with a forum for free expression of conflicting points of view.[398] When readers disagree with the commentary and editorials they see, they may reply with their own counterarguments, thereby carrying out the free and vigorous discussion of public issues anticipated by the first amendment.[399] Constitutional protection of free speech contemplates and encompasses vehement, caustic and sometimes unpleasantly sharp attacks on individuals regarding issues of public interest.[400] Misstatements or errors that occur in the course of vigorous public discourse are, in the long run, essential to enlightened opinion.[401] Conjecture and public debate fuel national discourse on popular issues and stimulate pressure for answers from those who know more.[402] In light of these public goals and considerations, journalists should not be penalized for producing commentary that, although not false, can be said to create a false impression in their readers' minds.[403]

Thus, strong public interests exist in allowing the news media the privilege of publishing whatever is reasonably regarded as true and newsworthy.[404] The press has the right as well as the obligation to inform the public through editorial and opinion journalism, however harsh, on any matter of public interest.[405] A contrary position could only inhibit the scope of public discussion on matters of general interest and concern.[406] Given these concerns, the *Milkovich* Court should have shielded forums

396. R. SMOLLA, LAW OF DEFAMATION § 1.07[3], at 1-20 (1990).

397. *Id.*

398. *See Milkovich,* 110 S. Ct. at 2714 (observing that the public and press regularly examine the activities of those who affect our lives, and that "one of the prerogatives of American citizenship is the right to criticize men and measures") (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (quoting Baumgartner v. United States, 322 U.S. 665, 673-74 (1944))).

This policy rationale is known as the broader enlightenment function of free speech, serving non-political social interests such as knowledge, intelligence, and sensitivity to human values. *See* R. SMOLLA, LAW OF DEFAMATION § 1.07[4], at 1-20 to 1-21 (1990).

399. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2714 (1990) (Brennan, J., dissenting).

400. Scott v. News-Herald, 25 Ohio St. 3d 243, 255, 496 N.E.2d 699, 709 (1986) (Douglas, J., concurring) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

401. *See id.* at 255, 496 N.E.2d at 710.

402. *Milkovich,* 110 S. Ct. at 2714 (Brennan, J., dissenting).

403. Levine, *Fear and Libel in the Newsroom,* Tex. Law., Aug. 13, 1990, at 22.

404. W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 113, at 807-08 (1984).

405. Scott v. News-Herald, 25 Ohio St. 3d 243, 262, 496 N.E.2d 699, 715 (1986) (Wright, J., concurring).

406. Ollman v. Evans, 750 F.2d 970, 991 (D.C. Cir. 1984).

of free expression, in which the exchange of conflicting perspectives furthers public understanding of important social issues.[407]

V. IMPLICATIONS OF *MILKOVICH V. LORAIN JOURNAL CO.*

A. Impact on Media: Journalists and Publishers

The *Milkovich* holding unquestionably narrowed the constitutional shield for defamation liability.[408] In a period of already resurging libel actions,[409] increased litigation against newspapers and commentators is

407. *See supra* text accompanying notes 398-406.

408. Greenhouse, *High Court Narrows Shield in Libel Law,* N.Y. Times, June 22, 1990, at A17, col. 4.

409. *Ollman,* 750 F.2d at 996 (Bork, J., concurring). *See also* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. PA. L. REV. 1 (1983) (observing that America is in the midst of a rejuvenation of the law of libel). The following listing of recent libel claims aptly illustrates the trend:

1. Former Governor Edward J. King of Massachusetts filed a $3.6 million suit against the *Boston Globe* for implications conveyed by articles, editorials, and political cartoons that King was "unfit and incapable of properly performing the duties of governor."

2. Former United States ambassador to Chile, Nathaniel Davis, and two of his ex-assistants filed a $150 million suit against the makers of "Missing," alleging that the 1982 film implied that the American embassy was connected with the killing of an American free-lance writer during the 1973 coup d'etat in Chile.

3. Public interest advocate Ralph Nader sued Ralph de Toledano for de Toledano's statements in a syndicated column regarding Nader's crusade against the lack of safety in General Motors' Corvair car.

4. Feminist attorney Gloria Allred filed a $10 million libel suit against a California state senator, who allegedly characterized her as a "slick butch lawyeress" in a press release.

5. Carol Burnett sued the *National Enquirer* in a $10 million libel action, and received a $1.6 million verdict from the jury.

6. Wayne Newton sued NBC for a report linking him with organized crime.

7. Elizabeth Taylor filed an action against ABC over a docu-drama depicting her life.

8. Writer Norman Mailer filed a $7 million libel suit against the *New York Post,* claiming that the newspaper defamed him in reports about the trial of writer Jack Henry Abbott.

9. Kimerli Jayne Pring, Miss Wyoming of 1978, was awarded $26 million (later reversed on appeal) by a federal court jury in a suit against *Penthouse* magazine.

