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Liar! Liar? The Defamatory Impact of “Liar” in the Modern World

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Abstract

Calling someone a liar is an age-old epithet. Depending on the context, calling someone a liar could be defamatory, causing harm to a reputation. But, more often than not, calling someone a liar may be simply an expression of opinion. In some settings, litigation surrounding the publication also implicates the First Amendment. In recent years, several courts have weighed in on this issue, some with conflicting outcomes. This Article examines whether accusations of dishonesty or lying in a modern media world has a defamatory impact.

KEYWORDS: Defamation, Liar, Modern

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| | |
|--|-----|
| INTRODUCTION..... | 254 |
| I. FALSITY, HONESTY, AND LIABILITY | 257 |
| A. <i>The Law of Defamation and Protecting Reputation</i> | 257 |
| B. <i>The Importance of Being Honest</i> | 261 |
| C. <i>Liar and Legal Liability?</i> | 262 |
| II. IS THIS THE LESSON . . . ?..... | 265 |
| A. <i>Milkovich v. Lorain Journal Co.</i> | 265 |
| B. <i>Two Modern (and Conflicting) Sets of Cases</i> | 269 |
| 1. <i>Accusing the Accuser—Hill v. Cosby</i> | 269 |
| 2. <i>Full-Court Press in Overtime—Davis v. Boenheim</i> | 272 |
| III. APPLYING THE LAW OF DEFAMATION TO THE TERM ‘LIAR’ | 278 |
| CONCLUSION..... | 286 |

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INTRODUCTION

“Talk is cheap and lies are expensive.”

– Billie Joe Armstrong¹

Accusations of dishonesty or lying, or the act of calling someone a liar are an epithet for the ages. Ordinarily, an insult, even one as timeless as *liar*, would be viewed simply as an insult, not worthy of legal liability. But the impact of imputing dishonesty by calling someone a liar could have legal consequences under the tort of defamation. For centuries, defamation law has tested the harm to a person’s reputation after the person is branded a liar, and the standards for liability, harm, and the contextual meaning of the epithet are, at best, inconsistent and often considered murky. Precedent testing the liar epithet lacks clear and consistent application across courts and jurisdictions.

The tort liability surrounding the word “liar” has been litigated in recent years with mixed and conflicting court rulings. Furthermore, during the 2016 presidential primary campaign, labeling opponents liars practically became a plank in the candidates’ political platforms.² Then-presidential candidate Donald Trump even proclaimed that he wanted to change libel laws to make them more amenable for public figure plaintiffs.³ Because of current standards under the First Amendment, a political candidate would hardly have a leg to stand on in court by pressing a defamation claim for being branded a liar on the campaign trail.⁴ While this brought the

¹ GREEN DAY, *Walking Contradiction*, on *INSOMNIAC* (Reprise Records 1995).

² Editorial, *The Party of Trump and Path Forward for Democrats*, N.Y. TIMES (Mar. 1, 2016), <http://www.nytimes.com/2016/03/02/opinion/the-party-of-trump-and-the-path-forward-for-democrats.html> [https://perma.cc/P93A-AV65]; Katie Zezima, *Liar, Liar: A Charged Word Is Now Common in the GOP Race*, WASH. POST (Feb. 19, 2016), https://www.washingtonpost.com/politics/liar-liar-a-charged-word-is-now-common-in-the-gop-race/2016/02/19/96464d34-d63e-11e5-b195-2e29a4e13425_story.html [https://perma.cc/7DRK-XAHQ].

³ Louis Jacobson, *Donald Trump Wrong that New York Times Can’t Be Sued for a ‘Story that They Know Is False,’* POLITIFACT (Mar. 1, 2016, 1:40 PM), <http://www.politifact.com/truth-o-meter/statements/2016/mar/01/donald-trump/donald-trump-wrong-ny-times-cant-be-sued-story-the/> [https://perma.cc/7B59-8XH3].

⁴ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

discussion of libel law to the forefront of public discourse (at least for a news cycle), it does little to clarify the standards or the public's understanding of defamation law.

Outside the political world, though, the question of whether calling someone a liar is defamatory is more in flux. Three recent lawsuits emanating from the Bill Cosby sexual assault allegations have put "liars" and accusations of lying in play.⁵ One recent case involving a prominent college basketball coach stands out as an example of how courts can apply, or misapply, a range of precedent regarding the term liar.⁶

Calling someone a liar has never been a nice thing to say. As an insult, it immediately casts doubt on every aspect of the target's integrity, self-worth, and being. Insults, while not endearing, do not necessarily rise to the level of defamation.⁷ The tort of defamation provides a civil remedy to protect people from false statements that may harm one's reputation.⁸ Reputational protection has ancient roots, and tort law in a civil society provides a financial remedy to those whose reputations have been harmed by false statements.⁹ Much like humanity itself, the law of defamation has evolved and will continue to develop.¹⁰ However, calling someone a liar strad-

⁵ See *Hill v. Cosby*, 15-CV-1658, 2016 U.S. Dist. LEXIS 15795 (W.D. Pa. Feb. 9, 2016), *aff'd*, No. 16-1362, 2016 U.S. App. LEXIS 22199 (3d Cir. Dec. 14, 2016); Complaint at 4, *Green v. Cosby*, 99 F. Supp. 3d 223 (D. Mass. 2015) (No. 14-30211-MGM); Amended Complaint at 12-15, *Costand v. Cosby*, 232 F.R.D. 494 (E.D. Pa. 2006) (No. 05-CV-1099) (seeking damages for defamation and defamation per se in count four of the complaint); see also Sydney Ember & Graham Bowley, *Defamation Suits Against Cosby Point to Peril of Belittling Accusers*, N.Y. TIMES (Nov. 13, 2015), <https://www.nytimes.com/2015/11/14/business/media/defamation-suits-against-cosby-point-to-peril-of-belittling-accusers.html> [<https://perma.cc/GH7U-KYED>].

⁶ See *Davis v. Boenheim*, 24 N.Y.3d 262, 271-73 (2014).

⁷ ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 2.4 (4th ed. 2010) ("The distinction between what is merely unflattering, insulting, or derogatory and what will actually injure reputation is thus crucial. People are expected to be sufficiently hardy to withstand the occasional jibe or disparaging remark; if each such statement gave rise to a cause of action, courts would have time for little but defamation suits.").

⁸ W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 772 (5th ed. 1984).

⁹ *Id.* (noting the tort provided an alternative to duels as a remedy for an offended party to repair a reputation).

¹⁰ See *infra* Section I.A.

dles the line between actionable defamation and a statement that may be immunized by at least the opinion privilege.¹¹

Falsity is the most basic element of defamation.¹² In some settings, calling someone a liar may be a clear matter of fact, which could lead to liability.¹³ In other settings, this epithet may be more of a term of art, protected by the opinion privilege.¹⁴ In the quarter-century since the U.S. Supreme Court addressed the liability of publishing that someone is a liar, there has been no shortage of litigation testing this issue.¹⁵ More recently, a spate of high-profile cases has emerged to test this concept.¹⁶ In more than a couple cases, the plaintiffs appear to use defamation law, specifically litigating the allegation of lying, to circumvent both civil and criminal statutes of limitations in the underlying disputes.¹⁷

This Article analyzes whether in our contemporary world calling someone a liar has the same defamatory impact it once had. Part I reviews defamation law and considers what it means to be called a liar. Part II analyzes the cases in which courts have examined the defamatory impact of the “liar” accusation, paying particular attention to the landmark *Milkovich v. Lorain Journal* case. Part II also examines two recent controversies litigating the liar epithet as an end-run around expired statutes of limitations. Finally, Part III discusses how these defamation issues are handled in modern contexts and in social media.

¹¹ See *infra* notes 34–40 and accompanying text.

¹² RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

¹³ SACK, *supra* note 7, § 2.4.7.

¹⁴ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (holding that a statement that cannot be proven either true or false may not be held as defamatory).

¹⁵ See *Air Wis. Airlines Corp. v. Hooper*, 134 S.Ct 852 (2014); *Tory v. Cochran*, 544 U.S. 734 (2005); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991); *Milkovich*, 497 U.S. at 1; *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Herbert v. Lando*, 441 U.S. 153 (1979); *Paul v. Davis*, 424 U.S. 693 (1976); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁶ See cases cited *supra* notes 5–6.

¹⁷ See *id.*

I. FALSITY, HONESTY, AND LIABILITY

A. *The Law of Defamation and Protecting Reputation*

The twin torts of defamation are libel and slander.¹⁸ As a matter of state law, defamation is comprised of four elements: an unprivileged false published statement of fact about the plaintiff that causes harm to the plaintiff's reputation.¹⁹ The standard of proof depends on the plaintiff's status in the community: A private figure simply must prove that the statements were published with a degree of negligence, whereas a public official (someone who works for government or a public figure) must prove that the statements were published with actual malice, which requires knowledge of their falsity or reckless disregard for the truth.²⁰

The effects of a defamatory statement include public contempt, ridicule, aversion, and disgrace.²¹ According to William L. Prosser and W. Page Keeton, who wrote the leading treatise on torts, at common law, "[d]efamation is rather that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."²² "Personal disgrace" is another important element and all defamation claims must be adjudged by a "reasonable person."²³ But what constitutes personal disgrace is relative, much like language itself. As language and societal standards evolve, one scholar described defamation as a "distinctly sociological tort."²⁴ In his

¹⁸ RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

¹⁹ *Id.*; see also Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 720–21 (1986). Post notes that defamation law protects reputation as a property right, assigning a civil financial remedy to a plaintiff's dignity and honor: "Our own social world contains important elements of both market and communitarian societies. If these tensions resolve themselves, one can expect the contours of defamation law to become clearer and its doctrines more internally consistent." *Id.*

²⁰ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

²¹ See *Foster v. Churchill*, 665 N.E.2d 153, 157 (N.Y. 1996).

