

Chapter 4

Opinion

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*We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.*¹

*Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity.*²

§ 4:1 Overview³

It is second nature for a person who reads or hears a statement to try to determine, on the basis of the language used and surrounding circumstances, whether it is meant to be objective or subjective—whether the statement is intended to assert information about people, things, and events, on the one hand, or the speaker’s attitude toward people, things, and events, on the other.⁴ He or she is deciding whether to treat the statement as an assertion of fact or a declaration of opinion.

Listeners and readers also try to decide whether and to what extent communications should be taken literally. Does “My partner is robbing me blind” indicate disagreement with the fairness of the allocation of partnership profits, or require a telephone call to the police?

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1. J.S. MILL, ON LIBERTY, ch. 2.
 2. *Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part, dissenting in part).
 3. The author’s views on the subject are set out at some length in Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, Defamation and Privacy Under the First Amendment*, 100 COLUM. L. REV. 294 (2000).
 4. Cf. W. LIPPMAN, PUBLIC OPINION 18 (MacMillan paperback ed. 1965) (“Those features of the world outside which have to do with the behavior of other human beings, in so far as that behavior crosses ours, is dependent upon us, or is interesting to us, we call roughly public affairs. The pictures inside the heads of these human beings, the pictures of themselves, of others, of their needs, purposes, and relationship, are their public opinions.”).

Does “This city is a jungle” mean that people in this city are particularly cruel, that the speaker has had a bad day, or that it is wise to take a snakebite kit on the next foray for lunch? The law of defamation takes this search for meaning and differentiation between fact and opinion from the living room into the courtroom. There the inquiry tends to become artificial and difficult.

An easy consensus holds that in some way and to some extent expressions of opinion must be protected from the legal process. The reasons are manifold. They include the need to protect the individual value of free self-expression—“the freedom to speak one’s mind . . . [as] an aspect of individual liberty—and thus a good unto itself,”⁵ and the societal and political value of public debate—“the common quest for truth and the vitality of society as a whole.”⁶

It is significant that the guarantee of freedom of speech and press falls between the religious guarantees and the guarantee of the right to petition for redress of grievances in the text of the First Amendment. . . . It partakes of the nature of both, for it is as much a guarantee to individuals of their personal right to make their thoughts public and put them before the community . . . as it is a social necessity required for the “maintenance of our political system and an open society.”⁷

The reasons also include the perception that a statement of opinion tends to inflict less damage to reputation where the underlying facts are also stated, enabling the assertion of opinion to be rebutted;⁸ that such an assertion typically reflects on the speaker as much as the person spoken about;⁹ and that the courts should not and cannot be in the business of restraining every epithet-shouter and loudmouth, even if his or her words inflict some measure of harm.¹⁰ And yet, a thoughtless or cruel statement of opinion can severely injure reputation. A spiteful review in the *New York Times Book Review* can

5. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503, 10 Media L. Rep. (BNA) 1625 (1984).

6. *Id.*, 466 U.S. at 503–04.

7. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 149 (1967) (opinion of Harlan, J.) (citation omitted). For a thorough survey of theories underlying protection for freedom of expression, see Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

8. See section 4:3.2, *infra*.

9. See section 2:4.7, *supra*. A statement correctly understood to be an opinion can be said to be “true” in the sense that it is an accurate portrayal of the attitude of the speaker. This is the corollary to the notion that expression of a stated opinion not genuinely held by the speaker may be said to be false. See section 4:3.5, *infra*.

10. See section 2:4.7, *supra*.

hurt the reputation of both the reviewed work and its author even though it is not objectively, demonstrably false.¹¹ No task undertaken under the law of defamation is more elusive than distinguishing between fact and opinion.¹² Analysis is complicated because communications commonly consist of intertwined allegations of fact and opinion: statements that are ostensibly opinion imply allegations of fact, and statements that are ostensibly of fact turn out, upon examination, to be opinion.¹³ Indeed, we suspect that there is some opinion in any assertion of fact, and some factual content in every statement of opinion.¹⁴ It is not surprising, then, that courts have had difficulty in deciding how to identify opinion and in determining the scope of its protection.

11. *Cf.* *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 22 Media L. Rep. (BNA) 1673 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994).

12. *Goldwater v. Ginzburg*, 261 F. Supp. 784, 786 (S.D.N.Y. 1966), *aff'd*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (quoting PROSSER ON TORTS (3d ed. 1964), to the effect that the distinction “has proved to be a most unsatisfactory and unreliable one, difficult to draw in practice”); *cf.* MCCORMICK ON EVIDENCE § 11, at 23 (2d ed. 1972) (emphasis added):

This classic formula, based as it is on the assumption that “fact” and “opinion” stand in contrast and hence are readily distinguishable, has proven the clumsiest of all the tools furnished the judge for regulating the examination of witnesses. *It is clumsy because its basic assumption is an illusion.*

See generally Franklin & Bussel, *The Plaintiff’s Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 869–71 (1984). *But cf.* *A.S. Abell Co. v. Kirby*, 227 Md. 267, 176 A.2d 340, 343, 90 A.L.R.2d 1264 (1961) (distinction is “theoretically and logically hard to draw” but “usually reasonably determinable as a practical matter”).

Because of the difficulty in distinguishing between fact and opinion, it has long been common for a defendant to make a “rolled-up plea” to the effect that insofar as the complained-of statement is factual it is true, and insofar as it is opinion, it is either “fair,” not provably false, or otherwise protected. *See* PETER F. CARTER-RUCK & HARVEY STARTE, *CARTER-RUCK ON LIBEL AND SLANDER* 112–13 (5th ed. 1997); J. CARTER & A. HUGHES, *DEFAMATION ACTIONS* 33 (PLI 1963).

13. *See* section 4:3.2, *infra*.

14. *See* *Stevens v. Tillman*, 855 F.2d 394, 398 (7th Cir. 1988). The most factual of statements, an eyewitness account of a crime, for example, is no more than an assertion that the person who was there believes he or she saw something. Even honest eyewitness accounts are notoriously unreliable. *See generally* E. LOFTUS & J. DOYLE, *EYEWITNESS TESTIMONY/CIVIL & CRIMINAL* (2d ed. 1992). And an opinion so pure that it contains no factual implications is rare, if not unimaginable.

§ 4:2 Historical Review

§ 4:2.1 Introduction

An understanding of the doctrine governing the treatment of opinion by the law of defamation requires recapitulation of its history, falling roughly into three stages: common-law “fair comment,” largely prior to 1974; protection between 1974 and 1990 based on language in the Supreme Court’s opinion in *Gertz v. Robert Welch, Inc.*;¹⁵ and treatment arising out of the Court’s 1990 opinion in *Milkovich v. Lorain Journal Co.*¹⁶

§ 4:2.2 Common-Law Roots¹⁷

In developing the common law of defamation, courts exhibited some sensitivity to the dangers of the law’s impingement on freedom of expression long before the Supreme Court began to erect First Amendment safeguards in the area.¹⁸ In the arena of debate and criticism about public issues, this consideration gave rise to protection for opinion usually referred to as the privilege of “fair comment.”¹⁹ The purpose served by the privilege was essentially the same as that which later motivated the Court: to ensure that “debate on public issues [will be] uninhibited, robust and wide-open.”²⁰

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15. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
 16. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 Media L. Rep. (BNA) 2009 (1990).
 17. State and federal constitutional protection has its roots in the common-law fair-comment privilege. *See, e.g.*, *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994). Because the common-law privilege is largely vestigial, however, separate discussion of common-law protection is postponed to later in this chapter. *See* section 4:4, *infra*.
 18. *See generally* *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942); *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234, 86 A.L.R. 466 (1933); *Parmelee v. Hearst Publ’g Co.*, 341 Ill. App. 339, 347–48, 93 N.E.2d 512, 515 (1950); *Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901); *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908); and cases cited in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 n.20 (1964).
 19. *See Hill, Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1227–36 (1976); section 4:4, *infra*.
 20. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See, e.g.*, *Pearson v. Fairbanks Publ’g Co.*, 413 P.2d 711, 714 (Alaska 1966) (“freedom of discussion and debate on public issues”); *Edmonds v. Delta Democrat Publ’g Co.*, 230 Miss. 583, 591, 93 So. 2d 171, 173 (1957) (that “matters of a public nature may be freely discussed”); *Julian v. Am. Bus. Consultants, Inc.*, 2 N.Y.2d 1, 7, 137 N.E.2d 1, 5, 155 N.Y.S.2d 1, 7 (1956) (“in furtherance of . . . the right to write freely”); *see also Keeton, Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1222–23 (1976).

“Fair comment” was inadequate. The scope of the common-law privilege was uncertain, and there was substantial diversity in the rationales for it. While the common-law fair-comment tradition has been termed “rich and complex,”²¹ that very richness and complexity rendered its protection uncertain. Under the fair-comment privilege, a decision to state an opinion safely required, first, a prediction by the would-be speaker as to which state’s law would govern any ensuing litigation, since the law differs markedly from jurisdiction to jurisdiction.²² He or she would then be required to guess whether a court would consider the utterance indeed to be an opinion rather than an assertion of fact,²³ and how a jury would answer vague and subjective questions such as whether the views were the speaker’s “actual opinion” or were “excessively vituperative” or “unfair.”²⁴

The hazard increased dramatically as technology projected publishing and broadcasting into multiple jurisdictions. Speakers were subject to the constant threat of large libel judgments resting on the findings of often-hostile local juries whose views were based on subjective and ephemeral conclusions on issues such as whether the criticism was “unreasonable.”²⁵ The fractionated common-law approach was unequal to the task of protecting “the freedom to speak one’s mind.”

Underlying the privilege was a desire to protect “intuitive, evaluative statements that could not be proved either true or false by the rigorous deductive reasoning of the judicial process.”

Moldea v. N.Y. Times Co., 15 F.3d 1137, 1153, 22 Media L. Rep. (BNA) 1321 (Mikva, J., dissenting) (quoting Franklin & Bussel, *The Plaintiff’s Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 871 (1984)), *modified on reh’g*, 22 F.3d 310, 22 Media L. Rep. (BNA) 1673 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994).

21. *See, e.g.*, *Ollman v. Evans*, 471 U.S. 1127, 1129, 11 Media L. Rep. (BNA) 2015 (1985) (Rehnquist, J., dissenting from denial of certiorari) (quoting Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1239 (1976)).
22. *See* section 4:4, *infra*.
23. The common law, like the predominant view post-*Gertz* that all opinion was constitutionally immune, required in the first instance a decision as to whether the statement was fact or opinion, since fair-comment doctrine was largely limited to protection of comment, or opinion, and ordinarily did not protect false statements of fact. *But cf.* section 4:4.3, *infra*.
24. *See* section 4:4.6, *infra*.
25. With respect to wire copy or syndicated material, an aggrieved person could bring separate actions against republishers in many jurisdictions, each applying its own common-law standards. *See, e.g.*, Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 RUTGERS L. REV. 81, 87–88 (1981), describing a series of suits brought by a Congressman against newspapers carrying a syndicated column that

§ 4:2.3 *Opinion in the Wake of Gertz*

[A] *Gertz and Its Aftermath*

In 1974, against this legal landscape, the Supreme Court observed at the outset of its opinion in *Gertz*:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.²⁶

This principle, together with the implication in *Gertz* that only a falsehood can be defamatory,²⁷ seemed to lead to a simple but powerful syllogism: A defamation is actionable only if it is false;²⁸ opinions cannot be proved false; therefore, opinions can never be actionable, no matter how derogatory they may be.

The *Gertz* statement has often been referred to as a dictum²⁹ because the Court was not deciding an opinion case. Whatever its force

allegedly accused him of anti-Semitic behavior. Most of the courts held the column to be non-libelous; one held it to be actionable and unprotected by the fair-comment doctrine. *Sweeney v. Schenectady Union Publ'g Co.*, 122 F.2d 288 (2d Cir. 1941), *aff'd*, 316 U.S. 642 (1942); *cf.* *Walker v. Associated Press*, 388 U.S. 130 (1967). The Associated Press dispatch in *Walker* resulted in at least fifteen different lawsuits by the plaintiff against various defendants throughout the United States. *Walker v. Pulitzer Publ'g Co.*, 394 F.2d 800, 806–07 (8th Cir. 1968) (collecting cases).

26. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).
27. The Court has not held that a truthful statement can never be the basis for any defamation suit. *See* section 3:3.2[A], *supra*.
28. “An assertion that cannot be proved false cannot be held libellous.” *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913, 2 Media L. Rep. (BNA) 1545 (2d Cir.), *cert. denied*, 434 U.S. 834, 3 Media L. Rep. (BNA) 1128 (1977).
29. *See, e.g.*, *Keller v. Miami Herald Publ'g Co.*, 778 F.2d 711, 715 n.11, 12 Media L. Rep. (BNA) 1561 (11th Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 974 n.6, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985); *Immuno A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, 556, 549 N.E.2d 129, 132, 549 N.Y.S.2d 938, 941, 17 Media L. Rep. (BNA) 1161 (1989). On the day the Court rendered its opinion in *Gertz*, it also decided *Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974). The Court held that the use of vigorous epithets in the context of a labor dispute could not support a defamation judgment, basing its holding, at least in part, on the *Gertz* principle that “there is no such thing as a false idea.” *Id.* at 284. The epithets were opinion, as such unprovable, and therefore nonactionable. Although the *Gertz* language when stated was a dictum, it was arguably treated as authoritative by the Court on the same day it was first uttered.

as precedent, though, the observation had a deep, virtually instantaneous impact on the law of defamation.

At the time *Gertz* was decided, the American Law Institute was considering a revision of the *Restatement of Torts*.³⁰ When it issued the second *Restatement*, three years after *Gertz*, the Institute relied on the Court's language in *Gertz* as a basis for abandoning the common-law defense of fair comment reflected in the 1938 version of the *Restatement*. "The common law rule that an expression of opinion of the . . . pure type may be the basis of an action for defamation now appears to have been rendered unconstitutional by U.S. Supreme Court decisions."³¹

The notion that opinion might be entitled to constitutional protection had been around for some time.³² Yet, after *Gertz* and the *Restatement*, jurisdiction by jurisdiction, an avalanche followed: Court after court employed the *Gertz* language as a mandate for a constitutionally based rule providing immunity for all expressions of opinion. Simultaneously, the common-law fair-comment privilege was all but abandoned.