10. E. Howard Hunt sued a weekly newspaper called the *Spotlight* regarding a story linking him to the assassination of John F. Kennedy, and was awarded $650,000 in damages by a Miami federal jury.

11. William Tavoulareas, president of Mobile Oil, was awarded more than $2 million in a suit against the *Washington Post* for an article claiming that Tavoulareas had used his influence to set up his son in business.

12. Writer Lillian Helman sued Mary McCarthy for $2.25 million over McCarthy's statements regarding Helman's writing on the Dick Cavett show.

13. Former President Jimmy Carter publicly threatened to sue the *Washington Post* for a gossip column relaying rumors that Blair House had been bugged during Ronald and Nancy Reagan's residence there before Reagan's inauguration. Following a retraction and published letter of apology by the *Post,* Carter chose not to file suit. Smolla, *supra,* at 2-4 (referring to cases 1-13).

14. Senator Paul Laxalt sued the *Sacramento Bee* for $250 million.

15. Ariel Sharon claimed $50 million dollars in damages against *Time* magazine.

16. Bestselling novelist Jackie Collins was awarded $40 million by a jury in her suit

likely to result from the decision.[410] One expert predicts that celebrities and other subjects of criticism will fire back at editorialists who write worst-dressed lists or hint at promiscuity, drug addiction, or unprofessional conduct.[411] For reasons discussed below,[412] cases will proceed fully to trial, escalating legal expenses and diverting time to protracted litigation, perhaps for as long as a decade.[413] Legal fees in the recent unappealed libel case brought by General William Westmoreland against CBS reached an estimated three to six million dollars.[414] Defending such

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against Larry Flynt, publisher of *Hustler* magazine. *See* Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 FORDHAM L. REV. 761, 766 (1990) (referring to cases 14-16).

17. The *Philadelphia Inquirer* has appealed a $34 million libel award in a suit brought by a former district attorney, and has lost a libel suit brought by two Pennsylvania Supreme Court justices.

18. In November, 1990, Washington apple growers filed a $150 million libel suit against CBS and the Natural Resources Defense Council, Inc., a New York City-based environmental public interest group, alleging that a biased "60 Minutes" report led to a government ban on the preservative Alar that caused apple sales to plummet.

19. LA Gear, Inc., a sportswear firm with annual sales of $900 million, sued a small newsletter, *Sporting Goods Intelligence*, charging that an erroneous news story hurt the firm's sales to distributors. Moore, *Press Clipping*, 22 NAT'L J. 3086 (1990) (referring to cases 17-19).

410. Resnick, *Florida Case Tests Libel Ruling*, Nat'l L.J., Sept. 24, 1990, at 27, col. 3 (quoting Bruce Sanford). In the few months since the Supreme Court's June decision, a number of state and federal lawsuits have been filed, seeking to take advantage of the *Milkovich* ruling. In one case, Moldea v. New York Times Co., No. 90-2053 (D.D.C. filed Aug. 23, 1990), the plaintiff seeks ten million dollars as compensation for a statement in a book review protraying him as a "sloppy and incompetent journalist." "Sloppy" is the harshest word used by the author who reviewed the plaintiff's book. *Id.* at col. 2; Streitfeld, *Author Sues Over Negative Review; Criticism Was Libelous, D.C. Writer Charges*, Wash. Post, Aug. 24, 1990, at C2, col. 1.

In Florida, a non-profit arts society sued a local newspaper and its entertainment writer, seeking damages for an allegedly defamatory series of news stories, an editorial, and a letter to the editor. The suit, Performing Arts Society of Stuart, Inc. v. Pine, No. 90-712-CA (Fla. Cir. Ct. filed July 16, 1990), claims against the *Stuart News*, which is owned by Scripps Howard, the country's eighth largest newspaper chain. *Id.* at 27, col. 1-3. *See Suing the Reviewer*, Wash. Post, Aug. 26, 1990, at C6, col. 1 (regarding the Moldea suit).

See also supra notes 24, 409 (regarding proliferation and resurgence of libel suits, respectively).

411. Streitfeld, *Author Sues Over Negative Review; Criticism Was Libelous, D.C. Writer Charges*, Wash. Post, Aug. 24, 1990, at C2, col. 1 (quoting attorney Bruce Sanford).

412. *See infra* text accompanying notes 444-54 (reasons why libel suits may proceed fully to trial).

413. Streitfeld, *Author Sues Over Negative Review; Criticism Was Libelous, D.C. Writer Charges*, Wash. Post, Aug. 24, 1990, at C1, col. 1 (quoting attorney Bruce Sanford). *See* Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1026 (1986) (stating that the defense of a libel suit can be both economically and psychologically expensive for a publisher).

414. Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1027 (1986). In Westmoreland v. CBS, 8 Media L. Rep. (BNA) 2493 (D.S.C. 1982), Westmoreland sued CBS for allegedly suggesting his complicity or incompetence in connection with the underestimation of enemy troop strength levels in Vietnam. Defense of Herbert v. Lando, 441 U.S. 153 (1979) — a case that never went to trial — cost an estimated three to four million dollars. *Id.*

suits will place an onerous and perhaps devastating financial burden on the press.[415]

More importantly, fear of such prolonged and devastatingly costly lawsuits may suppress media coverage of controversial issues through self-censorship.[416] One commentator has described the *Milkovich* decision as "ugly" because it endorses a jurisprudence that encourages journalists "to be timid, to pull their punches, and to watch their words."[417] Fearing the possibility of libel suits, the press may refrain from printing even material that is *non*-defamatory.[418] Commentators may be deterred from voicing criticism, even though they believe it is true, and it is in fact true, because of doubt over whether it can be proven in court or due to fear of the expense of doing so.[419] This self-censorship would dampen the vigor and variety of public debate, and impair the unfettered exercise of first amendment freedoms.[420] Thus, the *Milkovich* decision may rein-

415. *See* Garbus, *Courting Libel,* 251 THE NATION 548 (1990); Moore, *Press Clipping,* 22 NAT'L J. 3086 (1990) (reporting that lawyers for a small newsletter sued for libel by LA Gear, Inc., a large sportswear firm, say that the cost of litigation threatens the newsletter's future).

416. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 367-68 (1974) (Brennan, J., dissenting:

> It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance. (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52-53 (1971)).

417. Levine, *Fear and Libel in the Newsroom,* Tex. Law., Aug. 13, 1990, at 22. *See also The Supreme Court, 1989 Term—Leading Cases,* 104 HARV. L. REV. 219, 224 (1990) (stating that the *Milkovich* Court's failure to provide clear rules for determining when a statement is actionable raises the specter of self-censorship).

418. Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule,* 72 GEO. L.J. 1817, 1818 n.12, 1845 (1984). *See also* Comment, *Statements of Fact, Statements of Opinion, and the First Amendment,* 74 CALIF. L. REV. 1001, 1025 (1986) (noting that the expense of defending against libel suits and the possibility of large jury verdicts cause publishers to avoid controversial issues, even though not all statements about controversial issues are libelous).

419. Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule,* 72 GEO. L.J. 1817, 1848 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

420. Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule,* 72 GEO. L.J. 1817, 1845, 1848 (1984). *See also* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (noting that the fear of large verdicts in damage suits for innocent or merely negligent misstatement, and fear of the expense involved in their defense, must inevitably cause publishers to steer wider of the unlawful zone and thus avoid the danger that the legitimate utterance will be penalized); Moffatt v. Brown, 751 P.2d 939 (Alaska 1988) ("The threat of being put to the defense of a lawsuit brought by a popular public official [or public figure] may be as chilling to the exercise of [f]irst [a]mendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. . . . Unless persons, including newspapers, desiring to exercise their [f]irst [a]mendment rights are assured freedom from harassment of lawsuits, they will tend to become self-censors" (quoting Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967)); *The Supreme Court, 1989 Term—Leading Cases,* 104 HARV. L. REV. 219 (1990) (suggesting that the uncertainty in defamation law perpetuated by the *Milkovich* Court's decision may lead the press to

force a chilling effect on public debate in the press.[421]

Another consequence of the *Milkovich* decision may be that written commentary will become irresponsible and exaggerated.[422] The *Milkovich* rule exempted from defamation liability only statements of rhetorical hyperbole or imaginative expression that could not reasonably be interpreted as stating actual facts about an individual.[423] Under *Milkovich,* only words so loosely figurative that no reasonable person would believe the writer intended them seriously, will qualify as protected opinion.[424] Ironically, an author who expresses a moderately noncomplimentary opinion about an individual will be more likely to incur a defamation lawsuit than an author who engages in vicious name-calling.[425] A milder accusation, such as "liar," may be actionable if it is found to imply defamatory facts. On the other hand, a stronger allegation of sexual misconduct or criminal blackmail, made in a satirical or politically charged context, will be inactionable if it is held that no reader would infer false fact from the statement.[426]

The anomaly is that a writer may print anything, no matter how outrageous, as long as no reasonable reader believes it.[427] As a result, journalists may exaggerate their statements to ensure that the public eas-

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not publish protected statements rather than risk defamation liability, to the detriment of public discourse).

421. An official of the Society of Professional Journalists predicted that public debate would take a more cautious turn in the press. Sitomer, *Can 'Opinion' Be Libelous?,* Christian Sci. Monitor, Aug. 9, 1990, at 14, col. 2.

422. *Id.* at 14, col. 2-3.

423. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706 (1990) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).

424. Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 4, col. 3.

