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## Challenging Defamatory Opinions as an Alternative to Media Self-Regulation

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# Challenging Defamatory Opinions as an Alternative to Media Self-Regulation

James F. Ponsoldt\*

## INTRODUCTION

With the proliferation of channels dedicated to news, debate, and commentary across all forms of media—including cable, radio, and the Internet—there has been an explosion of largely unrestrained trafficking in opinion. Many of these opinions imply underlying facts about public figures. Like other businesses, the media needs a product to sell. Increasingly, the media's product is the presentation of contentious opinion that has successfully attracted niche audiences in an otherwise fragmented market.

The “coverage” of the Clinton-Lewinsky affair, a recent example in which there were few hard facts to report, created an unprecedented atmosphere of speculative “information” published about a number of people. President Bill Clinton and Monica Lewinsky were not the only public and private parties caught up in the controversy. Others included Vernon Jordan, Linda Tripp, Bruce Lindsay, and Sidney Blumenthal.

Notwithstanding polls that demonstrate that the public is not buying what the media is selling,<sup>1</sup> the content of commentary has

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1. For example, in a *New York* magazine poll released in November 1998, fifty percent of those surveyed said that the media's Monica Lewinsky coverage has been “somewhat” or “very” irresponsible. See Howard Kurtz, *Not in it for the Sport; Keith Olbermann, Putting MSNBC Behind Him*, WASH. POST, Nov. 16, 1998, at B01. Forty-seven percent said that President Clinton's continued popularity reflects the public “sending a message to the media that they are tired of this story.” *Id.* Forty-eight percent said they aren't paying attention to the story anymore, forty-three percent said they do not want to hear any more, and seven percent said that they could not get enough. See *id.*

become even less restrained since Clinton's half-hearted national "apology."<sup>2</sup> In cable programming over the past year, for example, there has been an apparent lack of concern by commentators, particularly those with political goals, about the potential civil consequences of reckless commentary. However, a strong consensus of media critics opposes governmental regulation. The alternative they propose to media "recklessness" is "self-regulation," the application of professional editorial judgment to the content of what is published.

The media assumes that "opinion," no matter how nasty and outrageous, is not only a marketable commodity but also immune from legal challenge. They base their assumption on a broad interpretation of First Amendment freedoms.<sup>3</sup> Coupled with a lack of

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2. On August 17, 1998 President Clinton addressed that nation after testifying before the Office of Independent Counsel and a grand jury earlier that day:

I answered their questions truthfully, including questions about my private life. Questions no American citizen would ever want to answer. Still, I must take complete responsibility for all my actions, both public and private. And that is why I'm speaking to you tonight. As you know, in a deposition in January, I was asked questions about my relationship with Monica Lewinsky. While my answers were legally accurate, I did not volunteer information. Indeed, I did have a relationship with Ms. Lewinsky that was not appropriate. In fact, it was wrong. It constituted a critical lapse in judgment and a personal failure on my part for which I am solely and completely responsible. But I told the grand jury today, and I say to you now, that at no time did I ask anyone to lie, to hide or destroy evidence or to take any other unlawful action. I know that my public comments and my silence about this matter gave a false impression. I misled people, including even my wife. I deeply regret that . . . our country has been distracted by this matter for too long. And I take my responsibility for my part in all of this. That is all I can do.

ABC News Special Report: The President Apologizes to the American Public Bill Clinton Admits to Improper Behavior (ABC television broadcast, Aug. 17, 1998), available in 1998 WL 8056120.

3. The First Amendment of the United States Constitution proclaims that the "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I. One commentator asserts that:

[S]tate recognition and enforcement of private rights touching forms of communication is itself sufficient to subject the resulting exercises of private power to constitutional scrutiny can hardly be doubted. Perhaps the most familiar example is the line of United States Supreme Court decisions commencing with *New York Times Co. v. Sullivan*. . . . [In that case, d]espite the fact that the role of the state was limited to the enforcement of private rights, the Court showed no hesitation in subjecting the entire regime to constitutional inspection. . . . *New York Times* . . . concerned the limitations imposed by the first amendment

effective media self-regulation, this interpretation causes the media to act as if the targets of published viciousness have no remedy—that public figures are sitting ducks for allegations cloaked as “opinion” because opinion cannot be deemed false.

As evidenced by *Blumenthal v. Drudge*,<sup>4</sup> there is an underutilized alternative to media self-regulation: defamation law.<sup>5</sup> Sidney Blumenthal’s recent action for defamation against Matt Drudge for publishing claims that Blumenthal, a Clinton White House aide, had a history of wife-beating reflects the current state of the law of defamation. The fact that summary judgment was upheld for Drudge in the *Blumenthal* case reiterates the lack of media accountability arising from alleged defamatory opinion or speculation which implies an underlying, verifiable fact. However, similar future actions by public figurers may yet serve the public interest in restoring the proper balance between promoting robust public debate and protecting individual reputations.

This Essay analyzes defamation law as it applies to the media. Part I summarizes the state of defamation law prior to the 1990 Supreme Court decision in *Milkovich v. Lorain Journal Co.*, when opinion was presumed immune from liability. Part II examines the holding in *Milkovich*, which suggests the potential liability for recklessly defamatory statements couched as or in the context of opinion. Part III reviews post-*Milkovich* decisions during the 1990’s. This Essay concludes that the predictions of *Milkovich* were accurate in many jurisdictions and could apply to televised allegations during the coverage of the Clinton affair. The defamation law alternative to media self-regulation awaits only additional

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upon state doctrines restricting forms of expression that might intrude upon personal rights. Similar constitutional limitations operate with respect to state-ordained property rights.

Robert C. Denicola, *Trademark as Speech: Constitutional Implications of the Emerging Rationales for the Protection of the Trade Symbols*, 1982 WIS. L. REV. 158, 207 (1982).