Some courts explicitly held that *Gertz* had rendered the fair-comment privilege obsolete.³³ Some implied as much by referring to

30. See, e.g., Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 RUTGERS L. REV. 81, 97-99 (1981).

31. RESTATEMENT (SECOND) OF TORTS, § 566 cmt. c (1977). "Pure" opinions are those that "do not imply facts capable of being proved true or false." *Id.*; accord *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 133, 575 S.E.2d 858, 862 (2003).

32. See, e.g., *Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901). The Supreme Court of Iowa considered a review of a musical routine by the Cherry Sisters: "Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom." The court held the review protected as fair comment: "There is a manifest distinction between matters of fact and comment on or criticism of undisputed facts or conduct. Unless this be true, liberty of speech and of the press guaranteed by the constitution is nothing more than a name." *Id.*, 86 N.W. at 325. For a helpful, entertaining discussion of the Cherry Sisters case, see Michael Gartner, *Fair Comment*, AM. HERITAGE, Oct. 1982, at 28-31. *Cherry* has been cited as good authority as recently as 2014. *Bertrand v. Mullin*, 846 N.W.2d 884, 893 n.2, 42 Media L. Rep. (BNA) 1940 (Iowa 2014).

33. *Koch v. Goldway*, 817 F.2d 507, 509, 14 Media L. Rep. (BNA) 1213 (9th Cir. 1987); *Yerkie v. Post-Newsweek Stations*, 470 F. Supp. 91, 94, 4 Media L. Rep. (BNA) 2566 (D. Md. 1979); *Hofmann Co. v. E.I. Du Pont de Nemours & Co.*, 202 Cal. App. 3d 390, 407 n.10, 248 Cal. Rptr. 384, 395 n.10 (1988); *Mittelman v. Witous*, 135 Ill. 2d 220, 142 Ill. Dec. 232, 552 N.E.2d 973, 982 (1989); *Ferguson v. Watkins*, 448 So. 2d 271, 278 (Miss. 1984); *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 413 n.6, 664 P.2d

the fair-comment privilege but then deciding the case solely on the basis of the Constitution.³⁴ Others considered the constitutional privilege first and then declared that the constitutional analysis had rendered superfluous any consideration of the defendant's claim of fair comment.³⁵ In the words of one court that considered the fair-comment defense before deciding the case on constitutional grounds, "Much of what we find it necessary to write in this opinion may be likened unto deciding whether or not a base runner touched third when it is clear that he was thrown out at home plate."³⁶

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- 337, 343 n.6, 37 A.L.R.4th 1070, 9 Media L. Rep. (BNA) 1769 (1983); *Kotlikoff v. Cmty. News*, 89 N.J. 62, 65, 444 A.2d 1086, 1087, 8 Media L. Rep. (BNA) 1549 (1982); *Marchiondo v. N.M. State Tribune Co.*, 98 N.M. 282, 295, 648 P.2d 321, 334 (Ct. App. 1981); *Ryan v. Herald Ass'n, Inc.*, 152 Vt. 275, 566 A.2d 1316, 1321-22, 16 Media L. Rep. (BNA) 2472 (1989); *cf. Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1503 (D.D.C. 1987) ("obsolete in light of broader First Amendment protections").
34. *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1285 n.13 (4th Cir. 1987); *Action Repair, Inc. v. Am. Broad. Cos.*, 776 F.2d 143, 146-47, 12 Media L. Rep. (BNA) 1398 (7th Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 975, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114, 4 Media L. Rep. (BNA) 1593 (6th Cir. 1978), *cert. denied*, 440 U.S. 960, 4 Media L. Rep. (BNA) 2536 (1979); *Amcor Inv. Corp. v. Cox Ariz. Publ'ns, Inc.*, 158 Ariz. 566, 764 P.2d 327, 330, 16 Media L. Rep. (BNA) 1059 (Ct. App. 1988); *Henderson v. Times Mirror Co.*, 669 F. Supp. 356, 358-59, 14 Media L. Rep. (BNA) 1659 (D. Colo. 1987), *aff'd*, 876 F.2d 108 (10th Cir. 1989); *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 54, 57, 7 Media L. Rep. (BNA) 1811 (Fla. Dist. Ct. App. 1981), *petition denied*, 412 So. 2d 465 (Fla. 1982); *Henry v. Halliburton*, 690 S.W.2d 775, 780-83, 11 Media L. Rep. (BNA) 2185 (Mo. 1985); *Immuno A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, 555-56, 549 N.E.2d 129, 132, 549 N.Y.S.2d 938, 941, 17 Media L. Rep. (BNA) 1161 (1989).
35. *Hoffman v. Wash. Post Co.*, 433 F. Supp. 600, 603, 3 Media L. Rep. (BNA) 1143 (D.D.C. 1977), *aff'd without opinion*, 578 F.2d 442, 3 Media L. Rep. (BNA) 2546 (D.C. Cir. 1978); *Mashburn v. Collin*, 355 So. 2d 879, 886, 3 Media L. Rep. (BNA) 1673 (La. 1977); *Camer v. Seattle Post-Intelligencer*, 45 Wash. App. 29, 41 n.3, 723 P.2d 1195, 1202 n.3, 13 Media L. Rep. (BNA) 1481 (1986), *cert. denied*, 482 U.S. 916 (1987).
- In the later words of a federal district court judge in the District of Columbia: "[D]efamation is inextricably linked with First Amendment concerns. For that reason, courts frequently examine the constitutional implications of libel actions at the summary judgment stage." *Lane v. Random House, Inc.*, 985 F. Supp. 141, 149, 23 Media L. Rep. (BNA) 1385 (D.D.C. 1995) (citing cases).
36. *Brewer v. Memphis Publ'g Co.*, 626 F.2d 1238, 1241-42, n.4, 6 Media L. Rep. (BNA) 2025 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981). *But cf. West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994) (carefully reasoned explanation of the value of treating state common-law and

By 1990, every federal circuit³⁷ and the courts of at least thirty-six states and the District of Columbia³⁸ had held that opinion is

constitutional protections first); *see also* *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 160 n.2, 5 Media L. Rep. (BNA) 1273 (1979) ("dispositive issues of statutory and local law are to be treated before reaching constitutional issues").

37. **FIRST CIRCUIT:** *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 14 Media L. Rep. (BNA) 2353 (1st Cir.), *cert. denied*, 488 U.S. 821 (1988); **SECOND CIRCUIT:** *Mr. Chow v. Ste. Jour Azur S.A.*, 759 F.2d 219, 11 Media L. Rep. (BNA) 1713 (2d Cir. 1985); **THIRD CIRCUIT:** *Jenkins v. KYW, Div. of Grp. W, Westinghouse Broad. & Cable, Inc.*, 829 F.2d 403, 14 Media L. Rep. (BNA) 1718 (3d Cir. 1987); **FOURTH CIRCUIT:** *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987); **FIFTH CIRCUIT:** *Lindsey v. Bd. of Regents*, 607 F.2d 672 (5th Cir. 1979); **SIXTH CIRCUIT:** *Falls v. Sporting News Publ'g Co.*, 834 F.2d 611 (6th Cir. 1987); **SEVENTH CIRCUIT:** *Woods v. Evansville Press Co.*, 791 F.2d 480, 12 Media L. Rep. (BNA) 2179 (7th Cir. 1986); **EIGHTH CIRCUIT:** *Secrist v. Harkin*, 874 F.2d 1244 (8th Cir.), *cert. denied*, 493 U.S. 933 (1989); **NINTH CIRCUIT:** *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 15 Media L. Rep. (BNA) 2205 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989); **TENTH CIRCUIT:** *Rinsley v. Brandt*, 700 F.2d 1304, 9 Media L. Rep. (BNA) 1225 (10th Cir. 1983) (false-light action); **ELEVENTH CIRCUIT:** *Keller v. Miami Herald Publ'g Co.*, 778 F.2d 711, 12 Media L. Rep. (BNA) 1561 (11th Cir. 1985) (Fla. law); **D.C. CIRCUIT:** *Ollman v. Evans*, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985).
38. **ALASKA:** *Moffatt v. Brown*, 751 P.2d 939, 15 Media L. Rep. (BNA) 1601 (Alaska 1988); **ARIZONA:** *MacConnell v. Mitten*, 131 Ariz. 22, 638 P.2d 689 (1981); **CALIFORNIA:** *Baker v. L.A. Herald Examiner*, 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206, 13 Media L. Rep. (BNA) 1159 (1986), *cert. denied*, 479 U.S. 1032 (1987); **COLORADO:** *Bucher v. Roberts*, 198 Colo. 1, 595 P.2d 239 (1979); **CONNECTICUT:** *Goodrich v. Waterbury Republican-Am., Inc.*, 188 Conn. 107, 448 A.2d 1317, 8 Media L. Rep. (BNA) 2329 (1982); **DELAWARE:** *Riley v. Moyed*, 529 A.2d 248, 14 Media L. Rep. (BNA) 1379 (Del. 1987); **DISTRICT OF COLUMBIA:** *Myers v. Plan Takoma, Inc.*, 472 A.2d 44 (D.C. 1983); **FLORIDA:** *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50 (Fla. Dist. Ct. App. 1976), *petition denied*, 354 So. 2d 351 (Fla. 1977), *cert. denied*, 439 U.S. 910 (1978); **GEORGIA:** *S&W Seafoods Co. v. Jacor Broad.*, 194 Ga. App. 233, 390 S.E.2d 228, 17 Media L. Rep. (BNA) 1340 (1989); **ILLINOIS:** *Mittelman v. Witous*, 135 Ill. 2d 220, 142 Ill. Dec. 232, 552 N.E.2d 973 (1989); **INDIANA:** *Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243 (Ind. Ct. App. 1984); **KENTUCKY:** *Yancey v. Hamilton*, 786 S.W.2d 854, 17 Media L. Rep. (BNA) 1012 (Ky. 1989); **LOUISIANA:** *Mashburn v. Collin*, 355 So. 2d 879, 3 Media L. Rep. (BNA) 1673 (La. 1977); **MAINE:** *True v. Ladner*, 513 A.2d 257 (Me. 1986); **MARYLAND:** *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A.2d 251 (1975), *cert. denied*, 426 U.S. 907 (1976) (recognizing a constitutionally based fair-comment privilege); **MASSACHUSETTS:** *Friedman v. Boston Broads., Inc.*, 402 Mass. 376, 522 N.E.2d 959 (1988); **MICHIGAN:** *Hodgins v. Times Herald Co.*, 169 Mich. App. 245, 425 N.W.2d 522, 15 Media L. Rep. (BNA) 1777 (1988); **MINNESOTA:** *Gernander v. Winona State Univ.*, 428 N.W.2d 473 (Minn. Ct. App. 1988); **MISSISSIPPI:** *Meridian Star, Inc. v. Williams*, 549 So. 2d

constitutionally protected because, according to *Gertz*, “[u]nder the First Amendment there is no such thing as a false idea.”

[B] Differentiating Fact from Opinion After *Gertz*

The post-*Gertz* cases left courts with a single though by no means easy³⁹ task: deciding what was an assertion of fact, and therefore potentially actionable, rather than an opinion, which was necessarily protected. They constructed a variety of tests to assist in doing so.

1332, 16 Media L. Rep. (BNA) 2446 (Miss. 1989); **MISSOURI**: *Henry v. Halliburton*, 690 S.W.2d 775, 11 Media L. Rep. (BNA) 2185 (Mo. 1985); **MONTANA**: *Frigon v. Morrison-Maierle, Inc.*, 233 Mont. 113, 760 P.2d 57 (1988); **NEBRASKA**: *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987); **NEVADA**: *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337, 37 A.L.R.4th 1070, 9 Media L. Rep. (BNA) 1769 (1983); **NEW HAMPSHIRE**: *Nash v. Keene Publ'g Corp.*, 127 N.H. 214, 498 A.2d 348, 12 Media L. Rep. (BNA) 1025 (1985); **NEW JERSEY**: *Kotlikoff v. Cmty. News*, 89 N.J. 62, 444 A.2d 1086, 8 Media L. Rep. (BNA) 1549 (1982); **NEW MEXICO**: *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462, 8 Media L. Rep. (BNA) 2233 (1982); **NEW YORK**: *Immuno A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938, 17 Media L. Rep. (BNA) 1161 (1989); **OHIO**: *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699, 25 Ohio B. 302, 13 Media L. Rep. (BNA) 1241 (1986); **OKLAHOMA**: *Miskovsky v. Tulsa Tribune Co.*, 678 P.2d 242, 9 Media L. Rep. (BNA) 1954 (Okla. 1983), *cert. denied*, 465 U.S. 1006 (1984); **OREGON**: *Haas v. Painter*, 62 Or. App. 719, 662 P.2d 768, 9 Media L. Rep. (BNA) 1665, *review denied*, 295 Or. 297, 668 P.2d 381 (1983) (finding constitutional protection for opinion about public officials); **RHODE ISLAND**: *Healey v. New Eng. Newspapers, Inc.*, 520 A.2d 147, 13 Media L. Rep. (BNA) 2148 (R.I. 1987); **SOUTH DAKOTA**: *Finch v. City of Tea*, 443 N.W.2d 632 (S.D. 1989); **TENNESSEE**: *Stones River Motors, Inc. v. Mid-South Publ'g Co.*, 651 S.W.2d 713 (Tenn. Ct. App. 1983); **TEXAS**: *El Paso Times, Inc. v. Kerr*, 706 S.W.2d 797, 13 Media L. Rep. (BNA) 1049 (Tex. App. 1986), *cert. denied*, 480 U.S. 932 (1987); **VERMONT**: *Ryan v. Herald Ass'n, Inc.*, 152 Vt. 275, 566 A.2d 1316, 16 Media L. Rep. (BNA) 2472 (1989); **VIRGINIA**: *Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97 (1985); **WEST VIRGINIA**: *Havalunch, Inc. v. Mazza*, 294 S.E.2d 70 (W. Va. 1981). Cases in other states indicated that those states would likely have held that opinion was constitutionally protected. *See, e.g.*, **ARKANSAS**: *Bland v. Verser*, 299 Ark. 490, 774 S.W.2d 124 (1989) (finding that statements were factual, not constitutionally protected opinion); **IOWA**: *Kiesau v. Bantz*, 686 N.W.2d 164, 177 (Iowa 2004) (stating in dictum that opinion is constitutionally protected under the First Amendment without reference to *Milkovich*; citing pre-*Milkovich* case *Jones v. Palmer Commc'ns, Inc.*, 440 N.W.2d 884, 891, 16 Media L. Rep. (BNA) 2137 (Iowa 1989)); **NORTH CAROLINA**: *Renwick v. News & Observer Publ'g Co.*, 63 N.C. App. 200, 304 S.E.2d 593 (1983), *rev'd on other grounds*, 310 N.C. 312, 312 S.E.2d 405, 57 A.L.R.4th 1, 10 Media L. Rep. (BNA) 1443, *cert. denied*, 469 U.S. 858 (1984).