²² KEETON ET AL., *supra* note 8, at 773.

²³ *Id.* at 774–75, 777.

²⁴ Jerome K. Skolnick, *Foreword: The Sociological Tort of Defamation*, 74 CALIF. L. REV. 677, 677 (1986) ("As a sociological tort defamation also invites a more comprehensive sociological analysis . . .").

update to a 1940s press law guide, a noted media lawyer wrote: Determining defamatory meaning “is not limited to orthodox dictionary definition. It hinges also upon the temper of the times, colloquialisms, connotations, previous and subsequent articles or broadcasts, and matters of common knowledge in the circulation or listening area.”²⁵

For decades (and, perhaps, centuries), plaintiffs had a strong cause of action for defamation if a newspaper referred to the plaintiff as homosexual. However, today, in most states such a case would not automatically give rise to a libel per se claim.²⁶ Similarly, falsely identifying a white person as African-American or mixed-race was at one time an actionable libel.²⁷ Throughout the Red Scare and well into the Cold War, falsely identifying someone as a Communist could be defamatory.²⁸ The false allegations of being a

²⁵ PAUL P. ASHLEY, *SAY IT SAFELY* 14 (3d. ed. 1966). Later, in his chapter of libel per se, Ashley provided a nearly seven-page list of terms and expressions which could be libel per se, including such terms as “atheist, Communist, nudist, subversive, ambulance chaser, humbug, sharp dealing, booze hound, scab, [and] horse thief,” among others. *Id.* at 19–25.

²⁶ See *Stern v. Cosby*, 645 F. Supp. 2d 258, 275 (S.D.N.Y. 2009) (“[Statements imputing homosexuality are] not defamatory per se merely because they impute homosexuality They are, however, nonetheless susceptible to a defamatory meaning.”); *Albright v. Morton*, 321 F. Supp. 2d 130, 138 (D. Mass. 2004) (“If this [c]ourt were to agree that calling someone a homosexual is defamatory per se—it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status.”); see also Jay Barth, *Is False Imputation of Being Gay, Lesbian, or Bisexual Still Defamatory? The Arkansas Case*, 34 U. ARK. LITTLE ROCK L. REV. 527, 527 (2012); Robert Richards, *Gay Labeling and Defamation Law: Have Attitudes Toward Homosexuality Changed Enough to Modify Reputational Torts?*, 18 COMM. LAW CONSPECTUS 349, 365 (2010).

²⁷ *Bowen v. Indep. Publ’g Co.*, 96 S.E.2d 566, 513 (S.C. 1957) (“Although to publish in a newspaper of a white woman that she is a Negro imputes no mental, moral or physical fault for which she may justly be held accountable to public opinion, yet in view of the social habits and customs deep-rooted in this [s]tate, such publication is calculated to affect her standing in society and to injure her in the estimation of her friends and acquaintances. That such a publication is libelous per se is supported by the very great weight of authority.”); *Flood v. News & Courier Co.*, 50 S.E. 637, 640–41 (S.C. 1905). (“We therefore hold that these three amendments to the Federal Constitution have not destroyed the law of this state which makes the publication of a white man as a negro anything but libel.”); see also *Natchez Times Publ’g Co. v. Dunigan*, 72 So.2d 681, 683–84 (Miss. 1954).

²⁸ See *Grant v. Reader’s Digest Ass’n, Inc.*, 151 F.2d 733, 735 (2d Cir. 1945); see also ROBERT H. PHELPS & E. DOUGLAS HAMILTON, *LIBEL: RIGHTS, RISKS, RESPONSIBILITIES* 68 (Macmillan 1966) (“When Americans and Russians were allies, a report that a man was a

“Leninist” and “Communist” played a prominent role in the landmark defamation case *Gertz v. Robert Welch, Inc.*²⁹ In his own memoir of the libel case, Elmer Gertz, a Chicago lawyer who played a relatively minor role in a separate civil action in a police brutality case, wrote: “As will appear presently, I filed suit against Robert Welch, Inc., the parent organization of American Opinion, charging that it had defamed me by publishing harmful lies impugning my reputation and patriotism.”³⁰ Even descriptions of both poverty³¹ and extreme wealth,³² at various times, generated defamation claims; whereas currently, a plaintiff who is accused of either may have a difficult time making a prima facie case.³³

Perhaps just as antiquated as misidentifying someone in one of the aforementioned areas are the descriptions of the defamatory effect itself. One of the most famous, and widely cited cases on the impact of a defamatory statement is *Kimmerle v. New York Evening Journal, Inc.*, which provided a laundry list of words which expose someone “to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society.”³⁴ In the twenty-first century, obloquy,³⁵ con-

communist was held nonlibelous Now the law is settled, at least for a time, that charges of Communist affiliation are libelous.”)

²⁹ 418 U.S. 323 (1974).

³⁰ ELMER GERTZ, *GERTZ V. ROBERT WELCH, INC.*—THE STORY OF A LANDMARK LIBEL CASE 6 (1992). Gertz also noted that the Birchers were “much too quick and careless in calling people Communists or dupes of Communists. Of course, I was not the sole victim of this looseness of terminology.” *Id.* at 45.

³¹ *Martin v. Press Publ’g Co.*, 93 A.D. 531, 531 (N.Y. 1904). Here, plaintiff was an educated family man who was accused of being “too poor” and unable to provide for his family. *Id.* at 531. The court held these statements were actionable because they “exposed the person referred to therein to public ridicule and tended to abridge his comfort and to injuriously alter his station in society and was, consequently, libelous *per se.*” *Id.* at 532.

³² *See Woolworth v. Star Co.*, 97 A.D. 525, 526–27 (N.Y. 1904).

³³ *See Trump v. O’Brien*, 29 A.3d 1090, 1097 (N.J. Super. Ct. App. Div. 2011) (affirming dismissal of defamation claims against author who essentially referred to businessman as a millionaire rather than a billionaire because the plaintiff was unable to establish publisher acted with actual malice).

³⁴ 186 N.E. 217, 218 (N.Y. 1933).

³⁵ For example, “obloquy” is still on the books in California’s statute defining defamation, but the law was first enacted in 1872. *See CAL. CIV. CODE* § 45 (West 2016); *see also Bettner v. Holt*, 11 P. 713, 716 (Cal. 1886) (“To expose one to obloquy is to expose

tumely,³⁶ and odium³⁷ are not words that frequently find their way into common parlance. Though these words do find a place in modern defamation cases, they are most often tacked on as part of the list of the harm caused by the defamatory statement, usually in citations to *Kimmerle*.³⁸ The four well-defined categories of defamation per se find various formulations embedded in state law.³⁹ Generally speaking, the categories are: imputing crime, imputing dishonesty or incompetence in business or trade, imputing a loathsome disease (sexually transmitted infection, HIV, or leprosy), and imputing unchastity of a woman.⁴⁰

Similarly, there are specific words and phrases whose very utterances can trigger reputational harm. This issue was litigated all the way to the Supreme Court.⁴¹ For example, “blackmail”⁴² and “Southern [law] violator”⁴³ were the centerpiece allegations in two landmark cases. Generally, the actionability of these types of words depends not only on the language used, but the context as well. However, there is perhaps no single epithet that causes more consternation than the word “liar.”

him to censure and reproach as the latter terms are synonymous with the word ‘obloquy.’”).

³⁶ See *Schaecher v. Bouffault*, 772 S.E.2d 589, 594 (Va. 2015) (stating that defamatory language “tends to injure one’s reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him . . .” (quoting *Moss v. Harwood*, 102 Va. 386, 387 (1904))).

³⁷ See *White v. Nicholls*, 44 U.S. 266, 283 (1845) (“The paper is actionable on its face, as it charges the plaintiff with things which are calculated to bring public odium upon him: such as ‘descending to the lowest means.’”); see also *Harris v. Minvielle*, 19 So. 925, 926 (La. 1896) (“He claims of the defendant the sum of \$2,500 for the actual loss and damage he has suffered by direct injury to his commercial business through the instrumentality of the slander thus circulated . . . by reason of the mortification, annoyance, public contempt, and odium it has occasioned on him . . .”).

³⁸ See generally *Karedes v. Ackerley Grp., Inc.*, 423 F.3d 107, 113 (2d Cir. 2005); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 177 (2d Cir. 2000).

³⁹ SACK, *supra* note 7, §§ 2.3–2.4.1.

⁴⁰ NEIL J. ROSINI, *THE PRACTICAL GUIDE TO LIBEL LAW* 8–9 (1991).

⁴¹ Other categories such as hate speech or fighting words could cause similar rancor, but fall outside the scope of this research, primarily because these categories, while potentially punishable through criminal law, are not regarded as defamatory. See generally *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁴² *Greenbelt Co-op Publ’g Ass’n v. Bresler*, 398 U.S. 6, 7–8 (1970).

⁴³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256–58 (1964).