4. 992 F. Supp. 44 (D.D.C. 1998).

5. See generally *Toney v. WCCO Television*, 85 F.3d 383 (8th Cir. 1996) (holding that the Minnesota Supreme Court, as predicted by the Court of Appeals, would recognize a cause of action for implied defamation where defendant omits important facts or where the defendant juxtaposes a series of facts so as to imply a defamatory connection between them). For a discussion of “implied” defamation, see *Foretich v. American Broad. Co.*, Nos. CIV.A. 93-2620, 94-0037, 1997 WL 669644, at \*1 (D.D.C. Oct. 17, 1997).

plaintiffs, like Blumenthal or perhaps non-public figures, to help the media serve the public interest by exercising media self-restraint and curtailing the destruction of individual reputations.

### I. PRE-MILKOVICH DISTINCTION BETWEEN FACT AND OPINION

Prior to the *Milkovich v. Lorain Journal Co.*<sup>6</sup> decision, most courts assumed that a constitutional privilege or immunity existed for opinion. As long as sixteen years after the fact, dictum in *Gertz v. Robert Welch, Inc.*<sup>7</sup> appeared to establish a privilege making statements of opinion non-actionable.<sup>8</sup> *Gertz* involved a policeman convicted of murder and a subsequent civil suit against the convicted murderer.<sup>9</sup> *Gertz* was the plaintiff's attorney, who was accused by *American Opinion*<sup>10</sup> of being part of a "frame-up" and scheme to discredit the local police.<sup>11</sup>

In *Gertz*, the fact/opinion distinction was never actually raised because the Supreme Court assumed that the statements made by *American Opinion* were demonstrably false and thus *per se* actionable.<sup>12</sup> The statements were said to contain "serious inaccuracies" in that *Gertz* was never a member of a Communist organization, and no evidence linked him to the Chicago riots.<sup>13</sup>

Justice Powell enunciated the so-called *Gertz* immunity doctrine: "[u]nder the First Amendment there is no such thing as a false *idea*. However pernicious an *opinion* may seem, we depend for its correction not on the conscience of judges and juries but on

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6. 497 U.S. 1 (1990).

7. 418 U.S. 323 (1974).

8. *See id.* at 339-40.

9. *See id.* at 325.

10. *American Opinion* is a publication associated with the John Birch Society. *See id.*

11. *See id.* at 325-26. Specifically, the monthly magazine labeled *Gertz* a "Leninist" and "Communist-fronter." *Id.* at 326. In addition, the writer insinuated that *Gertz* was involved in the attacks on Chicago police during the 1968 Democratic Convention. *See id.* at 326.

12. *See id.* at 332. Rather, *Gertz* primarily addressed whether private defamation plaintiffs are required to prove that defendants acted with actual malice. *See id.* at 325.

13. *Id.* at 326. The managing editor did not verify the charges by the author, who had studied the underlying murder case but never investigated *Gertz* himself. *See id.* at 327.

the competition of other ideas.”<sup>14</sup> Thus, as suggested in *Gertz*, pre-*Milkovich* courts believed that this statement promoted the voicing of opinions as a means of spurring debate in society. The courts also interpreted the statement as a test to distinguish fact, which is actionable, from opinion, which is not actionable.<sup>15</sup> This distinction came to be known as the *Ollman* test.<sup>16</sup>

The *Ollman v. Evans* decision, rendered ten years after *Gertz*, involved a university professor of political science who sued newspaper columnists for defamation.<sup>17</sup> The alleged defamation occurred in an article that claimed that the plaintiff professor was a Marxist who used “higher education for indoctrination.”<sup>18</sup> After the article appeared in the newspaper, the political science professor was denied the position of chairman of a university department.<sup>19</sup>

Unlike the *Gertz* court, the *Ollman* court directly addressed the fact/opinion distinction; finding the distinction to be a matter of law, the *Ollman* court kept the decision from a jury.<sup>20</sup> Ironically, Judge Kenneth Starr wrote the opinion for the D.C. circuit and applied what became the famous four-factor *Ollman* test.<sup>21</sup> The first factor examines the common usage or meaning of the specific language. Under this prong, the more precise the definition or commonly associated meaning of the words, the more likely the statement would be found a statement of fact and thus potentially

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14. *Id.* at 339-40.

15. *See id.*

16. *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

17. *See id.* at 971.

18. *Id.* The article was entitled “The Marxist Professor’s Intentions” and stated *Ollman* “is widely viewed in his profession as a political activist.” *Id.* at 971-972.

19. *See id.*

20. *See id.* at 981. This finding is consistent with most post-*Gertz* authority. *See id.* at 978.

21. *See id.* at 979-84. The court realized the difficulty in establishing a test “as evidenced by the capacity of the same words to convey different meanings in different contexts, it is quite impossible to lay down a bright-line or mechanical distinction.” *Id.* at 978. *See also* *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (1986) (finding pure opinion absolutely protected under First Amendment, but that no bright line rule exists to distinguish fact from opinion).

actionable.<sup>22</sup>

Second, the court examined verifiability. The verifiability test asks whether the statement can be proven true or false. If an ordinary reader would recognize a statement to be verifiable, the reader is less likely to view the statement as mere opinion.<sup>23</sup> Thus, if the reader can check an alternative source to see if the statement is true, then the statement is less likely to be attributed to the writer's own thoughts or opinion.