39. *See* note 12, *supra*.

The most comprehensive and widely used was articulated by the District of Columbia Circuit in *Ollman v. Evans*.⁴⁰ After referring to previous attempts to fashion such tests,⁴¹ the court proffered and applied these criteria: first, “the common usage or meaning of the specific language of the challenged statement itself”; second, the “verifiability” of the alleged defamation; third, “the full context of the statement—the entire article or column, for example—inasmuch as other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader’s readiness to infer that a particular statement has factual content”; and fourth, “the broader context or setting in which the statement appears. Different types of writing have . . . widely varying social conventions which signal to the reader the likelihood of a statement being either fact or opinion.”⁴² Courts struggled, case by case, to apply those and similar⁴³ analytical devices.

40. *Ollman v. Evans*, 750 F.2d 970, 979, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985).

41. *In Info. Control Corp. v. Genesis One Comput. Corp.*, 611 F.2d 781, 784 (9th Cir. 1980), for example, the court employed three criteria: the words understanding in context, the circumstances under which they were uttered, and the phrasing of the statement—is it phrased, for example, “in terms of apparency.” *See Ollman*, 750 F.2d at 977 n.12.

42. *Id.* at 979.

43. *See, e.g., Scholz v. Boston Herald, Inc.*, 473 Mass. 242, 250–51, 41 N.E.3d 38, 46, 43 Media L. Rep. (BNA) 3172 (2015) (“Factors to be considered include ‘the specific language used’; ‘whether the statement is verifiable’; ‘the general context of the statement’; and ‘the broader context in which the statement appeared.’”) (citations omitted); *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 366, 24 Media L. Rep. (BNA) 1039 (9th Cir. 1995) (“First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.”); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302–03, 12 Media L. Rep. (BNA) 1961 (8th Cir.) (analysis based on (1) the statement’s precision and specificity, (2) the statement’s verifiability, (3) the social and literary context in which the statement is made, and (4) the statement’s social context), *cert. denied*, 479 U.S. 883 (1986); *Keohane v. Stewart*, 882 P.2d 1293, 22 Media L. Rep. (BNA) 2545 (Colo. 1994) ((1) is statement susceptible of being proved true or false; (2) would reasonable person conclude that assertion is one of fact based on (a) how the assertion is phrased, (b) the context of the entire statement, and (c) the circumstances surrounding the assertion including the medium used and the audience),

§ 4:2.4 Milkovich and After

[A] Milkovich Decision

Then, in 1990, along came *Milkovich*.⁴⁴ The Court revisited the issue of constitutional protection for opinion for the first time in the sixteen years after *Gertz*.⁴⁵ It rejected out of hand the notion that ostensibly underlay the fifteen years of lower-court post-*Gertz* jurisprudence, that the *Gertz* dictum was “intended to create a wholesale exemption for anything that might be labeled ‘opinion.’”⁴⁶

Instead of a separate and distinct First Amendment protection for “opinion,” the *Milkovich* Court said, there was sufficient constitutionally based protection for opinion otherwise firmly in place: the requirement established by *Hepps*⁴⁷ that most statements⁴⁸ must be proved false before liability may ensue, and protection afforded to various “types” of speech that “cannot ‘reasonably [be] interpreted as

cert. denied, 513 U.S. 1127 (1995); *see also* *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987) (adopting a variation of *Ollman* test, but apparently abandoned by the circuit in *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180 (4th Cir. 1998), in favor of analysis under the language of *Milkovich*); *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 28 Media L. Rep. (BNA) 1329 (2d Cir. 2000) (looking to general tenor and context of statement, although not articulating it in “parts,” to conclude that reference to lawyer as “ambulance chaser” in organization’s guide to professionals was assertion of fact).

44. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 Media L. Rep. (BNA) 2009 (1990). The cases cited in note 43, *supra*, were decided both pre- and post-*Milkovich*. As explained in this section, *Milkovich* had very little effect on the method used for determining whether a statement was nonactionable opinion.
45. Several Justices had, in the interval, expressed their discomfort with the sweeping protection for opinion derived by lower courts from *Gertz*. *See Ollman v. Evans*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985) (Rehnquist, J., joined by Burger, C.J., dissenting from denial of certiorari); *Miskovsky v. Okla. Publ’g Co.*, 459 U.S. 923, 8 Media L. Rep. (BNA) 2302 (1982) (Rehnquist, J., joined by White, J., dissenting from denial of certiorari).
46. *Milkovich*, 497 U.S. at 18. The Court, citing Judge Friendly’s discussion in *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 6 Media L. Rep. (BNA) 1625 (2d Cir. 1980), equated the use of the term “opinion” in this passage in *Gertz* to the term “idea”—a reiteration of the “marketplace of ideas” concept from Justice Holmes’s opinion in *Abrams v. United States*, 250 U.S. 616 (1919). In such a marketplace, ideas can be corrected by further discussion.
47. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 12 Media L. Rep. (BNA) 1977 (1986).
48. Statements about matters not of general public concern and, possibly, although increasingly unlikely, statements by nonmedia defendants were not covered by *Hepps*. *See* discussion of *Hepps* in section 3:3.2[B], *supra*.

stating actual facts.”⁴⁹ Protection for opinion obtains, therefore, so long as the statement in question is not provably false.

There is also protection, said the Court, under its cases protecting invective,⁵⁰ for speech properly characterized as “rhetorical hyperbole,” a “vigorous epithet,” “loose, figurative” language, or “lusty and imaginative expression”—generally, speech that although literally containing assertions of fact is intended to express only points of view.⁵¹ The Court emphasized, however, that merely clothing an assertion of fact in language of opinion does not render it immune from a lawsuit for defamation.⁵²

Justice Brennan, in a dissent joined by Justice Marshall, noted his agreement with the Court’s approach: “[O]nly defamatory statements

49. *Milkovich*, 497 U.S. at 20 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 14 Media L. Rep. (BNA) 2281 (1988), and citing *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6 (1970), and *Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974)).

50. *Id.*

51. A classic example is *Weinberg v. Pollock*, 19 Media L. Rep. (BNA) 1442 (Conn. Super. Ct. 1991), where the trial court dismissed a defamation claim by a woman who claimed that the epithet “bastard” directed at her son, a convicted murderer, was actionable by her as an assault on her chastity.

52. *Milkovich*, 497 U.S. at 19 (“In my opinion Jones is a liar,’ can cause as much damage to reputation as the statement ‘Jones is a liar.’”). In *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002), the First Circuit held that a statement by a retail store employee to the police that he “suspected” a store patron of theft was, in context, not nonactionable as a matter of law. “[B]y ‘context’ we mean such factors as the identity of the speaker, the identity of the audience, the circumstances in which the statement is made, and what else is said in the course of the conversation, and a myriad of other considerations.” *Id.* at 104.

“[S]tatements in a publications do not attain constitutional protection simply because they are sprinkled with words to the effect that something does or does not ‘appear’ to be thus and so, or because they are framed as being ‘in our opinion’ or as a matter of ‘concern.’” *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 703–04, 61 Cal. Rptr. 3d 29, 40–41, 35 Media L. Rep. (BNA) 2135 (2007). “[W]rapping an article around a disclaimer that the contents represented a ‘judgment’ does not conclusively resolve the dispositive question—whether a reasonable fact finder could conclude that the publication declares or implies a provably false assertion of fact.” *Id.* at 704, 61 Cal. Rptr. 3d at 41; *see also* *Swengler v. ITT Corp.*, 993 F.2d 1063, 1071 (4th Cir. 1993); *Bently Reserve LP v. Papaliolios*, 218 Cal. App. 4th 418, 428, 160 Cal. Rptr. 3d 423, 425–26 (2013) (where the defendant “asserted plaintiffs’ activities ‘(likely) contributed’ to the ‘deaths’ of three particular tenants [of the plaintiff] . . . and to the departure of tenants in eight particular units . . . ‘in very short order[,]’ [h]edging his statements with the word ‘likely’ does not insulate them from examination” as to the factual nature or their falsity) (citing *Milkovich*); *Weller v. Am. Broad. Cos.*, 232 Cal. App. 3d 991, 283 Cal. Rptr. 644, 649, 19 Media L. Rep. (BNA) 1161 (1991).

that are capable of being proved false are subject to liability under state libel laws.”⁵³ But he disagreed on the application of that principle to the sports column in issue. “Read in context, the statements [to the effect that the plaintiff lied under oath about what had happened at a wrestling meet] cannot reasonably be interpreted as implying . . . an assertion as fact.”⁵⁴ While the majority implicitly criticized the line of cases setting out factors developed to distinguish fact from opinion under *Gertz*,⁵⁵ Justice Brennan said that, in determining what statements state or imply facts and therefore may be demonstrably false, courts might use the same “indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion.”⁵⁶

Justice Brennan’s opinion was something of a feat of legerdemain. The three cases he cited were widely acknowledged for the principle that “opinion” was ipso facto constitutionally protected—precisely the theory that the Court in *Milkovich* rejected—and for proffering tests to distinguish between unprotected allegations of fact and protected statements of opinion. The opinion nonetheless transmuted these cases from authority on the no-longer-viable issue of how to tell the difference between unprotected fact and protected opinion, to authority for how to tell the difference between unprotected statements provably false and protected statements not provably false under *Milkovich*.⁵⁷ Justice Brennan thus signaled that judicial treatment of opinion after *Milkovich* need not materially differ from such treatment before the case was decided. The subsequent treatment of opinion by the courts has borne out his views.⁵⁸

[B] Protection for Opinion Post-*Milkovich*

To what extent do the protections cited by the Court in *Milkovich* continue to immunize expressions of opinion? While there was considerable public hand-wringing by the press when *Milkovich* was handed down, the answer was reflected in an opinion issued by a federal district judge in New York several days after *Milkovich* was decided: “[The protection is] considerably broader than might be

53. *Milkovich*, 497 U.S. at 23.

54. *Id.* at 28.

55. *Id.* at 19.

56. *Id.* at 24 (citing *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 12 Media L. Rep. (BNA) 1961 (8th Cir.), cert. denied, 479 U.S. 883 (1986); and *Ollman v. Evans*, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985)).

57. See cases collected in note 68, *infra*.

58. See section 4:2.4[B], *infra*.

imagined from a reading of popular reports of the opinion privilege's demise."⁵⁹ For in *Milkovich*, the Court gave with one hand what it took away with the other: Opinion is not protected per se by the Constitution, yet because opinion can be proved neither true nor false and a plaintiff must prove falsity to succeed, it remains nonactionable as a matter of constitutional law.⁶⁰ Thus the syllogism inferred from *Gertz* stands after *Milkovich*: Defamation is actionable only if false; opinions cannot be false; opinions are not actionable.⁶¹

There are cases that have been and will be decided differently after *Milkovich* than they would have been before. Shortly after *Milkovich*,

59. *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 782 (S.D.N.Y. 1990) (Sweet, J.); *see also Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 612 N.E.2d 1158, 1162 (1993) (citing *The Supreme Court—Leading Cases*, 104 HARV. L. REV. 129, 219, 223–24 (1990), for the proposition that “[b]ecause the criteria used by lower courts to distinguish fact from opinion are consistent with *Milkovich*, the law of defamation will remain essentially unchanged”).

60. *See Andrews v. Stallings*, 119 N.M. 478, 892 P.2d 611 (Ct. App. 1995); *Brian v. Richardson*, 87 N.Y.2d 46, 660 N.E.2d 1126, 637 N.Y.S.2d 347, 24 Media L. Rep. (BNA) 1543 (1995); *Am. Commc’ns Network, Inc. v. Williams*, 264 Va. 336, 340, 568 S.E.2d 683, 685 (2002) (“Pure expressions of opinion, not amounting to “fighting words,” cannot form the basis of an action for defamation.”) (quoting *Chaves v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 101 (1985), a pre-*Milkovich* opinion).

The Iowa Supreme Court observed:

Although the Court in *Milkovich* rejected the dichotomy between fact and opinion as the framework of analysis . . . , we agree with the following:

The test used in *Milkovich* to identify protected opinions is very similar to the four-factor inquiry used by the circuit courts to distinguish fact from opinion. Specificity and variability are closely related to whether the statement is capable of being proven false. Whether a remark can be reasonably interpreted as stating actual facts must be inferred from the political, literary, and social context in which the statement was made. Given the similarity between the Supreme Court’s definition of protected opinion and the circuit courts’ fact/opinion analysis, decisions applying the . . . test [established pre-*Milkovich*] are still helpful under *Milkovich*.

Yates v. Iowa W. Racing Ass’n, 721 N.W.2d 762, 771 (Iowa 2006) (quoting *Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 94 (Minn. Ct. App. 1991)).