425. *See* Cox, *Lawyer Wins $1.6 Million Libel Award,* Nat'l L.J., Nov. 5, 1990, at 13, col. 3 (quoting Judith Epstein, a media lawyer at Oakland's Crosby, Heafey, Roach & May, and journalism instructor at the University of California, Berkeley, as saying, "Four months ago, 'Asshole of the Month' was okay to print, and now you can't say 'arrogant' "); Streitfeld, *Author Sues Over Negative Review; Criticism Was Libelous, D.C. Writer Charges,* Wash. Post, Aug. 24, 1990, at C2, col. 1-2 (quoting media attorney Bruce Sanford: "If you call someone a 'jerk' or a 'horse's ass' or 'lousy,' those are . . . clearly words of opinion. But if you begin to imply something, there's a problem. When you call someone 'nuts' or 'loony tunes,' are you implying they're emotionally disturbed? In the old days, we'd say clearly not. After *Milkovich,* one wonders"). *See also* Moldea v. New York Times, No. 90-2053 (D.D.C. filed Aug. 23, 1990).

426. Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* 58 FORDHAM L. REV. 761, 762 (1990). *See also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); R. SMOLLA, LAW OF DEFAMATION § 6.12[10], at 6-52 (1990); Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 4, col. 3.

427. Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 4, col. 3.

ily perceives them as rhetorical hyperbole rather than fact.[428] The *Milkovich* decision may encourage irresponsible overstatement at the expense of well-reasoned analysis, as editorialists seek to shield themselves from libel suits.[429] This result weakens the viability of the Court's holding and contradicts society's interest in honest and creditable journalism.

B. Effects on Libel Litigation and Media Counsel

The significance of the *Milkovich* decision will depend primarily on its treatment by state appellate courts.[430] The *Milkovich* rule will automatically govern only in areas of federal law where opinion issues arise.[431] Although state courts may continue to provide broad protection to opinion,[432] many may be swayed by the influential 7-2 decision in *Milkovich.*[433]

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428. *See* Sitomer, *Can 'Opinion' Be Libelous?,* Christian Sci. Monitor, Aug. 9, 1990, at 14, col. 2-3.

429. Greenhouse, *High Court Narrows Shield in Libel Law,* N.Y. Times, June 22, 1990, at A17, col. 6.

430. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 28, col. 1.

431. *Id.*

432. *Id.* State constitutions often provide for broader protection of speech and press rights than is provided under the first amendment. State statutory and common law, in areas such as the fair comment doctrine, grant additional protection by requiring proof of a false and defamatory statement of fact. Warren, Heinke & Sager, *Not as Bad as It Looks,* Nat'l L.J., July 30, 1990, at 14, col. 3-4.

433. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 28, col. 1. *See* Cox, *Lawyer Wins $1.6 Million Libel Award,* Nat'l L.J., Nov. 5, 1990, at 13 (discussing O'Connor v. McGraw-Hill, No. C437421 (L.A. Super. Ct. Oct. 19, 1990), in which Judge Ernest Zack applied the *Milkovich* decision retroactively. After a three-week trial, the jury awarded plaintiff O'Connor $1.6 million in compensatory damages against *BusinessWeek* for printing a quote about the possible "arrogance" of an unnamed attorney, who was the plaintiff. A cover story describing how Eastman Kodak Company had lost out to Fuji Photo Film in a bid to be an official sponsor of the Los Angeles Olympic Organizing Committee's 1984 Games stated: "[A] Kodak attorney picking over contract language declared, 'After all, this is Eastman Kodak,' recalls Daniel D. Greenwood, who is in charge of sponsorships for the LAOOC. It appeared to be a lack of enthusiasm, an arrogance." Allegedly, O'Connor was the only Kodak attorney negotiating with the Olympics. O'Connor claimed that Kodak fired him immediately, after seven years of favorable evaluations, with the explanation that he had "become visible." O'Connor, 48 years old, is now an associate at a four-lawyer law firm in New York, allegedly making less than half of his former salary).

See also Immuno A.G. v. Moor-Jankowski, 18 Media L. Rep. (BNA) 1625 (1991) (finding that defendant's letter to the editor "could be actionable" under *Milkovich* since it was "impossible to state with complete certainty that some of the statements previously considered protected opinion, because of the language and format of the speech, would not now be viewed as implied assertions of fact." The court concluded, however, that plaintiff's complaint had been properly dismissed because: (1) plaintiff had not met its burden of showing the falsity of the factual assertions; and (2) under independent state law, context separated actionable fact from opinion); Anderson, *Judge Dismisses Libel Suit Against New York Hospital,* N.Y. L.J., Aug. 17, 1990, at 1 (discussing Zion v. Bensel (N.Y. Sup. Ct. Aug. 1990), in which Justice Baer, Jr., of New York County Supreme Court, IA Part 11, concluded that a hospital attorney's lan-