The next factor of the *Ollman* test reviews the allegedly defamatory language in the full context of the entire statement. The language surrounding the allegedly defamatory statement should be examined for cautionary language that signals an opinion.<sup>24</sup> Such cautionary language might consist of "[i]n the opinion of" or "I think."<sup>25</sup> Finally, the judge should examine the broader context in which the statement appears.<sup>26</sup> The broader setting includes the type of magazine printing the statements or the location of the article within the newspaper. For example, the placement of the article containing the allegedly defamatory statements on the editorial page of the newspaper is likely to signal statements of opinion.<sup>27</sup>

Placement on the editorial page alone, however, is not dispositive; rather, the four factors were considerations to be balanced with each other. Thus, the *Ollman* test requires a fact-specific examination to distinguish actionable fact from immune opinion. Under the test, for example, hyperbolic statements about an elected official by a recognized political opponent on a cable channel talk program would likely be considered immune opinion.

Statements of opinion were not the only statements protected by pre-*Milkovich* courts. The courts also protected rhetorical hyperbole, which was usually defined as exaggeration, name calling, or an expression of emotion.<sup>28</sup> In addition, words used in a loose or

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22. See *Ollman*, 750 F.2d at 979-81.

23. See *id.* at 981. The verifiability test may be stated as: "[I]s the statement objectively capable of proof or disproof?" *Id.*

24. See *id.* at 982.

25. *Id.* at 983.

26. See *id.* at 984.

27. See Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974).

28. See *id.* at 284-86.

figurative sense were not actionable.<sup>29</sup> That exception stems back to the policy arguments of *New York Times Co. v. Sullivan*,<sup>30</sup> which balanced the protection of the individual's reputation with society's need for open debate and free speech. When the words can probably be viewed as emotionally induced rather than fact-based, the balance tips in favor of free speech,<sup>31</sup> preempting state defamation tort law. Therefore, neither the court nor a jury would need to address the "recklessness" component of the "actual malice" standard applicable to public figure plaintiffs in defamation suits. More so than even after 1990 pre-*Milkovich*, elected officials were sitting ducks for vituperative political opponents. Prior to 1990, their defamation claims would rarely reach a jury, and were not, in effect, pursued.

## II. *MILKOVICH V. LORAIN JOURNAL CO.*

The view that "opinion" was made immune by the *Gertz* dictum formally ended with the *Milkovich* decision. In *Milkovich*, the Supreme Court explicitly held that no federal constitutional privilege exists for opinion, and thus there was no preemption of state defamation law.<sup>32</sup> The case involved a high school wrestling coach named Mike Milkovich who sued the local newspaper over an article by a sports columnist that stated the coach lied at a hearing.<sup>33</sup> The article further stated that everyone knew the coach had lied.<sup>34</sup>

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29. *See id.* (finding that loose or figurative words were not actionable under federal labor laws).

30. 376 U.S. 254 (1964).

31. One exception to this general premise was outlined in *Cianci v. New York Times Publ'g Co.*, 639 F.2d 54, 64 (2d Cir. 1980). In *Cianci*, the court found charges of criminal activity to be treated as accusations of fact and thus actionable. The *Cianci* court found immaterial that the accusation may be phrased as opinion. *See id.* at 64.

32. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 10 (1990). The Court stated that "[t]he First Amendment does not require a separate 'opinion' privilege limiting the application of state defamation laws. While the Amendment does limit such application, . . . the breathing space that freedom of expression requires to survive is adequately secured by existing constitutional doctrine." *Id.*

33. *See id.* at 6-7. The title of the sports column read "Maple beat the law with the 'big lie.'" *Id.* The article then proclaimed that individuals in power were able to lie successfully. *See id.* Finally, the column stated that among "[t]he teachers responsible [was] mainly head Maple wrestling coach, Mike Milkovich . . ." *Id.* at 4-5.

34. *See id.* at 5. The columnist stated that if an individual had been at the wrestling match in question would know Milkovich lied on the stand, and thus was guilty of per-



Milkovich charged that the article accused him of perjury and was thus libelous *per se*. In light of their factual bases, comparisons are unavoidable between the *Milkovich* article and Clinton-Lewinsky commentary.

When the defendant newspaper columnist invoked the *Gertz* dictum as providing him with a privilege, the Court responded that *Gertz* never intended to "create a wholesale defamation exemption for anything that might be labeled 'opinion.'"<sup>35</sup> Rather, the court stated that a distinction between fact and opinion was not essential; "expressions of 'opinion' may often imply an assertion of objective fact."<sup>36</sup>

The rejection of the fact/opinion distinction and formal immunity for opinion are the pivotal elements of *Milkovich*.<sup>37</sup> In altering the way many commentators, attorneys, and judges should view defamation law, the Court rejected the defendant's argument that every First Amendment defamation challenge requires a preliminary inquiry into whether the statement is fact or opinion. Prior to 1990, this distinction had been seen as the crucial characterization and safeguard that precluded the possibility of a defamation cause of action from surviving a motion for summary judgment. Thus, it was believed liability for highly damaging reckless opinion could not exist. The trial courts would prevent such a claim from reaching a jury.

The Supreme Court proposed that the fact/opinion distinction was immaterial because any statement not provable as false by the

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jury.

35. *Id.* at 18. In advancing this idea, the Court specifically relied on Judge Friendly and Justice Holmes. *See id.* Judge Friendly read *Gertz* dictum to associate the word "opinion" with the word "idea"; thus, all ideas, not all statements, are protected. *See Cianci v. New York Times Publ'g Co.*, 639 F.2d 54, 62 n.10 (2d Cir. 1980). Judge Friendly's interpretation goes back to Justice Holmes' "marketplace of ideas" concept; truth is likely to be attained if competing ideas are allowed to be voiced. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

36. *Milkovich*, 497 U.S. at 18.