61. This reasoning was anticipated pre-*Milkovich*. *See, e.g., Bussie v. Lowenthal*, 535 So. 2d 378, 381 (La. 1988) (“A pure statement of opinion, which is based totally on the speaker’s subjective view and which does not expressly state or imply the existence of underlying facts, usually will not be actionable in defamation. That is because falsity is an indispensable element of any defamation claim, and a purely subjective statement can be neither true nor false.”) (citation omitted); *Tingle v. Hebert*, 305 F. Supp. 3d 678, 692 (M.D. La. 2018) (applying *Bussie* post-*Milkovich*).

for example, the Ninth Circuit considered a *Gertz*-based constitutional opinion-privilege accorded by the district court to a telecast editorial criticizing a commercially available rain repellent for automobile windshields. It held that the privilege was of no avail post-*Milkovich* because the broadcast, although as a whole clearly commentary, contained allegations of fact.⁶² Courts are thus more likely now than before *Milkovich* to examine closely what is ostensibly an opinion to discern whether it implies provable facts.⁶³ Nevertheless, most courts considering opinion since *Milkovich*⁶⁴ have reached the results they likely would have reached before. They have done so either because what was said, privileged as opinion before *Milkovich*, is

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62. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 17 Media L. Rep. (BNA) 2317 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991). The court nonetheless affirmed the district court's grant of summary judgment for the defendant on the ground that there was insufficient evidence that the statements of fact were false to require trial. *Id.* at 1057; *see also* *Scheidler v. NOW, Inc.*, 751 F. Supp. 743 (N.D. Ill. 1990).
63. *See, e.g., Unelko Corp. v. Rooney*, 912 F.2d 1049, 17 Media L. Rep. (BNA) 2317 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *White v. Fraternal Order of Police*, 909 F.2d 512, 17 Media L. Rep. (BNA) 2137 (D.C. Cir. 1990); *Chapin v. Greve*, 787 F. Supp. 557, 19 Media L. Rep. (BNA) 2161 (E.D. Va. 1992), *aff'd*, 993 F.2d 1087, 21 Media L. Rep. (BNA) 1449 (4th Cir. 1993); *Scheidler v. NOW, Inc.*, 751 F. Supp. 743 (N.D. Ill. 1990); *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 784 (S.D.N.Y. 1990) (under *Milkovich* test, "court is not free to ignore implicit assertions of fact necessarily embedded in an expression of opinion"); *Yetman v. English*, 168 Ariz. 71, 75, 811 P.2d 323, 327 (1991); *Gill v. Hughes*, 227 Cal. App. 3d 1299, 278 Cal. Rptr. 306 (1991); *Fla. Med. Ctr., Inc. v. N.Y. Post Co.*, 568 So. 2d 454, 18 Media L. Rep. (BNA) 1224 (Fla. Dist. Ct. App. 1990); *Beasley v. St. Mary's Hosp.*, 200 Ill. App. 3d 1024, 558 N.E.2d 677, 142 Ill. Dec. 232 (1989); *In re Westfall*, 808 S.W.2d 829 (Mo. 1991) (en banc), *cert. denied*, 502 U.S. 1009 (1991); *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 920 (Tex. App. 1991).
64. *See, e.g., Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 19 Media L. Rep. (BNA) 1786 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992); *Turner v. Devlin*, 848 P.2d 286, 21 Media L. Rep. (BNA) 1588 (Ariz. 1993); *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97, 19 Media L. Rep. (BNA) 1124 (1991); *McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 64 Cal. Rptr. 3d 467 (2007) (totality of the circumstances test); *Morningstar, Inc. v. L.A. Superior Court*, 23 Cal. App. 4th 676, 29 Cal. Rptr. 2d 547, 22 Media L. Rep. (BNA) 1513 (1994) ("Before *Milkovich* and after, California courts have applied a 'totality of the circumstances' test to review the meaning of the language in context and its susceptibility to being proved true or false."); *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 225 Cal. App. 3d 720, 725, 275 Cal. Rptr. 494, 18 Media L. Rep. (BNA) 1602 (1990) ("Before *Milkovich*, the California courts had employed a 'totality of the circumstances' test to differentiate between fact and opinion. . . . *Milkovich* did not substantially change [this] principle."); *NBC Subsidiary, Inc. v. Living Will Ctr.*, 879 P.2d 6 (Colo. 1994), *cert. denied*, 514 U.S. 1015 (1995); *Piersall v. SportsVision of Chi.*, 230 Ill. App. 3d 503, 595 N.E.2d 103, 172 Ill. Dec. 40, 20 Media L. Rep. (BNA) 1223 (1992) (incapable of

nonactionable after *Milkovich* since it is not capable of being proved false as required by the rule of *Hepps*,⁶⁵ or because it comes within the *Milkovich* classification of “rhetorical hyperbole,” “vigorous epithet,”

verification); *Starnes v. Capital Cities Media, Inc.*, 19 Media L. Rep. (BNA) 2115 (Ill. App. Ct. 1992); *Hunt v. Univ. of Minn.*, 465 N.W.2d 88 (Minn. Ct. App. 1991); *K Corp. v. Stewart*, 247 Neb. 290, 526 N.W.2d 429 (1995); *Wheeler v. Neb. State Bar Ass’n*, 244 Neb. 786, 508 N.W.2d 917, 921 (1993) (in “placing emphasis on the objectivity and verifiability of a statement,” *Milkovich* itself used an approach similar to pre-*Milkovich* cases depending on a fact/opinion dichotomy); *Daniels v. Metro Magazine Holding Co.*, 634 S.E.2d 586, 34 Media L. Rep. (BNA) 2363 (N.C. Ct. App. 2006); *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 447 S.E.2d 293, 22 Media L. Rep. (BNA) 2337 (1994).

See also *Reesman v. Highfill*, 327 Or. 597, 965 P.2d 1030 (1998) (expressions of opinion, “which cannot be interpreted reasonably as stating facts, are not actionable because they are constitutionally protected”) (citing *Milkovich*’s observation, 497 U.S. at 20, that statements about matters of public concern not containing provably false factual statements are constitutionally protected).

But cf. *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1183–84 (10th Cir. 2007) (noting that federal courts do not defer to state courts in interpreting the federal Constitution and that, therefore, it is for federal courts, in cases before them, to interpret the constitutional boundaries established by *Milkovich* rather than accept the interpretation of the courts of the states in which they sit).

65. Since “pure” opinions are those that “do not imply facts capable of being proved true or false,” *Partington v. Bugliosi*, 56 F.3d 1147, 1153 n.10, 23 Media L. Rep. (BNA) 1929 (9th Cir. 1995) (quoting *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053, 17 Media L. Rep. (BNA) 2317 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991)), “pure” opinions are as fully protected under *Hepps* as they were under the pre-*Milkovich* regime. *See, e.g.*, *Aviation Charter, Inc. v. Aviation Research Grp./US*, 416 F.3d 864, 868 (8th Cir. 2005) (“It is well recognized in Minnesota that the First Amendment absolutely protects opinion that lacks a provably false statement of fact. Statements about matters of public concern that are not capable of being proven true or false and statements that reasonably cannot be interpreted as stating facts are protected from defamation actions by the First Amendment.”) (citations and internal quotation marks omitted); *Weyrich v. New Republic*, 235 F.3d 617, 624, 29 Media L. Rep. (BNA) 1257 (D.C. Cir. 2001) (opinion protected because “[f]or a statement to be actionable under the First Amendment, it must at a minimum express or imply a verifiably false fact about appellant”); *Groden v. Random House, Inc.*, 1994 U.S. Dist. LEXIS 11794, 1994 WL 455555, 22 Media L. Rep. (BNA) 2257 (S.D.N.Y. 1994), *aff’d*, 61 F.3d 1045, 23 Media L. Rep. (BNA) 2203 (2d Cir. 1995) (false advertising case; ostensibly factual statement as to President Kennedy’s assassination treated as protected opinion because of inability to establish facts about the event); *Wierner v. Rankin*, 117 Idaho 566, 571, 790 P.2d 347, 352, 17 Media L. Rep. (BNA) 1753 (1990) (“An assertion that cannot be proved false cannot be held libellous.”) (pre-*Milkovich*); *Beattie v. Fleet Nat’l Bank*, 746 A.2d 717, 724 (R.I. 2000) (opinion based on nondefamatory statement of facts not

“loose, figurative” language, or “lusty and imaginative expression.”⁶⁶ Indeed, as Justice Brennan implied in his *Milkovich* dissent,⁶⁷ courts now rely on the pre-*Milkovich* opinion/fact criteria to decide,

actionable because it cannot be proved false, citing *Milkovich*); *Raytheon Technical Servs. Co. v. Hyland*, 273 Va. 292, 303, 641 S.E.2d 84, 90 (2007) (“Speech that does not contain a provably false factual connotation is sometimes referred to as ‘pure expressions of opinion.’ It is firmly established that pure expressions of opinion are protected by both the First Amendment to the Federal Constitution and Article I, Section 12 of the Constitution of Virginia and, therefore, cannot form the basis of a defamation action.”) (brackets, citations, and some internal quotation marks omitted); *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 447 S.E.2d 293, 22 Media L. Rep. (BNA) 2337 (1994) (suggestion that person involved in college basketball used position to obtain scholarship for his son is nonactionable because “[c]harges of favoritism and nepotism flourish in environments where people compete for positions, and no amount of independent or objective evidence is likely to appease those who make an issue of this incident and whose minds are already made up”).

A California court of appeal reached the same result on the basis of state statute that includes falsity in the libel and slander definition, holding that this statutory approach relieved the court from the need to rely on constitutional doctrine. *Savage v. Pac. Gas & Elec. Co.*, 21 Cal. App. 4th 434, 444–45, 26 Cal. Rptr. 2d 305, 22 Media L. Rep. (BNA) 1737 (1993), *cert. denied*, 513 U.S. 820 (1994); *see also* *Reesman v. Highfill*, 327 Or. 597, 965 P.2d 1030 (1998) (expressions of opinion, “which cannot be interpreted reasonably as stating facts, are not actionable because they are constitutionally protected”) (citing *Milkovich*’s observation, 497 U.S. at 20, that statements about matters of public concern not containing provably false factual statements are constitutionally protected).

66. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 21 Media L. Rep. (BNA) 1449 (4th Cir. 1993); *Wellman v. Fox*, 108 Nev. 83, 825 P.2d 208, 19 Media L. Rep. (BNA) 2028 (1992) (rhetorical hyperbole); *Haueter v. Cowles Publ’g Co.*, 61 Wash. App. 572, 811 P.2d 231, 239, 19 Media L. Rep. (BNA) 2107 (1991) (quoting *Milkovich* reference to protection for “rhetorical hyperbole”). The Ninth Circuit set forth three factors to be weighed in deciding whether a statement is actionable: whether figurative or hyperbolic language was used negating the impression that facts were being asserted; whether the publication’s general tenor negates the impression; and whether the assertion is capable of being proved true or false. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053, 17 Media L. Rep. (BNA) 2317 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *accord* *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97, 19 Media L. Rep. (BNA) 1124 (1991) (citing *Unelko*); *Edwards v. Hall*, 234 Cal. App. 3d 886, 902–04, 285 Cal. Rptr. 810, 819–20, 19 Media L. Rep. (BNA) 1969 (1991); *Keohane v. Stewart*, 882 P.2d 1293, 22 Media L. Rep. (BNA) 2545 (Colo. 1994), *cert. denied*, 513 U.S. 1127 (1995); *Dulgarian v. Stone*, 420 Mass. 843, 652 N.E.2d 603 (1995) (“Highway Robbery” as title for series on automobile collision damage appraisers).

67. *Milkovich*, 497 U.S. at 24 (Brennan, J., dissenting).

post-*Milkovich*, what is protected based on whether it is or is not provably false.⁶⁸

68. See, e.g., *Weyrich v. New Republic*, 235 F.3d 617, 624, 29 Media L. Rep. (BNA) 1257 (D.C. Cir. 2001); *Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'rs Servs., Inc.*, 175 F.3d 848, 27 Media L. Rep. (BNA) 1737 (10th Cir. 1999); *Partington v. Bugliosi*, 56 F.3d 1147, 1158 n.16, 23 Media L. Rep. (BNA) 1929 (9th Cir. 1995) (*Milkovich* “does not disturb the longstanding rule that statements on matters of public concern, at least when media defendants are involved are absolutely protected if they are not susceptible of being proved true or false.”); *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 22 Media L. Rep. (BNA) 1673 (D.C. Cir.), cert. denied, 513 U.S. 875 (1994); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 727, 19 Media L. Rep. (BNA) 1786 (1st Cir.) (*Milkovich* “did not depart from the multifaceted analysis that had been employed for some time by lower courts”), cert. denied, 504 U.S. 974 (1992); *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1178 (D. Colo. 1999) (applying three-part test established in *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 9 Media L. Rep. (BNA) 1257 (Colo. 1983)); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998); *McClure v. Am. Family Mut. Ins. Co.*, 29 F. Supp. 2d 1046 (D. Minn. 1998) (relying in part on New York state cases); *Johnson v. Cmty. Nursing Servs.*, 985 F. Supp. 1321 (D. Utah 1997) (relying on *Ollman v. Evans*, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985)); *Henry v. Nat'l Ass'n of Air Traffic Specialists, Inc.*, 836 F. Supp. 1204, 1214–19 (D. Md. 1993) (relying on, inter alia, both *Ollman v. Evans*, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985), and *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1285 n.13 (4th Cir. 1987)), *aff'd*, 34 F.3d 1066 (4th Cir. 1994); *Kahn v. Bower*, 232 Cal. App. 3d 1599, 1607–08, 284 Cal. Rptr. 244, 249–50, 19 Media L. Rep. (BNA) 1236 (1991); *NBC Subsidiary, Inc. v. Living Will Ctr.*, 879 P.2d 6 (Colo. 1994) (“[T]he factors identified in [the Colorado Supreme Court’s pre-*Milkovich* case holding opinion to be protected] for distinguishing between facts and opinions remain applicable under the *Milkovich* test.”), cert. denied, 514 U.S. 1015 (1995); *Keohane v. Stewart*, 882 P.2d 1293, 22 Media L. Rep. (BNA) 2545 (Colo. 1994) (applying these factors to hold two letters to the editor nonactionable but statement by councilman actionable), cert. denied, 513 U.S. 1127 (1995); *Daley v. Aetna Life & Cas. Co.*, 249 Conn. 766, 795, 734 A.2d 112, 129 (1999) (“To be actionable, the statement in question must convey an objective fact, as generally, a defendant cannot be held liable for expressing a mere opinion.”); *Moriarty v. Greene*, 315 Ill. App. 3d 225, 235, 732 N.E.2d 730, 740, 247 Ill. Dec. 675 (2000) (relying on *Mittelman v. Witous*, 135 Ill. 2d 220, 243, 142 Ill. Dec. 232, 552 N.E.2d 973 (1989), in turn relying on *Ollman v. Evans*, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985)); *Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995), and cases cited therein; *Lund v. Chi. & Nw. Transp. Co.*, 467 N.W.2d 366 (Minn. Ct. App. 1991); *Wheeler v. Neb. State Bar Ass'n*, 244 Neb. 786, 508 N.W.2d 917, 922 (1993) (relying on *Ollman v. Evans*, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985)); *Moore v. Sun Publ'g Corp.*, 118 N.M. 375, 881 P.2d 735 (Ct. App. 1994); *Price v. Walters*, 918 P.2d 1370 (Okla. 1996); *Krueger*

The Ninth Circuit has stated the rule as it might well have prior to *Milkovich*: “Among other protections, the First Amendment shields statements of opinion on matters of public concern that do not contain or imply a provable factual assertion.”⁶⁹ Similarly, in *Gilbrook v. City of Westminster*,⁷⁰ the court was faced with a labor conflict during the course of which a union official was referred to as a “Jimmy Hoffa.” He brought suit asserting that the statement was slanderous. The Ninth Circuit held that it was not actionable, observing that First Amendment “protection extends to statements of opinion, addressing matters of public concern, that do not ‘contain a provably false factual connotation,’ and to statements that cannot ‘reasonably [be] interpreted as stating actual facts,’” citing and quoting *Milkovich*.⁷¹

v. Austad, 1996 SD 26, 545 N.W.2d 205 (S.D. 1996); Janklow v. Viking Press, 459 N.W.2d 415, 17 Media L. Rep. (BNA) 2220 (S.D. 1990); Maynard v. Daily Gazette Co., 191 W. Va. 601, 447 S.E.2d 293, 22 Media L. Rep. (BNA) 2337 (1994); Dworkin v. L.F.P., Inc., 839 P.2d 903, 914, 20 Media L. Rep. (BNA) 2001 (Wyo. 1992) (citing pre-*Milkovich* case, comparing its facts to those at bar, and relying on its observation that statement is likely to be protected if it is “cautiously phrased in terms of apparency”). *Contra* Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180 (4th Cir. 1998) (abandoning multipart approach of Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987), in favor of analysis under the language of *Milkovich*).