The most probable effect of the *Milkovich* ruling on libel litigation will be a proliferation of libel suits[434] and a prolonging of libel actions in the courts.[435] Experts have predicted that the *Milkovich* decision will encourage individuals to bring defamation actions alleging implications of defamatory fact from opinion.[436] Private lay defendants may be subject to an increasing number of libel suits by plaintiffs whose true motives are intimidation or harassment.[437] Future defendants may include citizens who write letters to the editor and are sued by real estate developers or corporate giants with deep pockets and a vengeful purpose.[438] These lay defendants lack the resources that newspapers possess to fund the payment of costly legal fees.[439] Devastatingly expensive lawsuits may deter members of the public from strongly criticizing others and their activities.[440]

Other libel experts expect increased litigation on the distinction between actionable fact-laden opinion and non-actionable rhetorical hyperbole and imaginative expression.[441] This debate caused the *Milkovich* Court to split 7-2.[442] Courts may also see additional litigation as to whether particular states may continue to retain an absolute privilege for opinion implicating fact under the provisions of their constitutions.[443]

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guage was constitutionally protected under *Milkovich* because it could not be interpreted as stating actual facts about an individual. Referring to a pending malpractice action stemming from the death of plaintiff's daughter, the attorney had stated, "[plaintiff journalist and lawyer] Mr. Zion has chosen to manifest [his] grief by reckless and malicious attacks on the physicians who took care of his daughter . . . . Mr. Zion's accusations will be shown to have been both unfair and unfounded. It is unfortunate that Mr. Zion with his unique access to public forums (sic) is in a position to gain such widespread publicity for his uninformed invective." Judge Baer found that the charge clearly was a statement of the hospital's litigation positions, and that the statements were so inherently subjective as not to be susceptible to precise determination of truth or falsity).

For a federal court decision applying *Milkovich*, see Unelko Corp. v. Rooney, 912 F.2d 1049, 1055-57 (1990) (finding that Andy Rooney's words on the television program "60 Minutes" were not protected as opinion under the *Milkovich* decision, but holding that the district court properly granted summary judgment on Unelko's defamation claim because Unelko's evidence did not demonstrate that Rooney's statements were false or implied false assertions of fact).

434. *See supra* note 24 (increased libel litigation after *Milkovich*).

435. Goodale, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 2, col. 5.

436. *See supra* note 24 (increased libel litigation after *Milkovich).*

437. Hentoff, *Wrestling With the First Amendment,* Wash. Post, June 30, 1990, at A19, col. 1.

438. *Id.*

439. *Id.*

440. *Id.*

441. Goodale, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 2, col. 5.

442. *Id.*

443. *Id.*

Furthermore, libel litigation will likely become protracted, as cases that previously would have been dismissed on summary judgment are prolonged or proceed fully to trial.[444] Prior to the *Milkovich* holding, courts resolved determinations of opinion as questions of law.[445] Most libel suits were thrown out by judges granting motions to dismiss based on the theory that the disputed statement was absolutely protected as opinion by the Constitution.[446] Now, since the central issue is whether a reasonable factfinder could conclude that an opinion implies defamatory facts, many statements that would have been ruled opinion because of their context will survive summary judgment.[447]

With the Court's indication that the opinion issue is a question of fact,[448] it will be substantially more difficult to prevent libel claims based on opinion implicating fact from going to the jury.[449] One reason is that the Court's obliteration of opinion as a constitutional defense will necessitate a more intense intellectual analysis by courts and media defendants.[450] Detailed analysis of the kind required to determine close questions of non-actionability may lead some trial judges to evade their responsibility in favor of deference to a jury.[451] The requirement that plaintiffs prove allegedly defamatory statements were made with knowledge of their false implications or with reckless disregard of their truth[452] will also prolong litigation.[453] Dismissal will be delayed until the outcome of pre-trial discovery or after a trial itself.[454]

The danger of allowing juries to determine libel claims is that the number of costly damage awards may increase.[455] Typically, juries are

444. *See* Marcus & Pink, *Statements of Opinion Can Be Libelous, Court Rules; Expressions With 'False and Defamatory' Facts Not Automatically Shielded, Justices Find,* Wash. Post, Jun. 22, 1990, at A17, col. 1; Goodale, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 2, col. 4-5.

445. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 28, col. 1.

446. *See* Goodale, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 2, col. 4-5. *See also* Garbus, *Courting Libel,* 251 THE NATION 548 (1990) (stating that, presently, more than 80% of all libel cases are dismissed prior to trial).

447. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 28, col. 1.

448. *Id.* at 27, col. 1.

449. *Id.*

450. Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 8, col. 4.

451. *Id.*

452. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990).