B. *The Importance of Being Honest*

Before delving into the actionability of the word liar, a look at honesty is in order. The need for truth, and the importance of having a reputation for being truthful—or, in the converse, of being a liar—is so high that some philosophers, such as Sissela Bok, believe that truth-telling keeps civilization from imploding.⁴⁴ In her seminal book *Lying*, Bok wrote that society depends on language and language requires truth:

Were all statements randomly truthful or deceptive, action and choice would be undermined from the outset. There must be a minimal degree of trust in communication for language and to be more than stabs in the dark. This is why some level of truthfulness has always been seen as essential to human society, no matter how deficient the observance of other moral principles.⁴⁵

Lying is wrapped up in both ethics and morality—good and bad, honest and dishonest.⁴⁶ Thomas Carson, a professor of philosophy, speaks of a “warranty” of truth as a guarantee, or even a promise, for truth.⁴⁷ Truth also underpins and guarantees (or aims to guarantee) honesty in certain professions, such as in the occupations of lawyers, doctors, architects, and other fiduciaries.⁴⁸ “Honesty is generally regarded as a cardinal virtue, and calling someone a ‘dishonest person’ is generally taken to be a severe criticism or condemnation of the person,” Carson wrote.⁴⁹

From the Bible to Disney,⁵⁰ the ethical and moral judgments attached to the term liar paint quite a negative impression for the

⁴⁴ SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 19 (Pantheon Books 1978).

⁴⁵ *Id.* at 18.

⁴⁶ THOMAS CARSON, *LYING AND DECEPTION: THEORY AND PRACTICE* 71 (2010).

⁴⁷ *Id.* at 25.

⁴⁸ *Id.* at 202–03.

⁴⁹ *Id.* at 257.

⁵⁰ M. HIRSH GOLDBERG, *THE BOOK OF LIES: SCHEMES, SCAMS, FAKES, AND FRAUDS THAT HAVE CHANGED THE COURSE OF HISTORY AND AFFECT OUR DAILY LIVES* 15, 27 (1990) (“Lying is such a part of the fabric of our lives that even the Bible story of the beginning of humanity is filled with lies told by its three protagonists.”).

perniciousness of lies, lying, and dishonesty.⁵¹ Our predilection for dishonesty has been ridiculed,⁵² mocked, and satirized,⁵³ but is also of such import that calling someone a liar has taken on legal ramifications through libel law.

C. Liar and Legal Liability?

American courts have had difficulty with liability surrounding allegations of lying for centuries. In 1793, a Connecticut circuit court could not ascertain the defamatory impact of the statement: “Captain Riggs is a damned liar and a rogue, and I can prove it.”⁵⁴ In this case, the defendant admitted to libel, and the trial court ordered a one-pound payment to the plaintiff.⁵⁵ However, the appellate court was unable to determine whether the case was properly pleaded in either law or fact, and avoided answering the question with certitude.⁵⁶

Later, in the early 1800s, a Boston man was convicted and sentenced to two months in prison for posting statements calling an auctioneer a “liar, a scoundrel, a cheat and a swindler.”⁵⁷ Con-

⁵¹ RALPH KEYES, *THE POST-TRUTH ERA: DISHONESTY AND DECEPTION IN CONTEMPORARY LIFE* 27 (2004) (“All societies must reconcile the fact that lying is socially toxic with the fact that nearly all their members engage in this practice. Every belief system does its best to regulate dishonesty with taboos, sanctions, and norms. Few such systems claim that every lie is always wrong. This would put them too far out of synch with facts on the ground. Therefore a major task for all belief systems has been to determine when it’s permissible to tell a lie.”).

⁵² GOLDBERG, *supra* note 50, at 22 (“Lying is so prevalent that it has its own day—April Fools’ Day.”).

⁵³ For example, comedian Stephen Colbert was so skeptical and disdainful of dishonest claims by politicians that he coined the term “truthiness,” which a year later became the “word of the year.” See Andrew Adam Newman, *How Dictionaries Define Publicity: The Word of the Year*, N.Y. TIMES (Dec. 10, 2007), <http://www.nytimes.com/2007/12/10/business/media/10oxford.html> [<https://perma.cc/P6AE-NDA4>]; Alessandra Stanley, *Bringing Out the Absurdity of the News*, N.Y. TIMES (Oct. 25, 2005), <http://www.nytimes.com/2005/10/25/arts/television/bringing-out-the-absurdity-of-the-news.html> [<https://perma.cc/G2EB-TP9V>].

⁵⁴ *Kelly v. Riggs*, 2 Root 13, 13 (Conn. Super. Ct. 1793).

⁵⁵ *Id.* at 13.

⁵⁶ *Id.* at 14.

⁵⁷ *Commonwealth v. Clap*, 4 Mass. 163, 170 (1808) (“The publication of a libel maliciously with intent to defame, whether it be true or not, is clearly an offense against law, on sound principles, which must be adhered to, so long as the restraint of all

versely, a Pennsylvania judge in 1812 wrote: “Every one knows that to say of a man that he is a *rogue* or a *liar*, is not actionable.”⁵⁸ A Virginia court in 1850 ruled the same way.⁵⁹ On the other hand, during the same period, a North Carolina doctor’s \$200 award of damages was upheld in a slander case in which he was called a liar.⁶⁰ In Indiana, a letter declaring that a man was “a grand liar and a grand rascal, and deserve to come to the whipping-post or gallows” was held to be defamatory.⁶¹ And, a Maryland court ruled that mitigating evidence may be admitted in defense of a libel case surrounding a statement that plaintiff was “a degraded scoundrel, liar and blackguard.”⁶²

Prosser and Keeton cited a handful of ancient and conflicting cases where questions of honesty were at issue.⁶³ For example, a 1900 Georgia newspaper article that implied that a businessman was a liar was improperly dismissed,⁶⁴ with the Georgia Supreme Court holding: “It is difficult for us to imagine what words would more fully expose a man to public contempt than to publish him as being a liar.”⁶⁵ Meanwhile, the Montana Supreme Court wrestled with whether calling a teacher a liar could be libel per se,⁶⁶ and a

tendencies to the breach of the public peace, and to private animosity and revenge, is salutary to the commonwealth.”).

⁵⁸ *M’Clurg v. Ross*, 5 Binn. 218, 219 (Pa. 1812).

⁵⁹ *Moseley v. Moss*, 47 Va. 534, 538 (1850) (“Thus it is not actionable to call a man a villain, cheat, rascal, liar, coward or ruffian . . . where such defamation bears only on the feelings or general standing or reputation of the party implicated, and the misconduct imputed has not been made punishable by statute.”).

⁶⁰ *Dudley v. Robinson*, 24 N.C. 141, 143–44 (1841).

⁶¹ *McCoombs v. Tuttle*, 5 Blackf. 431, 431 (Ind. 1840).

⁶² *Davis v. Griffith*, 4 G. & J. 342, 342 (Md. 1832).

⁶³ See KEETON ET AL., *supra* note 8, at 771–85.

⁶⁴ *Colvard v. Black*, 36 S.E. 80 (Ga. 1900). This case involved a newspaper article entitled “A Dirty Lie Nailed” about the death of an unnamed man on a train passing through Georgia. *Id.* at 81. The court wrote: “[T]he article did, in effect, accuse petitioner of willfully lying, and was prepared and published for the purpose of exposing him to public hatred, contempt, and ridicule, to cause his defeat for the legislature, and that said article did cause such defeat.” *Id.*

⁶⁵ *Id.* at 82. The court cited a case decided by the Supreme Court of Indiana in which the court concluded that it was libelous to call someone a liar. See *id.* (citing *Hake v. Brames*, 95 Ind. 161 (1884)).

⁶⁶ *Paxton v. Woodward*, 78 P. 215 (Mont. 1904). The demand for \$5,000 in damages had been thrown out at trial. *Id.* at 216–217. The court wrestled with whether the published statements could be libel per se—whether calling a teacher a liar was of such

Louisiana doctor recovered \$5,000 (later reduced to \$500) for being branded a liar.⁶⁷ In another case, the Supreme Court of Iowa concluded that a libel claim made by a candidate for county sheriff should have been sent to a jury.⁶⁸

In his treatise on defamation, Judge Robert D. Sack articulated this range of precedent and the ensuing confusion surrounding the issue, speaking directly to the question:

The terms “lie” and “liar” are frequently used to characterize statements with which the speaker vehemently disagrees. If in context the words mean that the defendant disapproves, it is a protected epithet. If it literally implies that the plaintiff made a specific assertion or series of assertions knowing them to be false, it may be actionable.⁶⁹

weight that it injured him in his profession. *Id.* at 217. The article called him a “common liar.” *Id.* at 216. The issue on appeal focused on a demurrer at trial. The court held: While the written charge, “We knew that Paxton was a man of many attainments, but did not know that he was a common liar before,” is in its nature, libelous *per se*, and needs no colloquium or innuendo to illustrate its application or meaning, and the vice imputed to plaintiff by the words standing alone is unqualified, and as broad as language can make it, yet, if the defamatory language is connected with other language which limits or affects its meaning, or might tend to mitigate the damage, its construction must be in relation to such other language, and in arriving at the sense . . . in part at least, to certain statements contained in the Chronicle. *Id.* (emphasis added).

⁶⁷ *Smith v. Lyon*, 77 So. 896, 904 (La. 1918). The doctor recovered \$2,500 for libel damages following a comment that called him “an assassin of character, a liar, and unworthy of the respect and esteem of decent and fair-minded people.” *Id.* Eight months later, the Louisiana Supreme Court reduced the damages to \$500 because the initial award was later deemed to be excessive. *Id.*

⁶⁸ *Prewitt v. Wilson*, 103 N.W. 365, 367 (Iowa 1905). In this case, the court wrote: Applying the accepted definition of libel, it is difficult to conceive of any publication more likely to provoke the victim to wrath, or expose him to public hatred and distrust, or to deprive him of the benefit of public confidence, than to publish abroad that he is a common liar whose word, even under the solemnity of an oath, will not be believed by his acquaintances. *Id.* Derogatory comments published in the heat of a county sheriff race may be defamatory either as libel *per se* if the elements of the tort are met, but it should have been submitted to a jury. *Id.* “It is true that, ordinarily, oral words which impute to another a criminal disposition or charge him with being notoriously untruthful or unworthy of the respect and confidence of his neighbors are not actionable, but such imputations written and published are universally held to constitute a libel *per se*,” the court wrote. *Id.* (emphasis added).