Cf. Faulkner v. Ark. Children’s Hosp., 347 Ark. 941, 956, 69 S.W.3d 393, 402–03 (2002), in which the court adopted a three-part test ultimately derived from *Milkovich* itself: “(1) whether the author used figurative or hyperbolic language that would negate the impression that he or she was seriously asserting or implying a fact; (2) whether the general tenor of the publication negates this impression; and (3) whether the published assertion is susceptible of being proved true or false.” The court cited, *inter alia*, *Dodson v. Dicker*, 306 Ark. 108, 111, 812 S.W.2d 97, 98, 19 Media L. Rep. (BNA) 1124 (1991), which in turn cited *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053, 17 Media L. Rep. (BNA) 2317 (9th Cir. 1990), which in turn quoted *Milkovich*, 497 U.S. at 21:

This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.

69. *Lieberman v. Fieger*, 338 F.3d 1076, 1079 (9th Cir. 2003) (quoting *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 366, 24 Media L. Rep. (BNA) 1039 (9th Cir. 1995)) (internal quotation marks omitted); *see also* *Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 385, 10 Cal. Rptr. 3d 429, 436 (2004).
70. *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir.), *cert. denied*, 528 U.S. 1061 (1999).
71. *Id.* at 861 (citing and quoting *Milkovich*, 497 U.S. at 20) (alteration in the original); *see similarly* *Kniesel v. ESPN*, 393 F.3d 1068, 1074, 33 Media L.

The court then turned to its own previously adopted three-pronged counterpart to the *Ollman* test:

First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.⁷²

The court applied the three-factor analysis, concluding that the “‘Jimmy Hoffa’ statement was protected by the First Amendment and, therefore, was not the type of speech that may be the subject of a state-law defamation action.”⁷³ The *City of Westminster* court wrote as though *Ollman*, rejected by *Milkovich* nine years before, was still the law, and as though *Milkovich*, which *City of Westminster* quoted, had endorsed it.⁷⁴

Rep. (BNA) 1097 (9th Cir. 2005); *accord* *Sands v. Living Word Fellowship*, 34 P.3d 955, 960 (Alaska 2001) (“If the context demonstrates to the audience that the speaker is not purporting to state or imply actual, known facts, the speech cannot be the basis for a defamation claim.”).

72. *Gilbrook*, 177 F.3d at 862 (quoting *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 366, 24 Media L. Rep. (BNA) 1039 (9th Cir. 1995)); *accord* *Neumann v. Liles*, 358 Or. 706, 720–21, 369 P.3d 1117, 1125–26, 44 Media L. Rep. (BNA) 1433 (2016) (applied to online criticism of wedding venue, captioned “Disaster!!!! Find a different wedding venue.”).

For a more nuanced application of the *Underwager* test to a far more difficult and complex communication, see *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 28 Media L. Rep. (BNA) 1129 (N.D. Cal. 1999).

73. *Gilbrook*, 177 F.3d at 862. The court later observed:

In the final analysis, [the] reference to Jimmy Hoffa was the type of rhetorical hyperbole or caustic attack that a reasonable person would expect to hear in a rancorous public debate involving money, unions, and politics. Therefore, the statement could not give rise to a cognizable claim of defamation.

Id. at 863.

74. There does appear to be a thread of inconsistency in all of this. One of the several factors in determining whether a statement is nonactionable opinion using one of the multifactor tests is “verifiability.” *See, e.g., Underwager v. Channel 9 Austl.*, 69 F.3d 361, 366, 24 Media L. Rep. (BNA) 1039 (9th Cir. 1995); *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). Yet once it is determined that a statement is opinion it becomes nonactionable *solely* because it is not verifiable, irrespective of the other factors—it is not provably false and therefore not actionable under *Hepps*. Why not use a one-factor test—verifiability? Perhaps what is meant by verifiability as a factor in the multifactor test is that the *appearance* of verifiability

Similarly, the Supreme Court of Georgia concluded, quoting a pre-*Milkovich* Georgia Court of Appeals opinion, that “the expression of opinion on matters with respect to which reasonable men might entertain differing opinions is not libelous. . . . An assertion that cannot be proved false cannot be held libelous.”⁷⁵ But “[a]n opinion can constitute actionable defamation if the opinion can reasonably be interpreted, according to the context of the entire writing in which the opinion appears, to state or imply defamatory facts about the plaintiff that are capable of being proved false.”⁷⁶

And the Seventh Circuit said:

[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.⁷⁷

combined with other factors helps determine whether the statement in question is verifiable. In any event, this mechanism for deciding which statements are nonactionable opinions seems to have chugged along without courts addressing the issue.

75. *Gast v. Brittain*, 277 Ga. 340, 341, 589 S.E.2d 63, 64 (2003) (ellipses in original; citation and internal quotation marks omitted).

76. *Id.* at 341, 589 S.E.2d at 64 (footnote omitted).

77. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227, 21 Media L. Rep. (BNA) 2161 (7th Cir. 1993) (dicta), *quoted with approval in* *Riley v. Harr*, 292 F.3d 282, 289, 30 Media L. Rep. (BNA) 1961 (1st Cir. 2002); *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001); and *Partington v. Bugliosi*, 56 F.3d 1147, 1156, 23 Media L. Rep. (BNA) 1929 (9th Cir. 1995); *accord* *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1441 (9th Cir. 1995) (quoting *Haynes*); *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 440 (Alaska 2004) (quoting *Haynes*).

The Illinois Supreme Court has also concluded, applying *Ollman*-like criteria to determine whether a statement “can reasonably be interpreted as stating actual fact,” that if it cannot so reasonably be interpreted, it cannot be actionable defamation. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 398–99, 882 N.E.2d 1011, 1022, 317 Ill. Dec. 855, 36 Media L. Rep. (BNA) 1335 (2008). In a trio of Illinois Appellate Court decisions, derogatory statements were also held nonactionable because, without any context provided, they were not “objectively verifiable and, thus, [were not] actionable.” *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 761, 776 N.E.2d 693, 698, 267 Ill. Dec. 321, 30 Media L. Rep. (BNA) 2268 (2002) (“the evidence seems to indicate that you’re [the plaintiff is] cheating the city” shorn of all context not actionable) (citing and discussing *Dubinsky v. United Airlines Master Exec. Council*, 303 Ill. App. 3d 317, 708 N.E.2d 441, 236 Ill. Dec. 855 (1999) (referring to *Dubinsky* as a “crook” not, without more, actionable); and *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 701 N.E.2d 99, 233 Ill. Dec. 456 (1998) (statement that plaintiff was terminated as employee of political campaign “because of incompetence,” without more, not actionable)).

Although *Milkovich* was cited by the Seventh Circuit for the proposition, it is extremely close to the law as it existed pre-*Milkovich*.

And from time to time, courts revert to the apparent state of the law prior to *Milkovich*: to the effect that statements of opinion are absolutely privileged under the First Amendment.⁷⁸

Stating the test does not make its application easy. There is a continuum between what is and is not provably false.⁷⁹ Just as identification of what was “opinion” and therefore protected pre-*Milkovich* was often difficult, determining what is not provably false and therefore is not potentially actionable post-*Milkovich* may be extremely difficult.

[C] Open Issues

Open issues about the implications of *Milkovich* remain. Chief among them is the scope of protection for opinion when the statement is not about a matter of public concern.

Before *Milkovich*, all opinion was immune. But after *Milkovich*, protection depends largely on the *Hepps* doctrine. Under *Hepps*, a plaintiff must prove falsity, and opinion is protected since it cannot be proven false. But are statements not provably false about matters of purely private significance outside the scope of the *Hepps* doctrine and therefore actionable post-*Milkovich*?⁸⁰

It remains unclear what rubric and to what extent protection for such statements under the First Amendment might be found.⁸¹ The

78. See *United Consumers Club, Inc. v. Bledsoe*, 2006 U.S. Dist. LEXIS 57668, at *32, 2006 WL 2361818, at *10 (N.D. Ind. 2006) (“[The] statements [at issue] were [the news source’s] opinion, which is absolutely privileged under the First Amendment, regardless of whether the statements also fall under another privilege.”); *Cooksey v. Stewart*, 938 So. 2d 1206, 1212 (La. Ct. App. 2006) (“The First Amendment freedoms afford, at the very least, a defense against defamation actions for expressions of opinion.”); *Topper v. Midwest Div., Inc.*, 306 S.W.3d 117, 128 (Mo. App. 2010) (“Expressions of opinion are privileged under the First Amendment’s guarantee of freedom of speech.”).

79. As one commentator has noted, “verifiability is not a property that either does or does not obtain. Rather, it is a property that may be present in varying degrees.” Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 279 (1978), quoted in *Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1154, 22 Media L. Rep. (BNA) 1321 (Mikva, J., dissenting), modified on reh’g, 22 F.3d 310, 22 Media L. Rep. (BNA) 1673 (D.C. Cir.), cert. denied, 513 U.S. 875 (1994).

80. See discussion of *Hepps* at section 3:3.2[A], *supra*.

81. A California court of appeal has noted that under California statutory law, libel and slander are defined as false publications. Since an opinion is neither true nor false, the court concluded, an opinion cannot be libel or slander irrespective of the identity of the parties or the extent to which the communication is of public concern. *Savage v. Pac. Gas & Elec. Co.*, 21

Supreme Court might conclude in the proper case that statements not demonstrably true or false may not constitutionally support a defamation judgment irrespective of who has the burden of proof as to truth or falsity. That was arguably an implication of *Gertz* that survives *Milkovich*. It remains theoretically possible, however, that protection for such statements of opinion will be relegated to the common-law safeguards of the fair-comment, mutual interest, and similar privileges.⁸²

Hepps and its consequent protection for statements of opinion almost certainly apply to lawsuits against nonmedia defendants.⁸³ It

Cal. App. 4th 434, 444–45, 26 Cal. Rptr. 2d 305, 22 Media L. Rep. (BNA) 1737 (1993), *cert. denied*, 513 U.S. 820 (1994).

In *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 399–400, 882 N.E.2d 1011, 1022–23, 317 Ill. Dec. 855, 36 Media L. Rep. (BNA) 1335 (2008), the Illinois Supreme Court suggested it might so hold under federal constitutional principles, but did not actually decide the issue. The court pointed out that the Ohio Supreme Court, while holding such statements to be protected under Ohio's state constitutional protection for opinion in *Wampler v. Higgins*, 93 Ohio St. 3d 111, 123–26, 752 N.E.2d 962, 974–76, 29 Media L. Rep. (BNA) 2377 (2001), referred in the course of its analysis to federal constitutional principles.

82. See sections 4:4 and 9:2.3, *infra*. It is arguable that “fair comment” protection for these statements alone remains because, absent the *Hepps* presumption of truth, “the conflict . . . would always be resolved in the plaintiff’s favor” and opinions, neither provably true nor provably false, would therefore, for litigation purposes, always be false. Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1212 (1949), *quoted in* Franklin & Bussel, *The Plaintiff’s Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 872 (1984).

Arizona, relying largely on *Hepps*, has said that actionability of a statement depends, in part, on “whether the statement was provable as false.” *Yetman v. English*, 168 Ariz. 71, 76, 811 P.2d 323, 328 (1991). A federal district court in Illinois, applying Arizona law, concluded that that principle does not govern with respect to statements that are not about “matters of public concern.” *Chicago v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 800, 804–05 (N.D. Ill. 2011).

83. See *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 28 Media L. Rep. (BNA) 1329 (2d Cir. 2000) (opinion case); *Wheeler v. Neb. State Bar Ass’n*, 244 Neb. 786, 508 N.W.2d 917, 921 (1993); Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, “Defamation and Privacy under the First Amendment”*, 100 COLUM. L. REV. 294, 326–27 (2000); section 3:3.2[B][2], *supra* (discussing application to non-media-defendant cases of the *Hepps* rule as to burden of proof). The *Flamm* court limited its holding to cases, such as the one before it, “where the statements were directed towards a public audience with an interest in that concern,” although in a prefatory sentence it hinted that the principle might be broader by remarking “that a distinction drawn according to whether the defendant is a member of the media or not is untenable.” *Flamm*, 201 F.3d at 149.

It will be recalled that Justice Brennan, dissenting in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 11 Media L. Rep. (BNA)

seems increasingly unlikely that distinctions will be made in this connection between “media” and “nonmedia” defendants, inasmuch as with the proliferation of new means of electronic communication, the line between them is becoming increasingly difficult to draw. If, nonetheless, *Hepps* is held not to apply in nonmedia cases—whatever they are—analysis of protection for statements of opinion by persons not so classified would likely parallel that for statements not about matters of public concern.

Also open but less discussed is the question whether the fact that the plaintiff is a public figure or public official enters into the opinion calculus. One court, noting that, “[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability,”⁸⁴ held that a statement about a public figure should be given more leeway as opinion than would similar statements about private people.