453. Goodale, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 2, col. 5.

454. *Id.*

455. *See* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. PA. L. REV. 1, 4 (1983); Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 8, col. 4.

less sympathetic than judges to opinion defenses, and are much more likely to find for the plaintiff in a defamation case.[456] According to two studies done in the early 1980s, the average initial damage award in libel suits against the media was over two million dollars, with an additional two million in punitive damages.[457] In one recent case on appeal, a jury awarded the plaintiff $47.5 million.[458] Such judgments may threaten the financial viability of the press.[459] Although jury awards can be reduced, the risk that they will be upheld often leads to generous settlements.[460] In fact, data show not only a trend toward more generous jury awards, but a corresponding trend toward the media's settlement of suits at a substantial cost.[461] The chilling effect that fear of libel suits places on the media is intensified in the case of local newspaper publishers who cannot afford high damage awards or settlement costs.[462]

Furthermore, libel law experts fear that the *Milkovich* ruling will

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456. Clayton, *High Court: No Federal Privilege for 'Opinion' Found Defamatory,* Nat'l L.J., Aug. 27, 1990, at 28, col. 1-2; Ollman v. Evans, 750 F.2d 970, 1006 (Bork, J., concurring) (referring to evidence showing that juries do not give adequate attention to limits imposed by the first amendment); Moore, *Press Clipping,* 22 NAT'L J. 3086 (1990) (according to C. Thomas Dienes, a professor at George Washington University Law Center who represents *The Atlantic* and *U.S. News & World Report,* the news media lose two-thirds of the libel cases that go to a jury, but judges reverse or dismiss by summary judgment four-fifths of all libel cases in which the court rules on a point of law, rather than the specific facts of a case).

457. Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context,* 58 FORDHAM L. REV. 761, 766 (1990). Libel plaintiffs also tend to win before the jury more often than other tort plaintiffs, at a rate from 55% to 85% (compared with a rate for medical malpractice plaintiffs of 30% to 40%). *See also* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. PA. L. REV. 1, 7 (1983) (reporting that recent data from the Libel Defense Resource Center [LDRC] indicate a staggering average of almost $8 million per punitive award in libel suits). The LDRC is a New York-based information clearinghouse organized by media groups to monitor developments in libel law.

In 1988, the Supreme Court let stand a $3 million judgment against CBS, Inc., in a case brought by Brown & Williamson, Co. in response to a statement by a Chicago anchorman at a CBS-owned television station that the tobacco company improperly tried to encourage adolescents to smoke. The largest libel judgment ever paid by a newspaper was $2.8 million, by the *Pittsburgh Post-Gazette* for accusing an attorney of misconduct in drafting a will for a Pennsylvania millionaire. Moore, *Press Clipping,* 22 NAT'L J. 3086 (1990).

458. Comment, *Statements of Fact, Statements of Opinion, and the First Amendment,* 74 CALIF. L. REV. 1001, 1027 & n.151 (1986).

459. *Id.*

460. *Id.* A suit brought by Philadephia Mayor William J. Green against a CBS television station for $5.1 million (for reporting that he was under federal criminal investigation) was ultimately settled for between $250,000 and $400,000. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. PA. L. REV. 1, 2 & n.8 (1983).

461. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. PA. L. REV. 1, 4, 6 & n.40 (1983) (citing studies conducted by the LDRC and by Professor Marc Franklin).

462. Scott v. News-Herald, 25 Ohio St. 3d 243, 255, 496 N.E.2d 699, 710 (1986) (Douglas, J., concurring).

restore confusion in a body of law that had become orderly.[463] The crucial question of whether an opinion incorporates actionable assertions of fact will have to be resolved on a case-by-case basis.[464] From the *Milkovich* Court's summary of the law of defamation, it appears that it will not hear future first amendment press cases.[465] The Court's lack of interest in this area leaves unresolved the need for constitutional protection for the press in areas of libel law such as punitive damages.[466] The *Milkovich* ruling may also lead to conflicting decisions by federal courts.[467] Lower courts will be left on their own to work out, on an ad hoc basis, the principles catalogued in *Milkovich.*[468] Such a hesitation in the development of libel law under the first amendment will do little to encourage a robust press.[469]

Prior to the *Milkovich* decision, attorneys for journalists and novelists had advised their clients that they need not fear libel litigation for statements of opinion concerning others, whether or not they implicated fact.[470] However, following the *Milkovich* Court's eradication of broad constitutional protection for opinion, media counsel will have to cease that practice.[471] A statement that expresses an opinion will no longer be saved from defamation liability, if a reasonable person could conclude that a statement implies a factual assertion.[472]

The practical result of the *Milkovich* decision on libel lawyers will be to alter their counseling strategy. From now on, lawyers will need to review their clients' work closely. If a statement in an article can be characterized as opinion that implicates fact, then it may be advisable to delete it.[473] The lawyer should scrutinize the statement, however, to assess if it may be safely characterized as imaginative opinion or rhetorical

463. Coyle & Strasser, *Court Deals Blows to Patronage, Libel Privilege,* Nat'l L. J., July 2, 1990, at 5, col. 3, at 16, col. 1 (quoting Bruce Sanford).