⁶⁹ SACK, *supra* note 7, § 2.4.7.

II. IS THIS THE LESSON . . . ?

A. *Milkovich v. Lorain Journal Co.*

The modern law on defamation coalesces around the Supreme Court's decision in *New York Times Co. v. Sullivan* and the subsequent cases often referred to as the *Times*' "progeny."⁷⁰ In one of the progeny cases, *Milkovich v. Lorain Journal Co.*, the legal question focused on whether calling someone a liar was defamatory.⁷¹ This case pitted a legendary Ohio high school wrestling coach against a small daily newspaper in litigation that spanned nearly fifteen years.⁷² The sports columnist wrote that Coach Michael Milkovich had lied under oath during a hearing.⁷³ Under the headline "Maple beat the law with the 'big lie,'" the columnist wrote:

It is simply this: If you get in a jam, lie your way out. . . . 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.⁷⁴

The column wove a theme of pedagogy throughout the piece, with references that the alleged lies perpetrated by school officials would leave students with the wrong "lesson."⁷⁵ In his conclusion, the columnist posited a rhetorical question about lying and dishonesty: "Is that the kind of lesson we want our young people learning from their high school administrators and coaches?"⁷⁶

⁷⁰ C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237, 240, 281 (1993) ("We submit that *Masson* and *Milkovich*, when taken together, provide compelling support for our central proposition—that every defamation action governed by *New York Times Co. v. Sullivan* contemplates a threshold, constitutional inquiry by the court concerning whether the publication at issue is reasonably capable of bearing a false, defamatory meaning.").

⁷¹ 497 U.S. 1 (1990).

⁷² *Id.* at 3.

⁷³ *Id.*

⁷⁴ *Id.* at 4–5 (reprinting column from trial record).

⁷⁵ *Id.*

⁷⁶ *Id.*

The underlying facts and the tortuous fifteen-year procedural history show the complicated nature of the case and how courts wrestle (literally and figuratively) with the question of whether such statements could be defamatory.⁷⁷ The defamatory piece was actually a sports column written by columnist Ted Diadiun in *The News Herald*, a small daily newspaper in suburban Cleveland, Ohio.⁷⁸ Diadiun had covered the 1974 high school wrestling meet between Maple Heights and Mentor High Schools, which devolved into a melee in which several people were injured.⁷⁹ Subsequently, the Ohio High School Athletic Association held a hearing with testimony from Maple Heights Coach Milkovich and Superintendent H. Don Scott.⁸⁰ The ensuing controversy included probation for the team, suspension from the next year's state tournament, a censure for Milkovich for his role in the melee, and a civil lawsuit that parents brought against the state athletic association.⁸¹

The defamation claim—libel per se—focused on lying, which in this case would have encompassed lying under oath in a judicial proceeding.⁸² Milkovich argued that the column accused him of committing the crime of perjury, which was “an indictable offense in the state of Ohio, and damaged [the] plaintiff directly in his lifetime occupation of coach and teacher.”⁸³ The defamation precedent, *Gertz v. Robert Welch, Inc.*, as well as Superintendent Scott's separate libel lawsuit, added additional wrinkles to the case

⁷⁷ See generally DAVID A. ELDER, *DEFAMATION: A LAWYER'S GUIDE* § 8:22 (1993).

⁷⁸ *Milkovich*, 497 U.S. at 4. The named defendant, the Lorain Journal, was the parent company for the News-Herald.

⁷⁹ *Id.* at 3–4.

⁸⁰ *Id.* at 4.

⁸¹ *Id.*

⁸² *Id.* at 6–7; see also *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1197 (Ohio 1984) (“The plain import of the author's assertions is that Milkovich, *inter alia*, committed the crime of perjury in a court of law.”), *overruled by* *Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986).

⁸³ *Milkovich*, 497 U.S. at 7. Perjury is defined as: “The willful assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being material to the issue or point of inquiry and known to such witness to be false, and intended by him to mislead the court, jury, or person holding the proceeding.” *Perjury*, BLACK'S LAW DICTIONARY (2d ed. 1995).

because the plaintiffs' status as public figures also came into play.⁸⁴ To further complicate the analysis regarding opinion, a highly influential decision by the Court of Appeals for the District of Columbia, *Ollman v. Evans*, was decided in 1984.⁸⁵

By the time the case reached the Supreme Court, the narrow question of the defamatory impact of calling someone a liar was eclipsed by the broader question of whether there should be a wholesale privilege for opinion.⁸⁶ In tracing not only the meaning of defamation and the history of defamation, including an oft-cited passage from Shakespeare's *Othello*, the Court delved into defenses including actual malice under *New York Times Co. v. Sullivan*, and later *Gertz*, as well as fair comment.⁸⁷ The bulk of Chief Justice William Rehnquist's analysis rests on determining whether a statement is fact or opinion.⁸⁸ The dispositive factor in the analysis is whether the speaker makes a statement based on some undisclosed fact or facts.⁸⁹ Thus, the Court illustrated that the statement, "In my opinion John Jones is a liar," is really not any different than stating, "Jones is a liar."⁹⁰ "Simply couching such statements in terms of opinion does not dispel these implications; and the statement . . . can cause as much damage to reputation as the statement, 'Jones is a liar.'"⁹¹

To clarify this analysis, the Court provided three mechanisms, based on existing precedent, to determine whether a statement could be actionable as a statement of fact or protected as pure opinions. First, the Court said that a statement on matters of public

⁸⁴ *Milkovich*, 497 U.S. at 7 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

⁸⁵ See 750 F.2d 970, 979 (D.C. Cir. 1984). The *Ollman* court developed a four-prong analysis to decide if a statement is protected as pure opinion or actionable as defamation: (1) the specific language used, (2) whether it is verifiable, (3) the general context, and (4) the broader context. *Id.*

⁸⁶ *Milkovich*, 497 U.S. at 10, 18.

⁸⁷ *Id.* at 11–18. Fair comment is a common law qualified privilege also known as the critic's privilege, which indemnifies writers for writing bona fide critiques. See SACK, *supra* note 7, §§ 4.2.1–4.2.2.

⁸⁸ *Milkovich*, 497 U.S. at 18–22.

⁸⁹ *Id.* at 18–19.

⁹⁰ *Id.*

⁹¹ *Id.* at 19.

concern must be provably false to be defamatory.⁹² Second, statements that no reasonable person could mistake for fact or “imaginative expression” or “rhetorical hyperbole” cannot be actionable.⁹³ And, third, as a matter of public concern, a statement that “reasonably implies false and defamatory facts regarding public figures,” made with actual malice, can be actionable.⁹⁴

Thus, the Court held that a “reasonable factfinder” could determine that the published allegations in the column could be defamatory.⁹⁵ The specific language in the column was not “loose, figurative, or hyperbolic language” and did more than simply imply that Milkovich committed perjury.⁹⁶ The Court held:

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, *inter alia*, petitioner’s testimony before the [Ohio High School Athletic Association] board with his subsequent testimony before the trial court.⁹⁷

In the twenty-five years since the *Milkovich* decision, scholars have criticized the precedent for not clarifying the standards for determining whether a statement is protected opinion or actionable.⁹⁸ Furthermore, a recent analysis of the case called it “deeply

⁹² *Id.* at 19–20. This is the rationale under *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). In *Milkovich*, the court stated: “*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” *Milkovich*, 497 U.S. at 20.

⁹³ *Milkovich*, 497 U.S. at 20. The Court applied the *Bresler-Letter Carriers-Falwell* rationale from a previous line of cases. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Co-op. Publ’g Ass’n v. Bresler*, 398 U.S. 6 (1970).

⁹⁴ *Milkovich*, 497 U.S. at 20–21 (citing *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485 (1984); *Gertz v. Welch*, 418 U.S. 323 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

⁹⁵ *Id.* at 21.

⁹⁶ *Id.*

⁹⁷ *Id.* at 21–22.

⁹⁸ *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 219, 226–27 (1990) (“The *Milkovich* Court missed an opportunity to alleviate the uncertainty surrounding [F]irst [A]mendment protection for opinion. Rather than adopt a uniform test to determine when a statement is an actionable assertion of fact, the Court articulated vague

and unworkably confused.”⁹⁹ The question of whether a statement is opinion or fact, particularly that in which a plaintiff’s honesty and integrity is involved is not only confusing, but somewhat artificial.¹⁰⁰

B. Two Modern (and Conflicting) Sets of Cases

Two high-profile cases have found their way into the court system, pressing the question of whether calling someone a liar in a public setting is defamatory. The first case, involving one of the Bill Cosby accusers, was dismissed.¹⁰¹ The second case, involving a basketball coach, reached the New York Court of Appeals, the state’s highest court, and the court ruled that the statement was defamatory.¹⁰² The following sections discuss each case separately.

1. Accusing the Accuser—*Hill v. Cosby*

The first of the Bill Cosby defamation lawsuits thus far, *Hill v. Cosby*, was dismissed by a federal judge who applied Pennsylvania substantive tort law.¹⁰³ The plaintiff, Renita Hill, accused the legendary comedian of a range of sexual assaults dating back to the 1980s, when she first met Cosby in the Pittsburgh, Pennsylvania, area while he was casting young women for a television show.¹⁰⁴ A series of responses and rebuttals by Cosby, his lawyer, and his wife

standards that will allow a multitude of lower court tests to flourish.”); Edward M. Sussman, Note, *Milkovich Revisited: “Saving” the Opinion Privilege*, 41 DUKE L.J. 415, 421 (1991) (arguing that the *Milkovich* decision did not actually change the law of defamation).