37. According to one commentator, *Milkovich* "was an appropriate case for the Court to use in striking down the opinion defense because the defamatory statement complained of was difficult to classify as either fact or opinion." John B. David, Note, *Defamation Action for Opinion: An Analysis of the Effect of Milkovich v. Lorain Journal Co.*, 36 N.Y.L. SCH. L. REV. 643, 657 (1991).

plaintiff would still be protected by the Constitution,<sup>38</sup> regardless of whether it was presented as fact or opinion. Thus, the focus shifted to the verifiability of the allegedly defamatory statement as truthful—often a jury issue—rather than on a judicial characterization of the statement as fact or opinion. Applying this new focus to the facts of *Milkovich*, the Court found no privilege and remanded the case to the lower court.<sup>39</sup>

Specifically in *Milkovich*, the implication that Coach Milkovich committed perjury was sufficiently verifiable to be considered factual.<sup>40</sup> The *Milkovich* article could be compared to the minutes of the local Board meeting and the Coach's trial testimony for discrepancies, thus determining whether perjury had been committed as alleged.<sup>41</sup> To reiterate, perhaps the most significant aspect of this change of focus is that a jury, not the court, would conduct the comparison.

The new focus of the test is whether a reasonable fact finder can find the challenged statement verifiably true or false. As noted above, *Gertz* had suggested that the fact/opinion distinction was itself of constitutional importance and to be determined by the judge as a matter of law. After *Milkovich* and its new test, a greater number of decisions would require trials. And if the public sentiment is running against an unrestrained media, a jury chosen from that public might prove to be a hostile audience.

As was typical of Supreme Court First Amendment decisions of that era, Justices Marshall and Brennan dissented from the majority opinion. Marshall and Brennan essentially agreed with the majority's theory but differed on the application of the theory to

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38. See *Milkovich*, 497 U.S. at 21 (1990). To quell the fears that speech would now be restricted; the Court added that enough safeguards were left intact to ensure public debate without an "artificial dichotomy between 'opinion' and fact." *Id.* at 19. In addition, the Court felt the new test was still faithful to the "breathing space" requirement of *New York Times Co. v. Sullivan*. *Id.* at 19.

39. See *id.* at 23.

40. See *id.* at 21. In *Scott v. News-Herald*, the Ohio Supreme Court noted that the proximity in the column of the two statements "lied at the hearing" and "after . . . having given his solemn oath to tell the truth" led to the inference that *Milkovich* committed perjury. 496 N.E.2d 699, 707 (Ohio 1986).

41. See *Milkovich*, 497 U.S. at 21. The Court concluded the alleged perjury at the trial was a "verifiable event." *Id.*

the facts of the case. Justice Brennan wrote that lower courts had been under a “misimpression that there is a so-called opinion privilege *wholly in addition* to the protections we have already found to be guaranteed by the First Amendment . . . .”<sup>42</sup> Applying the majority’s test, the dissenters did not believe that a reasonable fact finder could deem the sports columnist’s statements to imply verifiable facts, which would make them non-actionable.<sup>43</sup> The dissenters examined the entire context of the article to find whether the statements were arguably verifiable as fact.<sup>44</sup>

The Court’s majority realized that future media defendants would be concerned about the outcome. To quell their fears, the Court left safeguards intact to ensure public debate was possible without an “artificial dichotomy between ‘opinion’ and fact”<sup>45</sup> — even after *Milkovich*. These safeguards were intended to ensure that courts remaining faithful to *New York Times Co. v. Sullivan* could balance freedom of speech and protection of individual reputations.<sup>46</sup>

*New York Times Co. v. Sullivan* is not the only case law the Supreme Court specifically cited as remaining good law after *Milkovich*. The Court also left other fact/opinion tests intact. Apparently, after the sixteen-year presumption of a constitutional privilege for opinion under the *Gertz* dictum, the Court did not want to leave any room for doubt.

The *Milkovich* Court emphasized that statements which cannot be proven false are still protected by the Constitution.<sup>47</sup> Furthermore, “rhetorical hyperbole” and verbal abuse, such as name-

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42. *Id.* at 24. The majority, likewise, rejected a blanket opinion theory. *See id.* at 21.

43. *See id.* at 24-25. In dissent, Justice Brennan believed the column’s statements deserved “full constitutional protection.” *Id.* For a recent discussion of “implied defamation,” *see* *Toney v. WCCO Television*, 85 F.3d 383 (8th Cir. 1996).

44. *See id.* at 28. Justice Brennan believed that the writer’s statements were “patently conjecture” and the writer clearly showed what statements were based on fact and which statements were mere guesses. *Id.*

45. *Id.* at 19.

46. *See id.* at 20.

47. *See id.* at 16. *See generally* *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (finding that plaintiff must show falsity of statement before seeking damages).

calling and “imaginative expression,” remain protected and thus non-actionable.<sup>48</sup> The *Milkovich* Court did not literally bar any opinion defense, but rather it refocused the inquiry into a plaintiff’s obligation to prove falsity without relying on the fact/opinion distinction. The level of fault the plaintiff must prove, actual malice for a public figure plaintiff, and the limitations on damages did not change, reaffirming the tests set forth in *Gertz* and *New York Times Co. v. Sullivan*.

Despite *Milkovich*, the so-called “opinion privilege” is not completely dead, but rather it remains in practice in the lower courts. As noted, during pre-trial discovery and, if necessary, at trial, the defense now depends on the plaintiff’s evidence that the statement is false. Thus, “opinion” not suggesting a false fact is not defamatory. And conversely, “opinion” which can be reasonably interpreted as stating or implying assertions of fact which are provable as false is not protected, even if the speaker intended the statement as opinion. Under this new test, a false “idea” or opinion may exist if the speaker makes the statement as an “opinion,” but it contains or implies assertions of fact which are provably false. Namely, it exists if the speaker means the statement as opinion but the reasonable listener interprets the statement as fact. In the context of political hyperbole when false facts are implied, proving the additional element of “recklessness” by a public official may now be less difficult than it has been in the past.<sup>49</sup>

To illustrate this new test, the Supreme Court presented the following example. A speaker may make two statements, both of

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48. *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1970) (finding that the accusation of developer’s negotiation stance as “blackmail” not actionable).