464. Greenhouse, *High Court Narrows Shield in Libel Law,* N.Y. Times, Jun. 22, 1990, at A17, col. 6.

465. Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 8, col. 3-4.

466. *Id.* at 8, col. 4.

467. *Id. See also The Supreme Court, 1989 Term—Leading Cases,* 104 HARV. L. REV. 219 (1990) (stating that the *Milkovich* Court's failure to provide lower courts with guidance in determining whether an opinion meets criteria used to distinguish fact from opinion, perpetuates the uncertainty that pervades the opinion privilege).

468. Gross, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 8, col. 4.

469. *Id.*

470. Goodale, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 2, col. 4.

471. *Id.*

472. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990).

473. *Id. See* Goodale, *Opinions Left Unprotected by Supreme Court Ruling,* Pa. L.J.-Rep., Aug. 6, 1990, at 2, col. 4.

hyperbole.[474] To protect their clients from libel actions (and themselves from malpractice suits), media attorneys may counsel clients to err on the side of conservatism.[475] This pre-publication scrutiny may result in a chilling of free expression by reporters and editorialists.[476]

VI. CONCLUSION

The freedom to think and speak as one pleases is one of our most fundamental constitutional rights.[477] In the Supreme Court's words, "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[478] The early opponents of our Constitution objected to its adoption on the ground that it contained no Bill of Rights to safeguard freedoms of religion, press, assembly, and speech against possible attempts by a powerful central government to curtail these liberties.[479] To address these concerns, James Madison proposed amendments to ensure that these freedoms would remain safe from governmental abridgment.[480] We cannot be absolutely certain of the precise intention of the framers and ratifiers of the first amendment's speech and press clauses.[481] In providing for these rights, however, the framers clearly meant to preserve freedom of expression.[482]

Our country has a judicial tradition of continuously serving this central purpose of the first amendment.[483] Specific constitutional protection is given to the press to safeguard it from the chilling effects of defamation litigation.[484] The goal is to avoid self-censorship, which results when overbroad defamation standards stifle important non-defamatory mate-

474. *Id.*

475. *See* Marcus & Pink, *Statements of Opinion Can Be Libelous, Court Rules; Expressions With 'False and Defamatory' Facts Not Automatically Shielded, Justices Find,* Wash. Post, June 22, 1990, at A4, col. 1.

476. *Id.*

477. *See* Scott v. News-Herald, 25 Ohio St. 3d 243, 261, 496 N.E.2d 699, 714 (1986) (Wright, J., concurring).

478. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1990) (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

479. *Scott,* 25 Ohio St. 3d at 260, 496 N.E.2d at 714 (Douglas, J., concurring).

480. *Id.*

481. Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring).

482. *Id.*

483. *Id.* at 995 (Bork, J., concurring).

484. Scott v. News-Herald, 25 Ohio St. 3d 243, 261, 496 N.E.2d 699, 714 (1986) (Douglas, J., concurring). *See also* Cooke, *The Free Press: Essential to Robust Debates,* 10 PACE L. REV. 1, 3 (1990) (former Justice Potter Stewart opined that the free press clause is a structural provision of the Constitution, and that its primary effect is to protect editorial autonomy).

rial.[485] Contradicting this intent, the *Milkovich* decision may cause reporters to withhold newsworthy information from publication whenever an opinion may implicate fact.[486] Editors may censor stinging comments, even from an Op-Ed page, to avoid the possibility of libel litigation. This threatened burden of self-censorship on the press can as effectively stifle discussion and criticism as would overt governmental regulation that the first amendment undoubtedly would not allow.[487] We must preserve protection for the press even at the cost of shielding the expression of ideas we abhor, or eventually the protection of expression may be denied to ideas we cherish.[488]

Although redressing injuries to an individual's reputation is undeniably important, the danger to reputation is one that we have chosen to tolerate in pursuit of individual knowledge, truth, and vitality in society as a whole.[489] Essential to the preservation of freedom of speech is the willingness of those who speak in our society to be spoken about.[490] This experience may not always be pleasant or painless, but it is a concession that is necessary to maintain a vigorous and enlightened society.[491] Employing first amendment law to make public dispute safe and comfortable for all participants would only stifle debate.[492]

More crucial than protecting reputation is the public's interest in receiving information on issues of public importance, even if the trustworthiness of the information is not absolutely certain.[493] The nation's collective interest in unhindered commentary and criticism can only be served by opinion-journalism that, although not definitive, raises questions and prompts investigation or debate.[494] Critical reviews of books, plays, and restaurants are intended as guides for would-be consumers.[495] Any chilling effect on free speech will be a disservice to the public, who has the right to know not only the facts, but also the broader background

485. *Scott,* 25 Ohio St. 3d at 245, 496 N.E.2d at 702 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

486. *See supra* notes 416-21 and accompanying text (discussing threat of self-censorship).

487. Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring).