[D] Illinois, Massachusetts, New Jersey, New York, Ohio, Oklahoma, Utah, and Washington

The Illinois Supreme Court has apparently “yet to determine whether . . . constitutional protections . . . apply where . . . a private party has allegedly defamed another private party on a matter of public or private concern.”^{84.1} At least two Illinois Appellate Court decisions have concluded in the affirmative.^{84.2}

2417 (1985), noted that six Justices “agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.” The statement preceded the Court’s decision in *Hepps*, but that case is probably best characterized as neutral on the issue. It was itself a traditional media-defendant case in which comments on its application to nonmedia defendants would have been dicta.

See generally Introduction, *supra*.

84. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292, 14 Media L. Rep. (BNA) 2249 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988); *accord* *Hunter v. Hartman*, 545 N.W.2d 699, 24 Media L. Rep. (BNA) 2004 (Minn. Ct. App. 1996).
- 84.1. *Perfect Choice Exteriors, LLC v. Better Bus. Bureau of Cent. Ill., Inc.*, 99 N.E.3d 541, 548, 421 Ill. Dec. 297, 304 (Ill. App. 2018) (citing *Imperial Apparel, Ltd. v. Cosmo’s Designer Direct, Inc.*, 227 Ill. 2d 381, 399, 882 N.E.2d 1011, 317 Ill. Dec. 855 (2008)).
- 84.2. *Id.*, 99 N.E.3d at 548, 421 Ill. Dec. at 304 (“Following *Stone v. Paddock Publications, Inc.*, 356 Ill. Dec. 284, 961 N.E.2d 380 (Ill. App. 2011), we hold that the first amendment privilege applies to allegedly defamatory communications made by private defendants where the standards prescribed in *Milkovich* and *Solaia Tech., LLC v. Specialty Pub’g Co.*, 221 Ill. 2d 558, 579, 304 Ill. Dec. 369, 852 N.E.2d 825 (2006)] are met.”).

Reading *Milkovich* narrowly, and finding it insufficient to protect statements of opinion, the New York Court of Appeals adopted as part of New York State constitutional law its pre-*Milkovich* doctrine of protection for all statements of opinion, emphasizing, in the proper case, the context and overall impact of the communication.⁸⁵ “[T]he dispositive inquiry . . . is . . . whether the challenged statement can reasonably be construed to be stating or implying facts about the

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85. *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, 18 Media L. Rep. (BNA) 1625, cert. denied, 500 U.S. 954 (1991). The three concurring opinions criticized the majority for giving *Milkovich* too narrow a reading. 77 N.Y.2d at 257 (Simons, J., concurring); *id.* at 263 (Titone, J., concurring); *id.* at 268 (Hancock, J., concurring); see also *Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 178 (2d Cir. 2000); *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 147, 28 Media L. Rep. (BNA) 1329 (2d Cir. 2000) [New York Court of Appeals has in *Immuno* “reaffirmed that the standard articulated and applied in [its pre-*Milkovich* opinion in] *Steinhilber [v. Alphonse]*, 68 N.Y.2d 283, 289–90, 508 N.Y.S.2d 901, 904, 501 N.E.2d 550, 553 (1986)] furnishes the operative standard in this State for separating actionable fact from protected opinion”] (citation to *Immuno* and internal quotation marks omitted); *Levin v. McPhee*, 119 F.3d 189, 25 Media L. Rep. (BNA) 1946 (2d Cir. 1997) (repetition of speculation about mysterious death of Soviet artist protected); *Mann v. Abel*, 10 N.Y.3d 271, 276, 885 N.E.2d 884, 885–86, 856 N.Y.S.2d 31, 32–33, 36 Media L. Rep. (BNA) 2106 (2008) (“Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation.”), cert. denied, 555 U.S. 1170 (2009); *Brian v. Richardson*, 87 N.Y.2d 46, 660 N.E.2d 1126, 637 N.Y.S.2d 347, 24 Media L. Rep. (BNA) 1543 (1995); *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 156, 623 N.E.2d 1163, 1169, 603 N.Y.S.2d 813, 21 Media L. Rep. (BNA) 2142 (1993) (allegations “in the course of a lengthy, copiously documented newspaper series” were potentially actionable statements of fact); *600 W. 115th St. v. Van Gutfield*, 80 N.Y.2d 130, 603 N.E.2d 930, 589 N.Y.S.2d 825, 21 Media L. Rep. (BNA) 1811 (1992) (statement made in heated debate before municipal agency nonactionable under both *Milkovich* and *Immuno*), cert. denied, 508 U.S. 910 (1993); *Sandals Resorts Int’l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 42, 925 N.Y.S.2d 407, 415, 39 Media L. Rep. (BNA) 2065 (1st Dep’t 2011) (“Considering the e-mail in question here as a whole, we find that it is an exercise in rhetoric, seeking to raise questions in the mind of the reader regarding the role of Jamaican nationals in the Sandals resorts located in Jamaica.”); *Park v. Capital Cities Commc’ns, Inc.*, 181 A.D.2d 192, 585 N.Y.S.2d 902, 20 Media L. Rep. (BNA) 1613 (4th Dep’t), appeal dismissed, 80 N.Y.2d 1022, 592 N.Y.S.2d 668, 607 N.E.2d 815 (1992); *McGill v. Parker*, 179 A.D.2d 98, 582 N.Y.S.2d 91, 19 Media L. Rep. (BNA) 2170 (1st Dep’t 1992). The *Gross* court read its earlier opinions as providing protection that is similar to federal constitutional protection post-*Milkovich*, that is, focusing on whether the communication is demonstrably false, except that under N.Y. law the context of the statement is more closely examined to determine whether the statement is provably false and therefore potentially actionable. 82 N.Y.2d at 151–52. The *Gross* court applied a three-factor test adopted

defamation plaintiff.”⁸⁶ Some Texas courts of appeals, finding their pre-*Milkovich* case law to be based on Texas state constitutional free-speech guarantees, have continued to accord per se protection to opinion.⁸⁷

Similarly, although the Supreme Court of New Jersey later adopted the traditional post-*Milkovich* approach, protecting statements that cannot be proved false and “loose, figurative or hyperbolic language,” the New Jersey Supreme Court observed that New Jersey’s common-law fair-comment privilege, which provides absolute protection for opinion based on stated or generally known facts on matters of public concern (“pure opinion”), was “at least as protective of free speech as federal law would be.”⁸⁸ The court therefore concluded that it was unnecessary to decide the extent of protection for opinion obtaining under the federal Constitution.⁸⁹

from New York’s pre-*Milkovich* law: “(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to ‘signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.’” *Id.* at 153 (quoting *Steinhilber*); accord *Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 178–79 (2d Cir. 2000); *Brian v. Richardson*, 87 N.Y.2d 46, 660 N.E.2d 1126, 637 N.Y.S.2d 347, 24 Media L. Rep. (BNA) 1543 (1995); see also *Sleepy’s LLC v. Select Comfort Wholesale Corp.*, 779 F.3d 191, 202–03 (2d Cir. 2015) (summarizing and applying New York law).

New York courts tend to apply the state’s protection for expressions of opinion broadly. See, e.g., *Rappaport v. VV Publ’g Corp.*, 163 Misc. 2d 1, 618 N.Y.S.2d 746 (N.Y. Cty. 1994) (assertions that plaintiff was one of ten worst judges in New York, allegedly suggesting that he had wrongfully arranged to have certain kinds of cases assigned to him, held to be protected, citing pre- and post-*Milkovich* case law inside and outside the state), *aff’d*, 223 A.D.2d 515, 637 N.Y.S.2d 109, 24 Media L. Rep. (BNA) 1831 (1st Dep’t 1996); see also *Brian*, 87 N.Y.2d 46 (reporting of unsubstantiated charges held, in context, to be protected opinion). For a survey of New York law respecting statements of opinion, emphasizing the breadth of the protection such law accords to defendants, see *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 695–96, 44 Media L. Rep. (BNA) 1401 (11th Cir. 2016) (describing New York law and applying it to defamation case brought in Florida).

86. *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 148, 28 Media L. Rep. (BNA) 1329 (2d Cir. 2000).

87. *Associated Press v. Cook*, 17 S.W.3d 447, 454, 28 Media L. Rep. (BNA) 2065 (Tex. App. 2000) (relying on, inter alia, the Texas Supreme Court’s pre-*Milkovich* case, *Carr v. Brasher*, 776 S.W.2d 567, 570, 16 Media L. Rep. (BNA) 1942 (Tex. 1989)).

88. *Ward v. Zelikovskiy*, 136 N.J. 516, 531, 643 A.2d 972, 979 (1994).

89. *Cassidy v. Merin*, 244 N.J. Super. 466, 582 A.2d 1039, 1048 (1990). The court noted that “[t]he New Jersey Supreme Court was prescient in its

In Massachusetts, the Supreme Judicial Court announced its fundamental agreement with the law pre-*Milkovich*, basing it on the First Amendment *as well as* state constitutional principles and the common law.

[W]ere [protection of opinion] not required [by the First Amendment], we would “reach the same result, believing that the action [at bar] is plainly without merit and the prospect of forcing the defendant to trial in such a case would put an unjustified and serious damper on freedom of expression.” . . . [T]he independent protections of freedom of speech which are found in our common law and in [the Massachusetts Declaration of Rights] would lead us to reach the same result even if there existed no Federal constitutional support for the principles which we applied.⁹⁰

In Maine, similarly, to be actionable, “[a] false statement must be ‘an assertion of fact, either explicit or implied, and not merely an opinion, provided the opinion does not imply the existence of undisclosed defamatory facts.’ If the publication is truly an opinion, however, then it is not actionable.”⁹¹

The Utah Supreme Court, after a painstaking review of its own constitution and constitutional history and of opinions under state constitutions similar to its own, also found protection for opinion similar to pre-*Milkovich* federal constitutional protection under its state constitutional guaranty of free expression.⁹²

Ohio courts, where *Milkovich* originated, have themselves, under the state constitution, strictly adhered to pre-*Milkovich* law: Opinion

recognition that “[a]lthough constitutional considerations have dominated defamation law in recent years, the common law provides an alternative, and potentially more stable, framework for analyzing statements about matters of public interest.” 582 A.2d at 1047 n.5 (quoting *Dairy Stores, Inc. v. Sentinel Publ’g Co.*, 104 N.J. 125, 516 A.2d 220, 13 Media L. Rep. (BNA) 1594 (1986)); see also *Peterson v. Meggitt*, 407 N.J. Super. 63, 969 A.2d 500 (App. Div. 2009).

90. *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 612 N.E.2d 1158, 1162 (1993) (quoting *Nat’l Ass’n of Gov’t Emps. v. Cent. Broad. Corp.*, 379 Mass. 220, 233, 396 N.E.2d 996, 1004, 5 Media L. Rep. (BNA) 2078 (1979), *cert. denied*, 446 U.S. 935 (1980)).

91. *Ballard v. Wagner*, 2005 ME 86, ¶ 10, 877 A.2d 1083, 1087 (2005) (citation omitted).

92. *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994). In applying it, the court adopted the D.C. Circuit’s pre-*Milkovich* analysis set forth in *Ollman v. Evans*, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985).

is nonactionable per se.⁹³ The Ohio Supreme Court has explicitly extended the protection to nonmedia defendants.⁹⁴ And it has adopted the *Ollman* test to determine whether a statement is opinion protected per se under its state constitution.⁹⁵ Rhode Island has based protection for opinion in part on state law and tradition:

Living in a state founded by dissenters, symbolized by “the independent man,” and still priding itself on its role in serving as the cradle of religious liberty in America, we are loath to adopt a rule that would retard the free flow of opinion and debate that has been so vital to our state throughout its history.⁹⁶

And the Washington Supreme Court, more than a decade after *Milkovich* was decided, applied pre-*Milkovich* doctrine according per se protection to expressions of opinion under the First Amendment without referring either to *Milkovich* or to any case decided thereafter

93. *Vail v. Plain Dealer Publ’g Co.*, 72 Ohio St. 3d 279, 649 N.E.2d 182, 23 Media L. Rep. (BNA) 1881 (1995). The *Vail* decision is of substantial historical interest. In *Milkovich*, a case also arising out of Ohio courts, the U.S. Supreme Court held opinion not to be per se nonactionable despite a previous Ohio Supreme Court decision—*Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699, 13 Media L. Rep. (BNA) 1241 (1986)—which had held opinion to be per se nonactionable under the Ohio constitution. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 10–11 n.5, 17 Media L. Rep. (BNA) 2009 (1990). The *Scott* court, however, had relied heavily on federal case law in reaching its conclusion, and did not make it clear on the face of its opinion that the Ohio constitution provided an independent state ground for the court’s conclusion. The Supreme Court therefore held that, despite the state-law grounds for the Ohio rule, federal review was not barred. *Id.*

The Ohio Supreme Court in *Vail*, again relying on *Scott*, did not repeat its mistake. Although observing that the difference between per se protection for opinion and the protection that has arisen out of *Milkovich* “is not as great as it may appear,” the court said explicitly that per se protection of opinion was a matter of state constitutional mandate. *Vail*, 649 N.E.2d at 185. Had it been as clear in *Scott*, there would have been no *Milkovich*.

94. *Wampler v. Higgins*, 93 Ohio St. 3d 111, 752 N.E.2d 962, 29 Media L. Rep. (BNA) 2377 (2001).

95. *Id.* (citing *Ollman v. Evans*, 471 U.S. 1127, 1129, 11 Media L. Rep. (BNA) 2015 (1985), discussed in section 4:2.3[B], *supra*). For a discussion of the law protecting opinion in Ohio and an application of it rendering nonactionable as opinion a statement which, read alone, would likely be treated as an assertion of fact, see *Bentkowski v. Scene Magazine*, 637 F.3d 689, 39 Media L. Rep. (BNA) 1654 (6th Cir. 2011) (“The Court of Appeals of Ohio has recognized that the ‘language of the entire column may signal that a specific statement which, sitting alone, would appear to be factual is in actuality a statement of opinion.’ *DeVito v. Gollinger*, 133 Ohio App. 3d 51, 726 N.E.2d 1048, 1051 (Ohio Ct. App. 1999) (internal quotation marks and citation omitted).”).