49. The task of a public figure to prove “recklessness,” of course, should not be underestimated, as indicated to former Reagan official Robert McFarlane. *See generally*, *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501 (D.C. Cir. 1996) (holding that the evidence presented was not enough to prove, clearly and convincingly, that the author and publisher defendants published the book in question with actual malice). According to the United States Court of Appeals, District of Columbia Circuit, “the standard of actual malice is a daunting one.” *Id.* at 1515 (quoting *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996)). Sidney Blumenthal’s case against Matt Drudge may not be indication enough whether the standard is insurmountable, at least in the District of Columbia. Future plaintiffs might well investigate the impact of alleged defamatory media publications outside New York, New Jersey, and Washington, D.C. in determining where to litigate defamation claims.

which can equally hurt an individual's reputation: (1) "Jones is a liar." and (2) "In my opinion, Jones, is a liar."<sup>50</sup> Under the old test, arguably the second statement would be protected because it was couched as a statement of opinion. Under the new test, however, both statements may be actionable, as amplified by Justice White's decision in *Toney v. WCCO Television*,<sup>51</sup> because each statement implies the speaker knows the facts to support it.<sup>52</sup> Thus, the reasonable fact finder may determine that a statement could be verifiable as true or false, and is actionable if the statement is false.

The verifiability test is critical in *Milkovich*. The test had been earlier described as a factor in the *Ollman* test, along with the three other factors discussed above, to distinguish fact from opinion. After *Milkovich*, the verifiability prong is the only *Ollman* factor that explicitly survives. The contextual factors and common usage factor of *Ollman* were not employed in *Milkovich* and should become less relevant over time. Specifically, as illustrated in the Jones example, the Court stated that using the words "[i]n my opinion" does not turn a statement into an opinion.<sup>53</sup> Moreover, engaging in defamatory rhetoric on a television talk show will not *per se* protect the speaker, even if such a program is known as an environment for exaggeration.

As one example, during commentary following President Clinton's brief televised address to the public about his relationship with Monica Lewinsky, Dan Quayle stated on ABC's *Nightline* that Clinton "basically admit[ted] . . . perjury."<sup>54</sup> On the same evening, Congressman Bob Barr appeared on *Larry King Live*, a CNN cable show, and stated that Clinton "has told the world 'I am a liar, I am a perjurer.'"<sup>55</sup> In addition, former prosecutor Barbara

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

51. 85 F.3d 383 (8th Cir. 1996).

52. *See id.* at 386-87.

53. *Milkovich*, 476 U.S. at 18-19. *See also* Cianci v. New York Times Publ'g Co., 639 F.2d 54 (2d Cir. 1980) (arguing that words "I think" cannot render defamatory statement non-actionable).

54. *Nightline: What Did He Say? President Clinton Admits Having Sexual Relations* (ABC television broadcast, Aug. 17, 1998), available in 1998 WL 5373113. *See also supra* note 2 and accompanying text.

55. *Larry King Live: Clinton Speaks Before the Nation* (CNN cable broadcast, Aug. 17, 1998) (transcript on file with the FORDHAM INTELLECTUAL PROPERTY, MEDIA &

Olson stated that Clinton "committed perjury."<sup>56</sup> Hypothetically, if Clinton could show that he did not, as a matter of law, commit and/or admit to the felony of perjury, Quayle, Barr, and Olson could be found liable for defamation after *Milkovich*. The same may hold for other obvious political opponents. Recognition of such potential liability could serve to return public debate about public figures to a more responsible level.

### III. POST-MILKOVICH DISTINCTION BETWEEN FACT AND OPINION

As with most landmark cases, the application of *Milkovich* and its new test has not been uniform by the lower courts. However, some basic judicial responses have emerged with respect to whether a particular comment is actionable.<sup>57</sup> Generally, the lower courts hold that if a statement is provably false under *Philadelphia Newspapers, Inc. v. Hepps*,<sup>58</sup> then it is actionable. If a statement is considered rhetorical hyperbole, then it is not actionable. Thus, the courts generally follow tests that remain true to *Milkovich*. However, as illustrated by the recent decision *Biospherics v. Forbes, Inc.*,<sup>59</sup> the Fourth Circuit is one example of a court which has retained the contextual *Ollman* factors to determine whether a statement is provably false.<sup>60</sup> The *Milkovich* court did not explicitly reject or embrace the contextual factors, but rather it cautioned against using contextual factors in determining whether a statement should be deemed actionable.

Certain pre-*Milkovich* tenets still remain strong. For example,

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56. *Id.*

57. In a lesser known, but important recent defamation decision, the Ninth Circuit upheld jurisdiction where the media defendant's only forum-related activity was circulating a newspaper in which the allegedly defamatory opinion appeared to only eighteen California subscribers. See *Gordy v. The Daily News*, 95 F.3d 829, 836 (9th Cir. 1996).

58. 475 U.S. 767 (1986) (holding that the truth is not a defense and that the plaintiff has burden of proving statement is false).