⁹⁹ Len Niehoff & Ashley Messenger, *Milkovich v. Lorain Journal Twenty-Five Years Later: The Slow, Quiet, and Troubled Demise of Liar Libel*, 49 U. MICH. J.L. REFORM 467, 468 (2016) (arguing that the *Milkovich* court’s “deeply and unworkably confused” opinion limited its subsequent application and influence).

¹⁰⁰ T.R. Hager, *Recent Development: Milkovich v. Lorain Journal Co.: Lost Breathing Space—Supreme Court Stifles Freedom of Expression by Eliminating First Amendment Opinion Privilege*, 65 TUL. L. REV. 944, 951–52 (1991) (arguing that the murky opinion’s “artificial dichotomy” between opinion and fact will stifle columnists and editorial writers and lead to a chilling effect for fear of liability).

¹⁰¹ *Hill v. Cosby*, No. 15-CV-1658, 2016 U.S. Dist. LEXIS 15795 (W.D. Pa. Feb. 9, 2016), *aff’d*, No. 16-1362, 2016 U.S. App. LEXIS 22199 (3d Cir. Dec. 14, 2016).

¹⁰² *Davis v. Boeheim*, 22 N.E.3d 999, 1001 (N.Y. 2014).

¹⁰³ *Hill*, 2016 U.S. Dist. LEXIS 15795, at *25–27.

¹⁰⁴ See Complaint, *Hill v. Cosby*, No. GD-15-018156 (C.P. Allegheny Cty. Oct. 14, 2015). The case was subsequently removed to federal court. See *Hill*, 2016 U.S. Dist. LEXIS 15795, at *1 n.1.

prompted Hill to retort in court, in a complaint averring that statements questioning her honesty were tantamount to defamation.¹⁰⁵

Pennsylvania courts apply a seven-point list for a prima facie showing of defamation: (1) defamatory character of the statement; (2) publication by defendant; (3) application to plaintiff; (4) a defamatory understanding by the recipient; (5) understanding by recipient of “intended” application to plaintiff; (6) special harm as a result of the publication; and (7) abuse of a conditional privilege.¹⁰⁶ The court also noted that the fact-opinion determination is a matter of law.¹⁰⁷

Though none of the three published statements explicitly refer to the plaintiff as a liar, she argued that they questioned her honesty and implied that she was a liar.¹⁰⁸ The statements included:

- Martin Singer, a Cosby attorney/representative, responded to the plaintiff’s initial public media interview, casting doubt on the plaintiff and her motives for public statements, calling them “new, never-before heard claims from women, who have come forward in the past two weeks with unsubstantiated, fantastical stories . . . have escalated far past the point of absurdity. These brand new claims about alleged decades-old events are becoming increasingly ridiculous . . . It makes no sense that not one of these new women who just came forward for the first time ever asserted a legal claim back at the time they allege they had been sexually assaulted.”¹⁰⁹
- Cosby, himself, told the newspaper *Florida Today*: “I know people are tired of me not saying anything, but a guy doesn’t have to answer to innuendos. People should fact-check. People

¹⁰⁵ *Hill*, 2016 U.S. Dist. LEXIS 15795, at *1–2. Plaintiff also pleaded counts for false light and intentional infliction of emotional distress. *Id.*

¹⁰⁶ *Id.* at *5–6 (applying 42 PA. CONS. STAT. ANN. § 8343 (West 2016)).

¹⁰⁷ *Id.* at *8.

¹⁰⁸ *Id.* at *12–13.

¹⁰⁹ *Id.* at *11–12.

shouldn't have to go through that and shouldn't answer to innuendos.”¹¹⁰

- Cosby's wife, Camille, published a letter to the editor in *The Washington Post* which stated that news organizations “failed to vet” the accusers.¹¹¹

The district court held that none of the statements constituted provable or disprovable fact and constituted opinion, immune from liability.¹¹² The statements did not imply or allege undisclosed information.¹¹³ The court wrote:

This [c]ourt does not find the Martin Singer Statement includes language which implies the existence of undisclosed defamatory facts about [the p]laintiff. As such, this [c]ourt considers the Martin Singer Statement to be purely an opinion proffered by an attorney who, while actively engaged in the zealous representation of his client, did not cross the line and defame the [p]laintiff.¹¹⁴

The court held that the *Florida Today* statements lacked the element of harm and simply encouraged the public to “draw its own conclusions” about the allegations, and that Camille Cosby's statements were more critical of the media, rather than the plaintiff.¹¹⁵ The court looked at all three statements together, concluding that they “did not lead to an inference that [the p]laintiff is a ‘liar and an extortionist.’”¹¹⁶ “Even assuming the veracity of all that [the p]laintiff has pled here, the three statements do not support a claim for defamation by Pennsylvania law,” the court concluded.¹¹⁷

The Third Circuit affirmed the dismissal, noting that some of the underlying statements were indeed based on stated facts even though a reasonable reader could come to the opposite conclu-

¹¹⁰ Complaint, *supra* note 104, ¶ 41.

¹¹¹ *Hill*, 2016 U.S. Dist. LEXIS 15795, at *12.

¹¹² *Id.* at *13-14.

¹¹³ *Id.*

¹¹⁴ *Id.* at *15.

¹¹⁵ *Id.* at *16-17.

¹¹⁶ *Id.* at *18-19.

¹¹⁷ *Id.* at *26.

sion.¹¹⁸ The court held that both the lawyer's and Camille Cosby's comments were clearly opinions.¹¹⁹ The responses to Hill's accusations came "in the midst of a heated public dispute could not reasonably be understood to imply the existence of any defamatory facts."¹²⁰

2. Full-Court Press in Overtime—*Davis v. Boeheim*

In the wake of the Jerry Sandusky child abuse scandal at Pennsylvania State University, two brothers in upstate New York alleged that they had been systematically molested as children by a long-time assistant basketball coach at Syracuse University in the 1980s.¹²¹ The case against the assistant coach, Bernie Fine, resurrected decades-old allegations that had been quietly investigated, possibly ignored, and disregarded years earlier by the university and law enforcement.¹²² New allegations arose in 2011 and the national spotlight shone on Syracuse University, its basketball team, and celebrity coach Jim Boeheim.¹²³ The story, initially reported by ESPN, created a firestorm of controversy, which included Coach

¹¹⁸ Hill v. Cosby, No. 16-1362, 2016 U.S. App. LEXIS 22199, at *9, 11 (3d Cir. Dec. 14, 2016).

¹¹⁹ *Id.* at *8.

¹²⁰ *Id.* at *11.

¹²¹ Marlen Garcia, *Syracuse Fires Associate Basketball Coach Fine*, USA TODAY (Nov. 28, 2011), <http://usatoday30.usatoday.com/sports/college/mensbasketball/story/2011-11-27/syracuse-fires-bernie-fine/51426600/1> [<https://perma.cc/FQ3Z-MLV4>]; Leonard Greene, 'Cuse Coach a 'Perv,' N.Y. POST (Nov. 18, 2011, 5:00 AM), <http://nypost.com/2011/11/18/cuse-coach-a-perv> [<https://perma.cc/7UJH-V3DU>]; Pete Thamel, *Syracuse's Boeheim Stands by Assistant Accused of Abuse*, N.Y. TIMES (Nov. 17, 2011), <http://www.nytimes.com/2011/11/18/sports/ncaabasketball/syracuse-assistant-is-accused-of-sexual-abuse.html> [<https://perma.cc/E28B-2ANA>].

¹²² Joe Nocera, *Opinion, It's Not Just Penn State*, N.Y. TIMES (Dec. 2, 2011), <http://www.nytimes.com/2011/12/03/opinion/nocera-its-not-just-penn-state.html> [<https://perma.cc/R73Q-QJBW>].

¹²³ Erik Brady & Marlen Garcia, *Jim Boeheim Under Fire Amid Fallout from Scandal*, USA TODAY (Nov. 29, 2011), <http://usatoday30.usatoday.com/sports/college/mensbasketball/story/2011-11-28/syracuse-bernie-fine-boeheim-allegations/51444458/1> [<https://perma.cc/S52F-4WNT>]; Lynn Zinser, *As Case Widens, So Do Concerns for Syracuse*, N.Y. TIMES (Nov. 28, 2011), <http://www.nytimes.com/2011/11/29/sports/ncaabasketball/as-bernie-fine-case-widens-so-do-concerns-for-syracuse.html> [<https://perma.cc/72PX-QYQW>].