96. *Beattie v. Fleet Nat’l Bank*, 746 A.2d 717, 724 (R.I. 2000).

(excepting only the decision on appeal).⁹⁷ There is at least a hint that Iowa law is to the same effect.⁹⁸

Oklahoma, by statute, is particularly protective of criticism of public officials:

Under Title 12, § 1443.1, of the Oklahoma Statutes, “[a]ny and all criticisms upon the official acts of any and all public officers” are privileged and cannot be considered libelous, unless a defendant makes a false allegation that the official engaged in criminal behavior. To fall into this category, “the words alleged to have been spoken of the plaintiff, when taken in their plainest and most natural sense, and as they would be ordinarily understood, [must] obviously import the commission of crime punishable by indictment.”⁹⁹

If protection accorded by a state is based on its court’s reading of state law, it is to be followed in federal-court diversity cases applying that law. If it is based on the state court’s interpretation of federal constitutional principles or federal constitutional case law, such as *Milkovich*, however, the federal courts decide the extent of the protection without deference to the state court’s interpretation.¹⁰⁰

§ 4:3 Analysis

§ 4:3.1 Custom and Context

[A] Generally

As is the case with all interpretation of statements examined under the law of defamation, whether stated as a search for the distinction between fact and opinion pre-*Milkovich* or as a search for the distinction between that which is and is not provably false post-*Milkovich*, two things are central to the inquiry: custom (how words are ordinarily

97. *Robel v. Roundup Corp.*, 148 Wash. 2d 35, 55, 59 P.3d 611, 622 (2002).

98. *Kiesau v. Bantz*, 686 N.W.2d 164, 177 (Iowa 2004) (stating in dictum that opinion is constitutionally protected under the First Amendment without reference to *Milkovich*; citing pre-*Milkovich* case *Jones v. Palmer Commc’ns, Inc.*, 440 N.W.2d 884, 891, 16 Media L. Rep. (BNA) 2137 (Iowa 1989)).

99. *Peterson v. Grisham*, 594 F.3d 723, 729, 38 Media L. Rep. (BNA) 1330 (10th Cir. 2010) (citing, for second quotation, *Okla. Publ’g Co. v. Kendall*, 96 Okla. 194, 221 P. 762, 764 (1923)). “Oklahoma courts have extended [the statute’s] reach to cover claims for intentional infliction of emotional distress and false light invasion of privacy.” *Id.*, 594 F.3d at 729–30.

100. *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1183–84 (10th Cir. 2007).

used) and context (both in terms of the language used and the situation in which it is used).¹⁰¹ “Words which, taken by themselves, would appear to be a positive allegation of fact, may be shown by the context to be a mere expression of opinion or argumentative influence.”¹⁰²

Statements of opinion may be couched in factual terms. Statements that expressly purport to be opinions are often understood to be statements of fact: “I believe he was murdered by his wife with an axe.”¹⁰³ And statements often can be taken to be either fact or opinion: “She’s crazy”; “Those men are robbers”; “That is dangerous.” In each case, a combination of custom and context determines the result.

To illustrate, if the statement “John is a thief” is actionable when considered in its applicable context, the statement “I believe John is a thief” would be equally actionable when placed in precisely the same context. By the same token, however, the assertion that “John is a thief” could well be treated as an expression of opinion or rhetorical hyperbole where it is accompanied by other statements, such as “John stole my heart,” that, taken in context,

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101. *See* *Aviation Charter, Inc. v. Aviation Research Grp./US*, 416 F.3d 864, 868 (8th Cir. 2005) (“In analyzing a defamation claim [in which the question for the court was whether there was an actionable, false statement of fact], we must consider the context within which the statement was made.”) (citations omitted); *Burns v. Davis*, 196 Ariz. 155, 165, 993 P.2d 1119, 1129 (Ct. App. 1999) (citing *Yetman v. English*, 168 Ariz. 71, 76–79, 811 P.2d 323, 328–31 (1991)) (“The meaning of words and statements should not be construed in isolation; rather, consideration should be given to the context and all surrounding circumstances, including the impression created by the words used and the expression’s general tenor.”); *Ballard v. Wagner*, 2005 ME 86, ¶ 11, 877 A.2d 1083, 1087–88 (2005) (“totality of the circumstances”); *see also* cases cited at note 64, *supra*.
102. *Mashburn v. Collin*, 355 So. 2d 879, 885, 3 Media L. Rep. (BNA) 1673 (La. 1977) (citing *GATLEY ON LIBEL AND SLANDER* § 709 (6th ed. 1967)); *see also* *Hammer v. City of Osage Beach*, 318 F.3d 832, 842–43 (8th Cir. 2003) (Mo. law) (“The court must examine the totality of the circumstances to determine whether the ordinary reader would have interpreted the statement as an opinion.”) (citation and internal quotation marks omitted); *Gray v. St. Martin’s Press, Inc.*, 221 F.3d 243, 248–49 (1st Cir. 2000) (“Whether calling something a ‘fake’ is or is not protected opinion depends very much on what is meant and therefore on context.”), *cert. denied*, 531 U.S. 1075 (2001); *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, 5 Media L. Rep. (BNA) 1113, *cert. denied*, 444 U.S. 984 (1979); *Lynch v. N.J. Educ. Ass’n*, 161 N.J. 152, 170, 735 A.2d 1129, 1137 (1999); *Beattie v. Fleet Nat’l Bank*, 746 A.2d 717, 728 (R.I. 2000).
103. “Every statement of opinion contains or implies some proposition of fact, just as every statement of fact has or implies an evaluative component.” *Stevens v. Tillman*, 855 F.2d 394, 398 (7th Cir. 1988) (Easterbrook, J.).
Cf. Supreme Court’s example in *Milkovich*: “In my opinion John Jones is a liar.” *Milkovich*, 497 U.S. at 18.

convey to the reasonable reader that something other than an objective fact is being asserted.¹⁰⁴

Potentially defamatory statements in the guise of statements of fact uttered during a bitter political debate are particularly likely to be understood to be rhetorical opinion.¹⁰⁵ When uttered at a time of high emotion, such as personal grief, they are also likely to be understood as expressions of rage rather than assertions of fact.¹⁰⁶ A similar understanding applies to statements made during the course of an ongoing public controversy¹⁰⁷ or a labor dispute.¹⁰⁸ In other words,

where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the

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104. *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 155, 623 N.E.2d 1163, 1169, 603 N.Y.S.2d 813, 21 Media L. Rep. (BNA) 2142 (1993); *see also* *Garrett v. Tandy Corp.*, 295 F.3d 94, 104 (1st Cir. 2002) (“[B]y ‘context’ we mean such factors as the identity of the speaker, the identity of the audience, the circumstances in which the statement is made, and what else is said in the course of the conversation, and a myriad of other considerations.”).
105. *Koch v. Goldway*, 817 F.2d 507, 14 Media L. Rep. (BNA) 1213 (9th Cir. 1987) (opponent allegedly suggested to be Nazi war criminal); *Arrington v. Palmer*, 971 P.2d 669 (Colo. Ct. App. 1998); *Pullum v. Edwin Mac Johnson & Faith Bible Coll., Inc.*, 647 So. 2d 254 (Fla. Dist. Ct. App. 1994) (broadcast reference to plaintiff proponent of legalized alcohol sales in county as “drug pusher” is nonactionable rhetorical hyperbole); *Mast v. Overson*, 971 P.2d 928 (Utah Ct. App. 1998) (heated public debate about development of golf course); *Hoppe v. Hearst Corp.*, 53 Wash. App. 668, 770 P.2d 203, 207, 16 Media L. Rep. (BNA) 2076 (1989) (satirical column during political campaign questioning plaintiff’s use of public funds to hire private detective protected).
106. *Gonzalez v. Gray*, 69 F. Supp. 2d 561 (S.D.N.Y. 1999), *aff’d*, 216 F.3d 1072 (2d Cir. 2000) (table); *see also* *Jorg v. Cincinnati Black United Front*, 153 Ohio App. 3d 258, 792 N.E.2d 781 (2003) (assertion that plaintiff police officer had “killed” an African-American person who died in police custody, where officer had been tried but not convicted of killing, made in the course of activists’ appeal for performers to boycott the city by whom officer was employed because of alleged police brutality, was hyperbole protected under Ohio’s categorical protection for opinion even though statement could reasonably be interpreted as a statement of fact).
107. *Weyrich v. New Republic*, 235 F.3d 617, 624, 29 Media L. Rep. (BNA) 1257 (D.C. Cir. 2001) (politics; *cf.* section 4:3.1[B], *infra*); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 16 Media L. Rep. (BNA) 1113 (9th Cir.) (pornography), *cert. denied*, 493 U.S. 812 (1989); *Baird v. Roussin*, 6 Media L. Rep. (BNA) 1555 (D. Mass. 1980) (abortion).
108. *Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Steam Press Holdings, Inc. v. Haw. Teamsters Union, Local 996*, 302 F.3d 998 (9th Cir. 2002); *Perruccio v. Arseneault*, 7 Conn. App. 389, 508 A.2d 831, 12 Media L. Rep. (BNA) 2208 (1986); *see also* *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 597–98 (D.C. 2000) (protection for op-ed piece about labor matters, relying on cases treating statements made by participants in labor disputes).

audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.¹⁰⁹

It must be borne in mind, however, that the likely understanding of listeners to speech in a political or labor context is not the only factor at work in protecting such speech. Particular solicitude is given to protection of such speech as a matter of policy, in order to safeguard the political and labor bargaining processes.¹¹⁰

If a statement appears in a place usually devoted to, or in a manner usually thought of as representing, personal viewpoints, it is also likely to be understood—and deemed by a court—to be nonactionable opinion.¹¹¹ A letter to the editor,¹¹² for example, an editorial or op-ed column¹¹³ or

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109. *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601, 552 P.2d 425, 430, 131 Cal. Rptr. 641 (1976). This view has been repeated by California courts after *Milkovich*. See *Rudnick v. McMillan*, 25 Cal. App. 4th 1183, 31 Cal. Rptr. 2d 193, 22 Media L. Rep. (BNA) 2008 (1994). Note the observation of a California court of appeal that the contents of Internet bulletin boards are *not* presumptively statements of opinion. *Varian Med. Sys., Inc. v. Delfino*, 113 Cal. App. 4th 273, 288–89, 6 Cal. Rptr. 3d 325, 337 (2003).
110. See section 4:3.4, *infra*.
111. See, e.g., *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 729, 19 Media L. Rep. (BNA) 1786 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992) (“The sum effect of the format, tone and entire content of the articles [at issue] is to make it unmistakably clear that [the author] was expressing a point of view only. As such, the challenged language is immune from liability.”); *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 254, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991) (analysis should “begin[] by looking at the content of the whole communication, its tone and apparent purpose”) (citing *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 293, 508 N.Y.S.2d 901, 501 N.E.2d 550, 13 Media L. Rep. (BNA) 1562 (1986)).
112. *Colodny v. Inverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917 (M.D. Fla. 1996); *Keohane v. Stewart*, 882 P.2d 1293, 22 Media L. Rep. (BNA) 2545 (Colo. 1994), *cert. denied*, 513 U.S. 1127 (1995); *Sall v. Barber*, 782 P.2d 1216, 16 Media L. Rep. (BNA) 1700 (Colo. Ct. App. 1989); *Haberstroh v. Crain Publ'ns, Inc.*, 189 Ill. App. 3d 267, 545 N.E.2d 295, 136 Ill. Dec. 771, 16 Media L. Rep. (BNA) 2423 (1989); *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, 18 Media L. Rep. (BNA) 1625, *cert. denied*, 500 U.S. 954 (1991).
113. *Ollman v. Evans*, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985); *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580 (D.C. 2000) (op-ed column); *Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 500 N.E.2d 794, 13 Media L. Rep. (BNA) 1779 (1986); *Edwards v. Detroit News, Inc.*,

broadcast,¹¹⁴ a cartoon,¹¹⁵ a critical parody or satire of a public person,¹¹⁶ a sports column,¹¹⁷ criticism on a radio talk show,¹¹⁸ or a

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- 322 Mich. App. 1, 910 N.W.2d 394, 46 Media L. Rep. (BNA) 1209 (2017); *Garvelink v. Detroit News*, 206 Mich. App. 604, 522 N.W.2d 883, 22 Media L. Rep. (BNA) 2503 (1994); *Andrews v. Stallings*, 119 N.M. 478, 892 P.2d 611 (Ct. App. 1995); *Brian v. Richardson*, 87 N.Y.2d 46, 660 N.E.2d 1126, 637 N.Y.S.2d 347, 24 Media L. Rep. (BNA) 1543 (1995) (op-ed page article); *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 156, 623 N.E.2d 1163, 603 N.Y.S.2d 813, 21 Media L. Rep. (BNA) 2142 (1993) (dicta); *Ferreri v. Plain Dealer Publ'g Co.*, 142 Ohio App. 3d 629, 756 N.E.2d 712 (2001) (editorial); *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994); *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 447 S.E.2d 293, 22 Media L. Rep. (BNA) 2337 (1994).
114. *Maholick v. WNEP TV*, 20 Media L. Rep. (BNA) 1022 (M.D. Pa. 1992) (telecast with word "editorial" displayed).
115. *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 385 (S.D.N.Y. 1998) ("[G]iven the inherent nature of a cartoon, a reasonable reader would view it as a statement of pure opinion not based on undisclosed facts."); *Ramunno v. Cawley*, 705 A.2d 1029 (Del. 1998); *Keller v. Miami Herald Publ'g Co.*, 778 F.2d 711, 12 Media L. Rep. (BNA) 1561 (11th Cir. 1985); *Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408, 14 Media L. Rep. (BNA) 1673 (C.D. Cal. 1987), *aff'd*, 867 F.2d 1188, 16 Media L. Rep. (BNA) 1113 (9th Cir.), *cert. denied*, 493 U.S. 812 (1989); *King v. Globe Newspaper Co.*, 400 Mass. 705, 512 N.E.2d 241, 14 Media L. Rep. (BNA) 1811 (1987), *cert. denied*, 485 U.S. 940 and 485 U.S. 962 (1988); *Ferreri v. Plain Dealer Publ'g Co.*, 142 Ohio App. 3d 629, 756 N.E.2d 712 (2001); and cases cited in section 2:4.9, notes 252 and 253, *supra*.
116. *Patrick v. Superior Court*, 22 Cal. App. 4th 814, 27 Cal. Rptr. 2d 883, 22 Media L. Rep. (BNA) 1367, *petition denied, opinion depublished* (see chapter 5, note 413, *infra*), 1994 Cal. LEXIS 3284 (1994) (bogus letter on judge's stationery intended to criticize judge); *Garvelink v. Detroit News*, 206 Mich. App. 604, 522 N.W.2d 883, 22 Media L. Rep. (BNA) 2503 (1994).
117. *Fortson v. Colangelo*, 434 F. Supp. 2d 1369 (S.D. Fla. 2006); *Washington v. Smith*, 893 F. Supp. 60 (D.D.C. 1995), *aff'd*, 80 F.3d 555 (D.C. Cir. 1996); *Hunter v. Hartman*, 545 N.W.2d 699, 24 Media L. Rep. (BNA) 2004 (Minn. Ct. App. 1996) (sports broadcast).
118. *See Gardner v. Martino*, 563 F.3d 981, 988 (9th Cir. 2009) ("The Tom Martino Show is a radio talk show program that contains many of the elements that would reduce the audience's expectation of learning an objective fact: drama, hyperbolic language, an opinionated and arrogant host, and heated controversy."). The *Gardner* court concluded that statements of the talk-show host based on "facts" asserted by an on-air telephone caller were protected statements of opinion:

As we stated in [*Partington v. Bugliosi*, 56 F.3d 1147, 23 Media L. Rep. (BNA) 1929 (9th Cir. 1995)], when it is clear that the allegedly defamatory statement is "speculat[ion] on the basis of the limited facts available," [*id.*] at 1156, it represents a non-actionable personal interpretation of the facts. *See id.*; *see also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) ("[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a

critical review¹¹⁹ are ordinarily not actionable, although this factor alone is by no means determinative.¹²⁰ There is substantial protection under these principles for humor and ridicule, generally.¹²¹

The digital media may well give rise to a new context in which to decide whether a statement is fact or opinion. Think, for example, emojis and emoticons.^{121.1} One can guess that they will, by their nature, ordinarily be treated as nonactionable opinion or commentary.^{121.2}

theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.”).