488. *Scott,* 25 Ohio St. 3d at 261, 496 N.E.2d at 714 (1986) (Douglas, J., concurring).

489. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2715 (1990).

490. *Ollman,* 750 F.2d at 1002 (Bork, J., concurring).

491. *Id.*

492. *Id.* at 993.

493. Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984); *see id.* at 995 (Bork, J., concurring) ("The American press is extraordinarily free and vigorous, as it should be. It should be, not because it is free of inaccuracy, oversimplification, and bias, but because the alternative to that freedom is worse than those failings").

494. *Id.* at 983.

495. *Suing the Reviewer,* Wash. Post, Aug. 26, 1990, at C6, col. 2.

and implications of controversial situations.[496]

Our democratic society is founded on the freedom to voice objections to the status quo, and is dependent on the interplay of conflicting viewpoints to inform itself and its citizens.[497] In balancing the concerns reflected in the first amendment and defamation law, the Supreme Court has stated that "whatever is added to the field of libel is taken from the field of free debate."[498] Thus, every concession to libel almost certainly results in a corresponding compromise to freedom of the press.[499]

Particular care must be taken to guard against detrimental effects that the *Milkovich* decision may have on the exercise of free speech and press rights.[500] Judges have a duty to ensure that these privileges, specified by the framers, are implemented in keeping with constitutional freedom.[501] Close judicial scrutiny of libel actions will help ensure that cases involving types of writing essential to a vigorous first amendment do not reach the jury.[502] Evidence has shown that juries do not give adequate attention to constitutional limits, as they are unfamiliar with the legal precedents protecting the press.[503]

These concerns point to the conclusion that the Court has erred in abandoning a constitutional exemption for statements deemed opinion, and failing in the alternative to create a special shield to protect opinion-journalism. Coupled with the *Milkovich* decision, the Supreme Court's recent agreement to hear another case, involving no important issues of libel law,[504] seems to indicate that the Rehnquist Court is cutting back

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496. Sitomer, *Can 'Opinion' Be Libelous?,* Christian Sci. Monitor, Aug. 9, 1990, at 14, col. 4.

497. Scott v. News-Herald, 25 Ohio St. 3d 243, 245, 496 N.E.2d 699, 702 (1986) (citing Orr v. Argus-Press Co., 586 F.2d 1108, 1117 (6th Cir. 1978)).

498. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

499. *Scott,* 25 Ohio St. 3d at 256, 496 N.E.2d at 710 (Douglas, J., concurring).

500. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2715 (1990) (Brennan, J., dissenting).

501. Ollman v. Evans, 750 F.2d 970, 996 (1984) (Bork, J., concurring).

502. *Id.* at 997 (Bork, J., concurring). *See also* Moffatt v. Brown, 751 P.2d 939, 946 (Alaska 1988) (noting that the failure of courts to summarily dispose of libel cases where warranted would chill the media's first amendment right to free speech by impeding th[e] national commitment to "uninhibited, robust, and wide-open" debate on public issues, as stressed in New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

503. *Id.* at 1006 (Bork, J., concurring); Moore, *Press Clipping,* 22 NAT'L J. 3086 (1990).

504. Masson v. The New Yorker Magazine, Inc., No. C-84-7548 EFL (N.D. Cal. filed Nov. 29, 1984). In *Masson,* psychoanalyst Jeffrey Masson brought suit against Janet Malcolm for fabricating quotes attributed to Masson in an article published in the *New Yorker.* Malcolm admitted inventing the quotes, in one of which Masson allegedly called himself "an intellectual gigolo." The United States Court of Appeals in California held that, while Malcolm may have been inaccurate, her accurate quotes outweighed her inaccurate ones, so she was not guilty of actual malice under *New York Times v. Sullivan. See* Garbus, *Courting Libel,* 251 THE NATION 548 (1990); Moore, *Press Clipping,* 22 NAT'L J. 3086 (1990).

on the protections given to the press by *New York Times v. Sullivan.*[505] With diminishing constitutional protection, the press is in danger of becoming less vigorous, and the American public less well-informed and open-minded. In the words of one writer, " 'free speech' may now, more than ever, be an oxymoron — in my opinion."[506]

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505. Garbus, *Courting Libel,* 251 THE NATION 548 (1990); Moore, *Press Clipping,* 22 NAT'L J. 3086 (1990) (quoting Rodney A. Smolla, director of the College of William and Mary Law School's Institute of Bill of Rights Law, as warning, "The Court is going to cut back on the edges [of *New York Times v. Sullivan*] everywhere it can"; the author also quotes Michael P. McDonald, director of the Center for Individual Rights in Washington, an organization that often represents libel plaintiffs, as stating, "The Court is not going to give the press the benefit of the doubt as different justices might have in times past").

506. James, *Free-Speech Cases Reveal Momentum of Restraint,* Nat'l L.J., Aug. 13, 1990, at S11, col. 4.