59. 151 F.3d 180 (4th Cir. 1998) (holding that magazine article not actionable). *Biospherics*, the most recent interpretation of *Milkovich*, recognized that "an opinion may constitute actionable defamation" if the opinion reasonably implies untrue facts. *Id.*

60. The danger is that jurisdictional discrepancies across factors may encourage forum-shopping by potential plaintiffs. See *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 727 (1st Cir. 1992) (holding *Ollman* test may still be valid because law not substantially changed).

in *Unelko Corp. v. Rooney*,<sup>61</sup> the plaintiff brought suit after defendant Andy Rooney, on a televised segment, claimed one of plaintiff's products did not work.<sup>62</sup> Following *Milkovich*, the appeals court held that the defendant's statement about the product was not protected opinion.<sup>63</sup> However, the plaintiff still bore the burden of proving the statement was false. The court employed a three-factor test to determine whether the statement implied an assertion of fact.<sup>64</sup> First, the court examined whether the use of "figurative or hyperbolic language" negated the impression that the defendant was serious. Second, the court examined the general tenor of the context. Finally, the court examined the likelihood that the statements would be proved true.<sup>65</sup>

Specifically, although some of the segment may have contained hyperbole, the statement "it didn't work" could not *per se* be construed as hyperbole.<sup>66</sup> Secondly, although Rooney's segment was generally humorous and satirical, the statement in question was presented as fact.<sup>67</sup> The overall tenor of the segment did not override the specific statement to make the statement non-actionable. Finally, the court believed Rooney's statement was capable of being construed as either true or false.<sup>68</sup> Although the statements might theoretically have been proved either true or false, the plaintiff failed to show the statement implied a false assertion of fact. When the plaintiff was unable to prove the statement was false, summary judgment was upheld for the defendant.

The Washington Court of Appeals employed a similar test, but added a public policy consideration to its factors. The plaintiff in

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61. 912 F.2d 1049 (9th Cir. 1990).

62. *Id.* at 1051. Rooney made the statement during a broadcast of *60 Minutes* regarding junkmail Rooney had received. *See id.* The Plaintiff had sent Rooney a carton of RAIN-X, which was supposed to keep rain off a car's windshield. *See id.*

63. *See id.* at 1053 (citing *Milkovich*).

64. *See id.* at 1053-54.

65. *See id.* at 1049, 1053-55.

66. *See id.* at 1054.

67. *See id.* Supporting this contention, the court cited the letters CBS received from viewers, which indicated the viewers believed the statement "it didn't work" was fact. *See id.*

68. *See id.* at 1054-55. "Although these are somewhat subjective determinations, they are based on factual observations to a sufficient extent to imply an assertion of fact." *Id.* at 1055.

*Haueter v. Cowles Publishing Co.*<sup>69</sup> sued the newspaper for publishing an article suggesting the plaintiff had retained up to eighty percent of the proceeds of charity funds he had solicited.<sup>70</sup> In finding the statements not actionable, the court examined two general questions as to rhetorical hyperbole. First, the broad question is whether the statement is provably false. If the statement is not provably false, as in the example of rhetorical hyperbole, then it is *per se* non-actionable.<sup>71</sup> On the other hand, if the statement is provably false, the second question is whether the statement is necessary to provoke public discussion.<sup>72</sup> In *Haueter*, as in *Rooney*, the court ruled the plaintiff had not met his burden of proof as to the statement's falsity.<sup>73</sup>

Other courts have relied more heavily on the context of the allegedly defamatory statements. As noted above, the contextual factor was not specifically embraced by *Milkovich*, which focused instead on verifiability. Preceding *Milkovich*, however, the contextual factor was very important in the *Ollman* test. Notwithstanding *Milkovich*, some courts appear reluctant to abandon the contextual analysis.

Applying the contextual criterion in *Florida Medical Center, Inc. v. New York Post Co.*,<sup>74</sup> the court found that an article positioned above a business news story would likely be taken as fact.<sup>75</sup> Following *Milkovich*, the primary test should have been whether an assertion of fact was provably false. The *Florida Medical* court, however, placed more emphasis on context in determining whether the plaintiff met the falsity burden. Specifically, the court examined context, language, content, and audience.<sup>76</sup> The court also fo-

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69. 811 P.2d 231 (Wash. App. 1991).

70. *See id.* at 233-234.

71. *See id.* at 238.

72. *See id.* at 239. A statement necessary to public opinion is considered conditionally privileged. *See id.* The privilege is disallowed if the report is not fair and accurate. *See id.* Furthermore, the plaintiff must prove the abuse of the privilege. *See id.*

73. *See id.* at 241.

74. 568 So.2d 454 (Fla. Dist. Ct. App. 1990).

75. *See id.* at 459. The article insinuated a Florida hospital kept unclean facilities, served unhealthy food, left patients in intensive care for excessive time periods to increase bills, and often performed and billed for unnecessary tests and medication. *See id.* at 459-60.

76. *See id.* at 459-60.



cused on the status of a plaintiff as either a public or private figure in determining the level of fault required for recovery.<sup>77</sup>

In determining whether a statement is verifiable, and thus actionable, courts following *Milkovich* also examine the context and placement of the defamatory language. For example, in *Moldea v. New York Times Co.*,<sup>78</sup> the court found a statement that an allegedly defamatory statement in a book review was “substantially true” as a matter of law. The court reasoned that book reviews are an “evaluation . . . of a type readers expect . . . .”<sup>79</sup> In addition, there is a commonly held belief that the public will be able to distinguish fact from opinion so long as the public knows the facts.

Not all state courts, however, have followed the *Milkovich* emphasis on verifiability. At least two states have found additional speech protection in their respective state constitutions. These states typically reject *Milkovich* and apply a broader definition of opinion in order to promote free speech.

The first and most notable state jurisdiction to apply this reasoning was New York. In *Immuno AG. v. Moor-Jankowski*,<sup>80</sup> a scientific journal was found not liable for printing a letter to the editor claiming that a company was using wild chimpanzees for hepatitis research.<sup>81</sup> The *Immuno* case was being heard at the same time that the Supreme Court considered *Milkovich*. Because the court understood the impact *Milkovich* would have on *Immuno*, it opted to stay its decision until the Supreme Court decided *Milkovich*.<sup>82</sup>

Curiously, after having expressly awaited the Supreme Court decision, the New York court rejected the *Milkovich* approach. The court found *Milkovich* too technical.<sup>83</sup> More importantly, the

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77. *See id.* at 458.