Boeheim vociferously and publicly defending his longtime assistant coach during a post-game press conference.¹²⁴

Coach Boeheim questioned the accusers' motives and charged them with lying.¹²⁵ His statements prompted a defamation lawsuit in a case that had been dormant for decades; the underlying legal claims were rendered unavailing because the statute of limitations had long since expired.¹²⁶ However, new characterizations of the accusers as liars served as the basis for the Davis-Lang brothers' defamation claims, which eventually reached the New York Court of Appeals.¹²⁷

The plaintiffs, Robert Davis and his stepbrother Michael Lang, came forward to accuse Syracuse University assistant basketball coach Bernie Fine of systematically sexually molesting them as young boys in the 1980s.¹²⁸ The allegations spurred both a university investigation and widespread media attention, and raised questions about whether the university's legendary basketball coach Jim Boeheim had knowledge of the alleged abuse.¹²⁹

After the controversy picked up steam, Coach Boeheim made several comments during a post-game press conference accusing the plaintiffs lying about their allegations and being motivated solely by money.¹³⁰ These allegations, particularly accusing the brothers of lying, harmed their reputations, they argued.¹³¹ The plaintiffs in the lawsuit isolated five specific statements made by Coach Boeheim:

- This is alleged to have occurred . . . what? Twenty years ago? Am I in the right neighborhood? . . . So we are supposed to do what? Stop the presses

¹²⁴ Joe Nocera, Opinion, *Why Syracuse Isn't Penn State*, N.Y. TIMES (Oct. 19, 2012), <http://www.nytimes.com/2012/10/20/opinion/nocera-why-syracuse-isnt-penn-state.html> [<https://perma.cc/SL6T-Q889>]; Lynn Zinser, *The Sudden Pivot at Syracuse*, N.Y. TIMES, (Nov. 28, 2011), <http://www.nytimes.com/2011/11/29/sports/at-syracuse-a-sudden-pivot-leading-off.html> [<https://perma.cc/F9NW-J8S3>].

¹²⁵ See *Davis v. Boeheim*, 22 N.E.3d 999, 1002 (N.Y. 2014).

¹²⁶ *Id.* at 1001.

¹²⁷ *Id.* at 1002–03.

¹²⁸ *Id.* at 1001.

¹²⁹ *Id.* at 1002.

¹³⁰ *Id.*

¹³¹ *Id.* at 1003.

26 years later? For a false allegation? For what I absolutely believe is a false allegation? I know [Davis is] lying about me seeing him in his hotel room. That's a lie. If he's going to tell one lie, I'm sure there's a few more of them.

- The Penn State thing came out and the kid behind this is trying to get money. He's tried before. And now he's trying again . . . That's what this is about. Money.
- It's a bunch of a thousand lies that [Davis] has told . . . He supplied four names to the university that would corroborate his story. None of them did . . . there is only one side to this story. He is lying . . . I believe they saw what happened at Penn State, and they are using ESPN to get money. That is what I believe.
- You don't think it is a little funny that his cousin (relative) is coming forward?
- "Boeheim stated that the timing of Lang's decision to speak out about his abuse seemed "a little suspicious."¹³²

The lawsuit was dismissed on a pre-trial motion and the appellate division affirmed the dismissal in a 3-2 decision; however, the Court of Appeals of New York reversed.¹³³ Although the court recited the elements for defamation as a false statement of fact that exposes a person to "public contempt, hatred, ridicule, aversion or disgrace,"¹³⁴ the court analyzed and discussed the application of the opinion privilege to the statements and quotes at issue.¹³⁵

The court wrote: "A defamatory statement of fact is in contrast to 'pure opinion' which under our laws is not actionable because '[e]xpressions of opinion, as opposed to assertions of fact, are

¹³² *Id.* at 1005-06.

¹³³ *See* *Davis v. Boeheim*, 110 A.D.3d 1431, 1431 (N.Y. 2013) (dismissing plaintiffs' defamation claims as a matter of law under N.Y. C.P.L.R. 3211(a)(7) (McKinney 2016) because within the context a reasonable reader could construe the statements as opinion not provable facts), *rev'd*, 22 N.E.3d 999 (N.Y. 2014).

¹³⁴ *Davis*, 22 N.E.3d at 1004 (quoting *Thomas H. v. Paul B.*, 965 N.E.2d 939, 942 (N.Y. 2012)).

¹³⁵ *Id.* at 1004-05.

deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation.’”¹³⁶ The court also reiterated the oft-quoted dicta from *Gertz*—that there is no such thing as a false idea.¹³⁷ Of more importance, though, is the court’s reference to *Ollman v. Evans*, in which the D.C. Circuit Court of Appeals laid out an important four-prong checklist for determining whether a published opinion should be afforded protection under the First Amendment.¹³⁸

The court also delved into the concept of “mixed opinion,” which is potentially actionable when it “implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it”¹³⁹ As a matter of law, applying an “average person” standard, the court narrowed its analysis and application:

This requirement that the facts upon which the opinion is based are known “ensure[s] that the reader has the opportunity to assess the basis upon which the opinion was reached in order to draw [the reader’s] own conclusions concerning its validity” What differentiates an actionable mixed opinion from a privileged, pure opinion is, “the implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker’s] opinion and are detrimental to the person” being discussed.¹⁴⁰

To determine whether a statement should be regarded as pure opinion or otherwise actionable, the court relied on New York’s recent precedent from *Mann v. Abel*.¹⁴¹ *Mann* sits atop a line of cas-

¹³⁶ *Id.* at 1004 (quoting *Mann v. Abel*, 885 N.E.2d 884, 886 (N.Y. 2008)).

¹³⁷ *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974)).

¹³⁸ *See id.* (citing *Ollman v. Evans*, 750 F.2d 970, 976 (D.C. Cir. 1984); *Steinhilber v. Alphonse*, 501 N.E.2d 550, 552 (N.Y. 1986)).

¹³⁹ *Id.* (quoting *Steinhilber*, 501 N.E.2d at 552).

¹⁴⁰ *Id.* (quoting *Steinhilber*, 501 N.E.2d at 553; *Silsdorf v. Levine*, 449 N.E.2d 716, 719 (N.Y. 1983)).

¹⁴¹ *See id.* at 1005 (citing 885 N.E.2d 884, 886 (N.Y. 2008)). In *Mann v. Abel*, the court ruled that a newspaper column labeling plaintiff, among other things, a “political hatchet Mann” that was “leading the Town of Rye to destruction” should be protected opinion. *Mann*, 885 N.E.2d at 885.

es that apply and channel *Milkovich* to guide courts on opinion.¹⁴² The *Mann* court developed a three-prong analysis—that is reminiscent of but does not cite *Ollman*—to determine whether a statement should be regarded as opinion:

- (1) [W]hether the specific language in question has a precise meaning which is readily understood;
- (2) [W]hether the statements can be proven true or false; and
- (3) [W]hether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.¹⁴³

The statements that Coach Boeheim made during the press conference, the court of appeals held, satisfied the first two prongs under *Mann* because Boeheim's statements were factual assertions.¹⁴⁴ Specifically, the court wrote:

With respect to the first factor, Boeheim used specific, easily understood language to communicate that Davis and Lang lied, their motive was financial gain, and Davis had made prior similar statements for the same reason. These are clear statements of plaintiffs' actions and the driving force for their allegations against Fine. Consideration of the second factor similarly weighs in favor of treating Boeheim's statements as factual because the statements are capable of being proven true or false, as they

¹⁴² *Mann*, 885 N.E.2d at 886; see *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270, 1275–77 (N.Y. 1991) (applying *Milkovich* to New York state libel law to hold that a critical letter to the editor of a science journal was protected because of the language and the context of the speech); see also *Thomas H. v. Paul B.*, 965 N.E.2d 939, 942–43 (N.Y. 2012) (applying *Mann* in a case involving allegations of child molestation); *Brian v. Richardson*, 660 N.E.2d 1126, 1130–31 (N.Y. 1995) (holding an op-ed column to be privileged as opinion). See generally *Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1169–70 (N.Y. 1993) (reversing a pre-answer motion to dismiss libel claim based on protected opinion privilege).

¹⁴³ *Mann*, 885 N.E.2d at 886.

¹⁴⁴ *Davis*, 22 N.E.3d at 1006.

concern whether plaintiffs made false sexual abuse allegations against Fine in order to get money, and whether Davis had made false statements in the past.¹⁴⁵

The court also emphatically discounted these statements as rhetorical hyperbole.¹⁴⁶ Courts consider the contextual analysis to be the “key” factor in determining whether opinion will be protected.¹⁴⁷ Boeheim’s phraseology, “‘I believe,’ [was] insufficient to transform his statements into nonactionable pure opinion, because in context, a reasonable reader could view his statements as supported by undisclosed facts despite these denials,” the court wrote.¹⁴⁸

An analysis of the contextual factors also undercut the defendant’s opinion argument because the court believed that Coach Boeheim was a well-respected, exalted authority in his community who “as head coach of the team appeared well placed to have information about the charges.”¹⁴⁹ Coach Boeheim’s knowledge of the case and access to the university’s internal investigation and other documents and materials, which were generally unavailable to the public, suggested that he had additional or undisclosed knowledge upon which he spoke, the court noted.¹⁵⁰ Furthermore, Coach Boeheim worked with the alleged abuser, Fine, for decades had intimate knowledge of this assistant, and claimed that he had some knowledge about the Davis brothers as well.¹⁵¹

In conclusion, the court wrote: “There is a reasonable view of the claims upon which Davis and Lang would be entitled to recover for defamation; therefore, the complaint must be deemed to suffi-

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (“‘[L]iar,’ in context, where it reflects a mere denial of accusations, was personal opinion and rhetorical hyperbole. Our inquiry, however, does not rest on these two factors because the third factor in the analysis ‘is often the key consideration in categorizing a statement as fact or opinion.’” (quoting *Indep. Living Aides, Inc. v. Maxi-Aides, Inc.*, 981 F. Supp. 124, 128 (E.D.N.Y. 1997); *Thomas H.*, 965 N.E.2d at 943).