78. 22 F.3d 310 (D.D.C. 1994).

79. *Id.* at 315.

80. 567 N.E.2d 1270 (N.Y. 1991).

81. *See id.* at 1272. The letter accused Immuno company of trying to avoid “international policies or legal restrictions on the importation of chimpanzees.” *Id.* It also suggested that the testing would spread hepatitis in the chimpanzee population. *See id.*

82. *See id.* at 1272.

83. *See id.* at 1273 (finding that the *Milkovich* decision focused too heavily on literalism instead of considering the impression made by the words).

court felt the Supreme Court had lost sight of the proper balance between the protection of individual reputation and the promotion of robust debate and free speech.<sup>84</sup>

Requiring some justification for rejecting a United States Supreme Court decision on point, the court held that the New York State Constitution is broader than the United States Constitution and was therefore intended to provide greater protection for speech and the press.<sup>85</sup> The court held that the United States Constitution serves as only a minimum standard that can be supplemented by the state constitution based on local needs and expectations.<sup>86</sup> Rather than strictly adhering to the *Milkovich* approach, the *Immuno* court reverted to the fact/opinion distinction.<sup>87</sup> To determine whether the chimpanzee statement was fact or opinion, the *Ollman* balancing test was utilized in its entirety.<sup>88</sup> Thus, despite acknowledging *Milkovich*, the New York Court of Appeals proceeded with little regard for its holding.

Similarly, the New Jersey Supreme Court circumvented *Milkovich*, albeit not as plainly. In *Cassidy v. Merin*,<sup>89</sup> the court did not expressly reject *Milkovich* and replace it with the traditional test, but rather the court applied a test altogether unrelated to *Milkovich*.<sup>90</sup> The New Jersey Supreme Court applied the fair comment rule, under which the insurance commissioner's remarks regarding ethics were pure opinion.<sup>91</sup> Similar to the New York Supreme

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84. *See id.* at 1275.

85. *See id.* at 1277-1278 (citation omitted). The court advanced the theory that state courts have traditionally had the role of applying privileges. *See id.* at 1277.

86. *See David, supra* note 37, at 662 (interpreting *Immuno* as holding that the Supreme Court provides a floor of civil liberties below which the state cannot go, but the state can provide additional protections for civil liberties based on state constitution).

87. *See Immuno*, 567 N.E.2d at 1275. The *Immuno* court did note that it was not holding all letters to editor as absolutely immune by virtue of a wholesale opinion privilege. *See id.*

88. *See id.* at 1281.

89. 582 A.2d 1039 (N.J. Sup. Ct. App. Div. 1990).

90. *See id.* at 1048.

91. *See id.* at 1046. The New Jersey Insurance Commission complained to the Office of Attorney Ethics and the press about an attorney's letter writing campaign about changes in the insurance code. *See id.* at 1041. The elements of the fair comment doctrine require 1) the statement be one of public concern; 2) the statement be based on true or privileged facts; 3) the statement represent the actual opinion of the speaker; and 4) the statement not be made with actual malice or the intent to cause harm. Several lower

Court in *Immuno*, the New Jersey court found state law to be at least as protective as federal law.<sup>92</sup> Furthermore, the court found an absolute privilege for even opinion uttered with actual malice. This appears to go even further than pre-*Milkovich* federal case law.

The Supreme Court of Georgia and the federal district courts of Georgia, on the other hand, have followed the *Milkovich* decision. They first rejected a constitutional privilege for opinion, and then applied a test faithful to the *Milkovich* decision.

In *Eidson v. Barry*,<sup>93</sup> the Court of Appeals of Georgia rejected a wholesale defamation exemption or privilege for opinion. Explicitly citing *Milkovich*, the Georgia court held that a statement is actionable if "reasonably interpreted as stating or implying defamatory facts about plaintiff and, if so, whether defamatory assertions are capable of being proved false."<sup>94</sup> The court stated that "[a]ny defamatory expression on matters of public concern that is provable as false may carry liability under state defamation law."<sup>95</sup>

The *Eidson* decision involved defamation that allegedly occurred in a letter to a newspaper editor. The printed letter claimed that audiocassettes existed on which the local mayor and city council members made racial slurs.<sup>96</sup> The letter further stated the city attorney gave these tapes to the local newspaper in violation of federal law.<sup>97</sup> The city attorney sued the newspaper that printed the letter for libel.<sup>98</sup>

The lower court held the statements in the letter were opinion and thus not actionable.<sup>99</sup> The Court of Appeals of Georgia re-

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courts have applied the fair comment doctrine, which fell out of use when *Gertz* was decided. See *Spence v. Flynt*, 816 P.2d 771 (Wyo. 1991).

92. See *Cassidy*, 582 A.2d at 1048.

93. 415 S.E.2d 16 (Ga. Ct. App. 1992).

94. *Id.* at 17.

95. *Id.* (citing *Milkovich*).

96. See *id.*

97. See *id.*

98. See *id.* In Georgia, libel is defined as "a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule." *Id.* (citing GA. CODE ANN. § 51-5-1(a) (1982)).

99. See *id.* Summary judgment was granted in favor of the defendant.

versed, holding the accusation that the city attorney was guilty of a crime was susceptible to being proved false and thus defamatory.<sup>100</sup> With that decision, Georgia rejected the supposed *Gertz* constitutional privilege for opinion and accepted the new standard of verifiability.

In *Brewer v. Purvis*,<sup>101</sup> a federal district court offered its interpretation of the two-prong *Milkovich* test to be applied in Georgia. Again, the test hinged on verifiability; subjective, unverifiable opinion about the plaintiff was not actionable under Georgia law.<sup>102</sup> While the court used the word "opinion," the verifiability test is clearly present in the decision. The *Brewer* decision involved numerous state and county agencies and officials involved in the investigation of a student's eligibility to play football. Ken Brewer, a Clarke county football coach, was accused of asking teachers to change a student's grades so the student could play football.<sup>103</sup> Brewer brought a claim against Carol Purvis, the county school superintendent, claiming Purvis defamed Brewer by recommending Brewer be terminated.<sup>104</sup> The federal court granted summary judgment to the defendant. Brewer also sued the Georgia High School Association ("GHSA") for intercommittee statements made about Brewer.<sup>105</sup> The federal court held the GHSA statements were not libelous because they were never officially published. Georgia law recognizes an exception to publication when communication is intracorporate.<sup>106</sup>

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100. *See id.* at 17-18. The city attorney, however, conceded he was a public figure, so the plaintiff had the added burden of proving the letter was written with actual malice. *See id.* at 17 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). The judge found the jury could have reasonably concluded the publishing newspaper acted with a reckless disregard for the truth, constituting actual malice. *See id.* Essentially, the publisher assumed too much without checking any facts. *See id.* at 18.

101. 816 F.Supp. 1560 (M.D. Ga. 1993).

102. *See id.* at 1580.

103. *See id.* at 1564-65. The grades were changed only after the school determined the student had a learning disability. *See id.* at 1565.

104. *See id.* at 1579.

105. *See id.* The GHSA is responsible for instructing local schools on eligibility of its players. *See id.* at 1564.

106. *See id.* at 1579. An intracorporate communication is one "between members of unincorporated groups . . . and is heard by one who, because of his/her duty, . . . has reason to receive the information . . ." *Id.*

Finally, Brewer sued William C. Fordham, an executive director of GHSA who made public statements to a television reporter about Brewer's alleged mistake of trying to change grades.<sup>107</sup> In this instance, the federal court held that Brewer might have been libeled. First, the court rejected the opinion privilege. Specifically, it held the defendant was wrong to rely on *S & W Seafoods, Co. v. Jacor Broadcasting of Atlanta*,<sup>108</sup> premised on the overly broad dictum from *Gertz*, which had been subsequently clarified by *Milkovich*.<sup>109</sup> The court continued to embrace *Milkovich* by outlining and applying its two-prong test. The *Brewer* court stated that under *Milkovich*, the first question is "whether a reasonable fact finder could conclude that a statement implied a defamatory assertion."<sup>110</sup> If the statement is plausibly defamatory, the second question is whether the "defamatory assertion is factual enough to be proved true or false."<sup>111</sup> The court found Fordham's statements about Brewer's conduct could be proved true or false, and thus, the statements were not constitutionally protected.<sup>112</sup> The defendant's motion for summary judgment relating to providing allegedly defamatory statements to a television reporter was denied.

In cases of defamatory opinion disseminated over national cable television, for example, a public plaintiff seeking an appropriate jurisdiction might take a closer look at Georgia precedent. Ohio law seems similar. In *Young v. Morning Journal*,<sup>113</sup> the Ohio Supreme Court held that a report of criminal contempt sufficiently misidentified the contemnor that the inaccurate report could be proven "false."<sup>114</sup> By contrast, in the most recent New York decisions, courts have continued to protect the press by emphasizing a multi-factor test which immunizes opinion.<sup>115</sup>

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107. *See id.* at 1568, 1580.

108. 390 S.E.2d 228 (Ga. Ct. App. 1989).

109. *See Brewer*, 816 F. Supp. at 1580.

110. *Id.* (internal citation omitted).

111. *Id.*

112. *See id.*

113. 669 N.E.2d 1136 (Ohio 1996).

114. *See id.* at 1137-38.

115. *See generally* *Millus v. Newsday, Inc.*, 675 N.E.2d 461 (N.Y. 1996), *cert. denied*, 117 S. Ct. 1313 (1997) (holding that in a newspaper editorial, a political candidate's admission that "he [did not] expect to win and [was] relieved by the prospect" was an opinion); *Brian v. Richardson*, 660 N.E.2d 1126 (N.Y. 1995) (immunizing an editorial

## CONCLUSION

The *Milkovich* decision may have introduced another era of defamation to First Amendment law practice. For many years, *New York Times Co. v. Sullivan* and the *Gertz* dictum's constitutional privilege for opinion were sacrosanct, as most courts elevated the protection of press freedom to new heights. First Amendment advocates had viewed the *Gertz* dictum as a necessary component of the freedom, particularly in that it allowed trial courts to dispose of defamation claims before they reached a jury.

With the 1990 *Milkovich* decision, however, many press advocates became concerned that the "marketplace of ideas" might be seriously curtailed. As illuminated by recent newsworthy events, such fears have been unfounded until now. Today, media recklessness is perceived to be at an all-time high. The *Milkovich* decision did not "chill" speech, after all.

Although the elimination of the so-called opinion privilege means more defamation cases should go to the jury and fewer media defendants should receive summary judgment in most jurisdictions, defendants are not without recourse. Now, defendants must argue their allegedly defamatory speech was neither verifiably false nor reckless.

Most state courts tend to follow *Milkovich*, which focuses on verifiability, rather than a multi-factor-balancing test for opinion. However, some jurisdictions, most notably New York and New Jersey, continue to defer to the label of "opinion." These courts adhere to the pre-*Milkovich* standard found in the *Gertz* dictum. Regardless, both *Milkovich* and its progeny remain tools for curbing more outrageous examples of media excess—as long as there are plaintiffs angry enough to assume the risk and expense that a defamation case entails.