¹⁴⁷ *Id.* (quoting *Thomas H.*, 965 N.E.2d at 943). In a footnote, the court also wrote that it would not need to determine that alternate theory of “mixed opinion.” *Id.* at 1007.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

ciently state a cause of action.”¹⁵² Thus, within the context of a sporting event press conference, off-the-cuff statements by a speaker regarded as a local celebrity with insider information could be defamatory.¹⁵³

III. APPLYING THE LAW OF DEFAMATION TO THE TERM ‘LIAR’

Even though language and standards for defamation evolve and reflect contemporary values, it is highly unlikely that calling someone a liar will never be harmful to someone’s reputation. The term should not be totally removed from the list of potentially defamatory language. Within certain settings, a false imputation of dishonesty can certainly harm someone’s reputation. But, determining the meaning, liability, and damages is no easy task. The current spate of cases, seemingly employing tort law to circumvent the statute of limitations on underlying tort issues or outdated criminal cases, does not appear on its face to be invoking defamation law in genuine, good-faith manners.

The recent defamation cases pressing the question of whether there should be liability in calling someone a liar are difficult to rationalize. On one hand, contemporary statements criticizing accusers who have no contemporary recourse in dated cases gives litigants a back door to litigate the past in the present. On the other hand, being branded a liar for speaking out or stepping forward to report abuse or wrongdoing, even decades later, takes courage. The firestorm such accusers endure is part of the rigors of coming forward.

The law of defamation and the impact of a false statement have never been easy to rationalize. Quantifying harm to reputation can be speculative, at best, and as much as the landmark *New York*

¹⁵² *Id.* at 1008.

¹⁵³ Rather than pursue further litigation, the parties settled the case for an undisclosed sum in August 2015. See Chris Carlson, *Syracuse, Jim Boeheim Settle Slander Lawsuit with Bobby Davis, Mike Lang*, SYRACUSE.COM (Aug. 6, 2015, 4:00 PM) http://www.syracuse.com/orangebasketball/index.ssf/2015/08/syracuse_jim_boeheim_settle_slander_lawsuit_with_bobby_davis_and_mike_land.html [https://perma.cc/6BZY-2VNW].

Times Co. v. Sullivan case has indemnified speakers, particularly the press, from a host of chilling libel suits by public officials and public figures, it has also added layers to the argument and raised questions about not only the meaning of actual malice, but its appropriateness.¹⁵⁴ Furthermore, the role of falsity in these discussions of public issues is also part of a long tradition of balancing vigorous, caustic debate on matters of public interest.¹⁵⁵

Any litigant or jurist looking for clarity on the defamatory impact of the term “liar,” however, must dig deep for clear guidance. *Milkovich* adds to the confusion because every statement must be assessed within the context.¹⁵⁶ Thus, there is no uniformity among courts—even with the specific charge of calling someone a liar. What is clear, however, is that accusers and aggrieved victims whose remedies are long since gone (because the statute of limitations expired for the underlying civil or criminal liability) have been able to fashion at least prima facie defamation claims by luring parties into a public discussion of the issues.

In some ways, this approach is both a brilliant and opportunistic legal strategy. This is not intended to diminish the underlying allegations, which the parties never pressed at the time for a variety of reasons. Unfortunately, with the passage of time, memories fade, evidence degrades, and witnesses disappear or die, which plays into the practical rationale for imposing a statute of limitations in the first place.

The underlying allegations at the heart of these disputes are of the utmost seriousness and probably should have been thoroughly investigated and prosecuted at the time of the assaults. As is often the case, defense in both the courtroom and the court of public opinion often entails denials and casting the accusers in an unfavorable light.¹⁵⁷ Balancing these two competing interests, though,

¹⁵⁴ See KEETON ET AL., *supra* note 8, at 815–16.

¹⁵⁵ See *Prewitt v. Wilson*, 103 N.W. 365, 367 (Iowa 1905).

¹⁵⁶ *Niehoff & Messenger*, *supra* note 99, at 468.

¹⁵⁷ For example, *Flowers v. Carville* illustrates the perils and difficulties that an accuser faces, and how the epithet “liar” among other retorts, can be actionable. See 310 F.3d 1118 (9th Cir. 2002). Here, the response against Jennifer Flowers, who stepped forward during the 1992 presidential campaign to allege that she had maintained a long-term extramarital relationship with then-candidate Bill Clinton, was labeled a liar and a fraud, and accused of doctoring tape recordings by a host of Clinton campaign staffers. *Id.* at

requires some legal guidance and that guidance comes from *Milkovich*, a Supreme Court precedent that is murky at best.¹⁵⁸

Thus, the context of the utterance “liar” is more dispositive than the word itself. Referring to a witness who testified as a liar may be actionable under *Milkovich* as a factual matter related to perjury, while a comedian such as Jon Stewart or John Oliver calling a candidate a liar would not be.¹⁵⁹ No reasonable person would expect facts to flow from a comedian. However, the context of a basketball coach’s off-the-cuff defense of a long-time assistant at a post-game press conference should not have the same credibility of a statement made under oath and threat of perjury.¹⁶⁰ How much credibility should or could be afforded to a post-game press conference?

The vast range of inconsistent court decisions does little to settle the question. Recently, courts have come to opposite conclusions in at least two high profile cases testing these issues. In cases against Bill Cosby, at least one court has rejected a defamation claim, while others are currently on appeal.¹⁶¹ In New York, the state’s high court held that a basketball coach’s spontaneous outburst at a post-game press conference, branding two accusers liars, could be held as defamatory and not opinion because of the weight of the speaker and the tenor of his comments.

The *Davis* court cited one of New York’s more recent defamation cases, *Thomas H. v. Paul B.*, in which a plaintiff who had been accused of child molestation and rape argued that he had been de-

1122–28. The court partially reversed a motion to dismiss, writing that Flowers deserved her day in court to prove that the statements about her were defamatory and published with actual malice. *Id.* at 1133.

¹⁵⁸ See Hager, *supra* note 100, at 951–52.

¹⁵⁹ See *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157–58 (Tex. 2004) (“In a case of parody or satire, courts must analyze the words at issue with detachment and dispassion, considering them in context and as a whole, as the reasonable reader would consider them.”).

¹⁶⁰ See generally *Michel v. NYP Holdings, Inc.*, No. 14-62649-CIV-COHN/SELTZER, 2015 U.S. Dist Lexis 38896, at *9–10 (S.D. Fla. Mar. 4, 2015) (applying *Davis v. Boenheim* to an analysis of the context of a potentially defamatory statement, paying particular attention to the tabloid’s gossip pages).

¹⁶¹ See sources cited *supra* note 5.

famed.¹⁶² Deciphering statements made in such a controversy may present a nearly “impossible” task for a court.¹⁶³ The court more clearly articulated the hazards:

Even when an accusation involves serious criminal conduct, differentiating between fact and opinion is not necessarily an easy endeavor. At first blush, a statement such as “plaintiff is a thief” certainly appears capable of being proven true or false. But the overall context in which such words are used may cloud their potentially defamatory nature.¹⁶⁴

If determining whether a statement questioning a person’s honesty in a traditional setting or in legacy media is confusing and potentially conflicting,¹⁶⁵ then modern media—particularly social media—is even worse because it is rife with mixed messages and a blurry context that courts are only beginning to rationalize.¹⁶⁶ Whether the context provided by social media platforms provides facts or opinion leaves courts vexed. One state trial court judge, ruling on social media posts that included an allegation that the plaintiff was a “liar,” noted the ease with which vitriolic and potentially defamatory statements find an easy home online.¹⁶⁷

In *Technovate LLC v. Fanelli*, the court held that while comments critical of the quality of the workmanship were protected as pure opinion, statements accusing the company’s owner of a

¹⁶² See *Davis v. Boenheim*, 22 N.E.3d 999, 1004–07 (N.Y. 2014); see also *Thomas H. v. Paul B.*, 965 N.E.2d 939, 941–42 (N.Y. 2012).

¹⁶³ *Thomas H.*, 965 N.E.2d at 943.

¹⁶⁴ *Id.* at 942–43.

¹⁶⁵ See *Niehoff & Messenger*, *supra* note 99 (discussing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)); see also *Bradford J. Kelley*, Comment, *Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims*, 73 LA. L. REV. 559, 588 (2013) (“Trial courts will be better served to continue to apply traditional defamation law, regardless of the publication medium.”).

¹⁶⁶ See *Joshua Azriel & Charles Mayo*, *Fifty Years After New York Times Co. v. Sullivan and Forty Years After Gertz v. Welch: How These Twentieth Century Supreme Court Rulings Impact Twenty-First Century Online Social Media Libel Claims*, 20 B.U. J. SCI. & TECH. L. 191 (2014).

¹⁶⁷ *Technovate LLC v. Fanelli*, No. 003713/15, 2015 N.Y. Misc. LEXIS 3394, at *11–12 (Civ. Ct. Sept. 10, 2015).

“scam” and being “a liar” were sufficiently factual and harmful.¹⁶⁸ The court awarded the plaintiff \$1,000 in damages.¹⁶⁹ The new medium, and thus the context, provides courts with great difficulty assessing defamation. The court explained:

The courts have been struggling with the application of the traditional analysis of defamation to the Internet. As noted in *Sandals Resorts International Ltd. v. Google, Inc.*, the culture of the Internet is characterized by a more freewheeling, anything-goes style of writing where bulletin boards and chat rooms may be the repository of a wide range of casual, emotive, and imprecise speech where the readers of the offensive statements do not necessarily attribute to them the same level of credence they would to statements made in other contexts. On-line speech often is characterized by the use of slang, grammatical mistakes, spelling errors, and a general lack of coherence. Many, if not, all of which exist in defendant’s postings.¹⁷⁰

In one of the first expositions on defamatory liability associated with Twitter, legal columnist Julie Hilden described how the lines between opinion and fact “blur” on the social media platform.¹⁷¹ Twitter’s immediacy and brevity, as well as the use of slang and direct contact with an infinite audience, differentiate the platform from traditional media.¹⁷² She wrote:

To try to get the protection of the privilege for opinion based on disclosed fact, however, defendants may ask courts to view certain sets of tweets—those that appeared closely enough to each other in time

¹⁶⁸ *Id.* at *4, *16–17. (“[D]efendant’s statements in regard to his honesty in business transactions qualified as defamation per se entitling him to general damages without proof of special harm.”).

¹⁶⁹ *Id.* at *17.

¹⁷⁰ *Id.* at *10 (citation omitted).

¹⁷¹ Julie Hilden, *Should the Law Treat Defamatory Tweets the Same Way as it Treats Printed Defamation*, JUSTIA (Oct. 3, 2011), <https://verdict.justia.com/2011/10/03/should-the-law-treat-defamatory-tweets-the-same-way-it-treats-printed-defamation> [<https://perma.cc/5R25-5UN9>].

¹⁷² *Id.*

to make it likely that they were read together by followers—as, in effect, one statement. In my view, that seems like a reasonable thing for a court to do. (Here, too, empirical evidence could be gathered, by contacting followers—or a sample of them—to see if they did, indeed, read every one of a series of related tweets, or if they just read the lone tweet that the plaintiff has now put at issue.)¹⁷³

While Hilden offered a range of solutions, including declaring socially accepted textual or typographical symbolism, such as color-coding statements intended to be humorous or sarcastic, or the creation of a symbol to indicate opinion like the four-character abbreviation of “In My Humble Opinion” (“IMHO”) which sometimes prefaces statements, Hilden predicted a future rife with more libel lawsuits.¹⁷⁴ Perhaps Hilden was writing sarcastically, but much like the message in cyberspace, the tone did not fully translate.

Though media accounts have publicized a handful of high-profile celebrity Twitter defamation suits, judicial opinions and guidance on these “twibel” cases are scant.¹⁷⁵ One of the first Twitter libel lawsuits involved rock star Courtney Love, who wrote, among other tweets, that a designer who she had a tiff with was a prostitute who had stolen from her.¹⁷⁶ In a series of tweets, Love also accused the plaintiff of drug use and losing custody of a child.¹⁷⁷ Thus, the lying epithet, likely played a minor role in the litigation compared to the other libels. But it was still a component of the lawsuit and a \$430,000 settlement, which a California appeals court affirmed, ruling that the publicly fought feud was not a matter of public interest worthy of dismissal on First Amendment grounds.¹⁷⁸

¹⁷³ *Id.*

¹⁷⁴ *Id.* Law professor Lili Levi humorously coined the word “twibel” to describe libel lawsuits emanating from Twitter. See Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1574–75 (2012) (discussing libel lawsuits based on tweets by Courtney Love and Kim Kardashian).

¹⁷⁵ Levi, *supra* note 174.

¹⁷⁶ See *Simorangkir v. Cobain*, No. B254895, 2015 Cal. App. Unpub. LEXIS 1442, at *7–8 (Feb. 26, 2015).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at *16–19.

One scholar analyzing the tensions relating to social media wrote:

Because of the informal nature of Twitter, reasonable readers of most Twitter feeds “do not understand ‘tweets’ to be conveying factual information.” In evaluating whether Love’s comments were factual (and therefore likely libelous), or opinion (which is more protected and less likely libelous), the California Courts examined the “context, including the nature of the platform.” Thus, because opinion-based speech receives much greater First Amendment protection than fact-based speech, this will be a crucial point of analysis in determining whether tweets are defamatory.¹⁷⁹

Lying and imputing dishonesty also infiltrates social media, such as Facebook,¹⁸⁰ and consumer complaint websites, which raises questions of common law defamation as well as other issues, such as trade disparagement and intellectual property infringement.¹⁸¹ The review website Yelp has tested the old law for reputation management within a modern media context.¹⁸²

An online post calling a realtor a “liar” was among the statements challenged in a defamation lawsuit, *Shiamili v. Real Estate*

¹⁷⁹ Ellyn M. Angelotti, *Twibel Law: What Defamation and its Remedies Look Like in the Age of Twitter*, 13 J. HIGH TECH. L. 433, 472–73 (2013) (citing Sam Bayard, *First Twitter Libel Suit, Starring Courtney Love*, DIGITAL MEDIA L. PROJECT (Mar. 30, 2009), <http://www.dmlp.org/blog/2009/sam-bayard/first-twitter-libel-suit-starring-courtney-love> [<https://perma.cc/YU46-XJYT>]).

¹⁸⁰ See generally *Armstrong v. Shirvell*, 596 Fed. App’x 433 (6th Cir. 2015); *Vizant Techs., LLC. v. Whitchurch*, No. 15-431, 2016 U.S. Dist. LEXIS 2112 (E.D. Pa. Jan. 8, 2016); *Runyan v. Fey*, No. 15-CV-00009-RBJ-CBS, 2015 U.S. Dist. LEXIS 170645 (D. Colo. Dec. 22, 2015).

¹⁸¹ See generally Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEGAL ETHICS 97 (2016).

¹⁸² While websites that allow third-parties or users to post or publish information on the platform are immune from liability under section 230 of Communications Decency Act (“CDA”), the authors of critical commentary have found themselves in court defending their statements. See *Braverman v. Yelp Inc.*, No. 158299, slip op. at 793 (N.Y. Sup. Ct. Feb. 24, 2014), *aff’d*, 128 A.D.3d 568 (N.Y. 2015); see also DERIGAN SILVER, *Defamation, in SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATION STUDENTS AND PROFESSIONALS* 23, 44 (Daxton R. Stewart ed., 2013) (suggesting that critical statements posted on Yelp might be afforded protection under the fair comment privilege).

Group of New York, Inc., which named a New York City real estate industry website among the defendants.¹⁸³ Because of section 230 of the Communications Decency Act (“CDA”), the case against the website was dismissed because it was viewed as a passive conduit for third-party comments.¹⁸⁴ However, the court also added that no reasonable reader could construe the statements, which were undoubtedly offensive, as fact or defamatory.¹⁸⁵ Some of those statements might have even been construed as satirical.¹⁸⁶ Meanwhile, a Washington state appellate court dismissed online postings which included a list of abusive insults, including “liar” because no reasonable viewer could construe the statements as factual, not opinion.¹⁸⁷ Even a website named “liarscheatersus.com,” which encouraged people to post comments about failed relationships, could be viewed as rhetorical hyperbole and opinion.¹⁸⁸

In the modern world, perhaps courts can find refuge with old legal standards. *Milkovich* has never been an easy precedent to apply, except perhaps with its *Hustler v. Falwell* rhetorical hyperbole rationale (the more outrageous the epithet, the less reasonable it is to accept for its truthfulness).¹⁸⁹ Applying the *Ollman* prongs may be useful: (1) does the language have a precise meaning; (2) can the language used be proven true or false; and (3) what is the full context of the statement?¹⁹⁰ Though the *Ollman* test may seem more accessible and workable in determining whether a statement should be regarded as factual or pure opinion, especially in an academic setting, such an analysis may be of little consolation to a potential

¹⁸³ 952 N.E.2d 1011, 1014 (N.Y. 2011).

¹⁸⁴ *Id.* at 1018–19. This was the New York Court of Appeals’ first ruling on the CDA. *See id.* at 1020.

¹⁸⁵ *Id.* at 1019–20.

¹⁸⁶ *Id.*

¹⁸⁷ *See* Life Designs Ranch, Inc. v. Sommer, 364 P.3d 129, 135–36 (Wash. 2015).

¹⁸⁸ *Couloute v. Ryncarz*, No. 11-CV-5986 (HB), 2012 U.S. Dist. Lexis 20534, *18–20 (S.D.N.Y. Feb. 15, 2012) (“Defendants note, liarscheatersus.com is ‘specifically intended to provide a forum for people to air their grievances about dishonest partners.’ The average reader would know that the comments are ‘emotionally charged rhetoric’ and the ‘opinions of disappointed lovers.’ Of course the internet makes it more likely that a greater number of people will read comments such as these, and thereby amplify the impact they may have on a person, but this does not change the underlying nature of the comments themselves.”).

¹⁸⁹ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

¹⁹⁰ *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984).

plaintiff who has just been branded a liar in a speech, a press conference, an editorial, or a post on social media.

A wholesale judicial declaration that social media or online comments sections should never be taken seriously as factual, or that no reasonable person should view such areas as fact, would neuter defamation law. Perhaps the only real solace a potential defamation plaintiff could take rests in the fact that being branded a “liar” in tweets, comments, or reviews is often accompanied by more derogatory and damaging statements. But, this is hardly a viable judicial standard.

CONCLUSION

The law of defamation revolves around the meaning of words. Language, particularly that which lowers someone’s esteem in their community or causes harm to his or her reputation, must be weighed against the context of that utterance. Even with the evolution of language, perhaps no epithet still tests these issues more than calling someone a liar. As much as observers might want a simple yes/no answer regarding liability surrounding the word liar, there is no one-size-fits-all determination of liability or harm. Courts wrestling with these issues in interpersonal communications, traditional legacy media (such as newspapers or broadcasters), and modern social media must pay particular attention to the context in which the speech emerged.

A spate of recent cases testing the liability of the term liar has emerged amid several high-profile public scandals. The plaintiffs in these cases, victims of abuses for which the statute of limitations had long since expired, have found new venues to seek justice through the tort law of defamation—litigating the liability and harm associated with being called a liar. While defamation law protects a person’s reputation, it should not be used as a back door when other civil and criminal remedies have expired. Long-standing Supreme Court precedent reiterates the importance of context in this analysis because sometimes calling someone a liar is nothing more than opinion. Thus, in many venues, calling someone a liar may be offensive or hurtful, but falls short of being defamatory. And, that is the truth.