- Id.* at 988–89 (some brackets in original).
119. Mr. Chow v. Ste. Jour Azur S.A., 759 F.2d 219, 11 Media L. Rep. (BNA) 1713 (2d Cir. 1985) (restaurant review); Neumann v. Liles, 358 Or. 706, 369 P.3d 1117, 44 Media L. Rep. (BNA) 1433 (2016) (critical online review of wedding venue, captioned “Disaster!!!! Find a different wedding venue.”); Pegasus v. Reno Newspapers, Inc., 57 P.3d 82, 31 Media L. Rep. (BNA) 1353 (Nev. 2002); Themed Rests., Inc. v. Zagat Survey, LLC, 4 Misc. 3d 974, 781 N.Y.S.2d 441, 32 Media L. Rep. (BNA) 1427 (Sup. Ct. N.Y. Cty. 2004), *aff’d*, 21 A.D.3d 826, 801 N.Y.S.2d 38 (1st Dep’t 2005).
120. Defamatory allegations of fact may be contained in places ordinarily given over to opinion, such as a sports column, Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); an editorial, Hinerman v. Daily Gazette Co., 188 W. Va. 157, 423 S.E.2d 560, 20 Media L. Rep. (BNA) 2169 (1992); commentary, Unelko Corp. v. Rooney, 912 F.2d 1049, 17 Media L. Rep. (BNA) 2317 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); a letter to the editor, Wasserman v. Haller, 627 N.Y.S.2d 456 (2d Dep’t 1995); or an op-ed piece, Haas v. Gill, 527 So. 2d 368, 15 Media L. Rep. (BNA) 2323 (La. Ct. App. 1988); Brian v. Richardson, 87 N.Y.2d 46, 660 N.E.2d 1126, 637 N.Y.S.2d 347, 24 Media L. Rep. (BNA) 1543 (1995) (same; dicta).
121. See section 5:5.2[G][1], *infra*. The Supreme Court of New Jersey has noted, interestingly, that a statement made in an emotional outburst is likely not to be understood as an assertion of fact, and that this is *particularly* true if the outburst is “unrelated to the general topic of discussion” at the time. Ward v. Zelikovskiy, 136 N.J. 516, 532, 643 A.2d 972, 980 (1994).
- 121.1. Alex Hern, *Don’t Know the Difference Between Emoji and Emoticons? Let Me Explain*, GUARDIAN, Feb. 6, 2015, www.theguardian.com/technology/2015/feb/06/difference-between-emoji-and-emoticons-explained (last visited Feb. 3, 2018).
- 121.2. See Ghanam v. Does, 303 Mich. App. 522, 550, 845 N.W.2d 128, 146, 42 Media L. Rep. (BNA) 1386 (2014) (“The joking, hostile, and sarcastic manner of the comments, the use of an emoticon showing someone sticking their tongue out, and the far-fetched suggestion that plaintiff somehow hid over 3,600 tons of salt near the city sports complex all indicate that these comments were made facetiously and with the intent to ridicule, criticize, and denigrate plaintiff rather than to assert knowledge of actual facts.”); Nicole Pelletier, *The Emoji That Cost \$20,000: Triggering Liability for Defamation on Social Media*, 52 WASH. U. J.L. & POL’Y 227, 244 (2016) (“A third nuanced issue social media defamation presents is interpreting the meaning of new forms of written communication

The converse is also true. If a statement is published where a reader would expect assertions of fact because of the context, it is likely to be understood to be, and therefore be treated by a court as, an assertion of fact. Thus, the Second Circuit decided that a statement contained in a guide to lawyers and other professionals expert with respect to gender discrimination legal actions that “[a]t least one [person involved in such suits] has described [the defendant] as an ‘ambulance chaser’ with interest only in ‘slam dunk cases,’” was an assertion of fact.¹²² The court relied significantly on context: “Exaggerated rhetoric may be commonplace in labor disputes, but a reasonable reader would not expect similar hyperbole in a straightforward directory of attorneys and other professionals. Indeed the opposite is true.”¹²³ The fact that the statement purported to be no more than the report of a single observer did not make it any less an assertion of fact. “[W]ith respect to the prefix ‘at least one [person],’ it would not be unreasonable for a reader to believe that the [defendant] would not have printed such a statement without some factual basis and to conclude that the statement did indeed state facts about [the plaintiff].”¹²⁴ Even if the context suggests a statement is opinion, it may be a statement of fact. Merely cloaking an allegation of fact in the garb of an opinion—“I think that Ernie had too much to drink”¹²⁵—does not assure that it will not be

available on technology. For example, in *AvePoint, Inc. v. Power Tools, Inc.* [981 F. Supp. 2d 496 (W.D. Va. 2013)], a U.S. court imposed liability for defamation based on a hashtag for the first time. A similar character denoting emotion on social media is an emoji.”) (footnotes omitted).

122. *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 28 Media L. Rep. (BNA) 1329 (2d Cir. 2000).

123. *Id.* at 152.

124. *Id.*

125. [P]refacing a defamatory statement with the phrase “in my opinion” does not shield a defendant from liability, and the same is true for presenting a defamatory statement under a list of “concerns.” Prefatory language does not control whether these statements are actionable as defamation; what matters is whether the assertions included in the three disputed sentences are verifiably false.

Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 729 (7th Cir. 2004); *see also Affolter v. Baugh Constr. Or., Inc.*, 183 Or. App. 198, 51 P.3d 642 (2002); *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 64, 6 Media L. Rep. (BNA) 1625 (2d Cir. 1980) (it “would be destructive of the law of libel if a writer could escape liability for accusations [that he or she defamed the plaintiff] simply by using, explicitly or implicitly, the words ‘I think.’”); *cf. Brennan v. Kadner*, 814 N.E.2d 951, 958, 351 Ill. App. 3d 963, 969–70, 286 Ill. Dec. 725, 732 (2004) (“While it is true that simply prefacing a statement with qualifying language such as ‘I think,’ ‘I predict,’

held to state¹²⁶ or imply¹²⁷ a provably false and therefore potentially actionable statement of fact.

or 'I believe' will not convert a factual statement into constitutionally protected speech, literary, public, and social contexts are a major determinant of whether an ordinary reader would view an alleged defamatory statement as constituting fact or opinion.") (citations omitted).

126. The example used by the *Milkovich* Court was:

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. . . . Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement "Jones is a liar."

497 U.S. at 18–19.

Use of this example must be understood in the factual context of the case. The plaintiff in *Milkovich* had been accused of lying during the course of a judicial proceeding and therefore committing perjury. It was an unfortunate example, however, inasmuch as "lying" and "liar" are frequently used as epithets, in a "loose and figurative sense and therefore nonactionable." *See, e.g.,* *Cook v. Winfrey*, 141 F.3d 322, 26 Media L. Rep. (BNA) 1586 (7th Cir. 1998) (whether "liar" was allegation of fact a factual issue not resolvable on motion to dismiss); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1573, 11 Media L. Rep. (BNA) 1001 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242, 12 Media L. Rep. (BNA) 2297 (1986); *Edwards v. Nat'l Audubon Soc'y*, 556 F.2d 113, 121, 2 Media L. Rep. (BNA) 1849 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977); *Indep. Living Aids, Inc. v. Maxi-Aids, Inc.*, 981 F. Supp. 124 (E.D.N.Y. 1997); *Faltas v. State Newspaper, Inc.*, 928 F. Supp. 637, 24 Media L. Rep. (BNA) 2057 (D.S.C. 1996) ("liar" as hyperbole); *Morningstar, Inc. v. L.A. Superior Court*, 23 Cal. App. 4th 676, 688, 29 Cal. Rptr. 2d 547, 22 Media L. Rep. (BNA) 1513 (1994) (reference to plaintiff mutual fund's advertising in defendant's article entitled "Lies, Damn Lies, and Fund Advertisements" not actionable because "in this context, the title conveyed the sense this was an article expressing an opinion about how statistics were manipulated not that the statistics themselves were false"); *Piersall v. SportsVision of Chi.*, 230 Ill. App. 3d 503, 595 N.E.2d 103, 172 Ill. Dec. 40, 20 Media L. Rep. (BNA) 1223 (1992) (distinguishing *Milkovich*). The Ninth Circuit said:

Reporters and historians routinely dispute the accuracy or truthfulness of the statements of their sources when those statements conflict with the facts as the authors perceive them. We would severely limit the ability of such writers to explain fully many of the ramifications of crucial issues of public importance were we to allow them to be sued every time they suggested that one of their sources was being less than truthful in describing an incident that is discussed in the published work.

Partington v. Bugliosi, 56 F.3d 1147, 23 Media L. Rep. (BNA) 1929 (9th Cir. 1995).

127. *See* section 4:3.2, *infra*.

The distinction between an allegation of fact and expression of opinion . . . often depends on what is stated in the rest of the [communication]. If the defendant accurately states what some public man has really done, and then asserts that ‘such conduct is disgraceful,’ this is merely [a nonactionable] expression of his opinion, his comment on the plaintiff’s conduct.¹²⁸

There is no reason to believe that this observation is any less cogent in deciding what may be actionable now than it was before *Milkovich*.¹²⁹

The District of Columbia, First, Second, and Ninth Circuits have engaged in particularly interesting post-*Milkovich* analyses. In *Moldea v. New York Times Co.*,¹³⁰ a panel of the District of Columbia Circuit reconsidered its own previous decision that the statement in a book review that there was “too much sloppy journalism in the book [being reviewed] to trust the bulk of this book’s 512 pages,” and two of five challenged examples taken from the book to support that claim, were actionable as implied statements of fact and statements of fact, respectively.¹³¹

The panel overruled itself on rehearing, deciding that it had unduly discounted the statements’ context the first time around: the fact that it was in a book review.¹³² The court observed that *Milkovich*¹³³ holds that context is not determinative and that the fact that the statement at issue was in a book review therefore did not alone render it protected. But *Milkovich* does not suggest, let alone require, that context be ignored.¹³⁴

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128. *Leers v. Green*, 24 N.J. 239, 131 A.2d 781, 787 (1957) (quoting ODGERS, LIBEL AND SLANDER, at 166 (6th ed. 1929)); *see also* *Goodrich v. Waterbury Republican-Am., Inc.*, 188 Conn. 107, 448 A.2d 1317, 8 Media L. Rep. (BNA) 2329 (1982).
129. *See* *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1441 & n.15 (9th Cir. 1995) (reaffirming validity post-*Milkovich* of RESTATEMENT (SECOND) OF TORTS § 566 (1977)).
130. *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 22 Media L. Rep. (BNA) 1673 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994).
131. *Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 22 Media L. Rep. (BNA) 1321, *modified on reh’g*, 22 F.3d 310, 22 Media L. Rep. (BNA) 1673 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994).
132. *Moldea*, 22 F.3d at 314 (citing *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724, 729 n.9, 19 Media L. Rep. (BNA) 1786 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992)).
133. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 Media L. Rep. (BNA) 2009 (1990).
134. *Moldea*, 22 F.3d at 313–15. The court made reference to the importance of context “because it is in part the *settings* of the speech in question that makes [its] . . . nature apparent, and which helps determine the way in which the intended audience will receive [it].” *Id.* at 314 (emphasis in original).

The court formulated and applied a context-based test:

[W]hen a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation.¹³⁵

It is crucial that the commentary be supportable with reference to the work:¹³⁶

[A] critic's interpretation must be rationally supportable by reference to the actual text he or she is evaluating, and [this standard] thus would not immunize situations analogous to that presented in *Milkovich*, in which a writer launches a personal attack, rather than interpreting a book.¹³⁷ . . . A critic's statement must be a rational assessment or account of something the reviewer can point to *in the text*, or *omitted from the text*, being critiqued.¹³⁸

Applying this test, the court concluded that “too much sloppy journalism,” supported by at least four of the five challenged examples from the book used in the review, could not be actionable. It would be understood to be opinion, was tied to the book, and constituted a supportable interpretation of the work.

Judge Edwards's opinion for the court is about criticism. “There is a long and rich history in our cultural and legal traditions,” he said, “of affording reviewers latitude to comment on literary and other works.”¹³⁹ But the standard he employed, based as it is on the proper method to analyze opinion in its context rather than simply the nature

135. *Id.* at 313.

136. *Id.*

137. The court distinguished the allegation by the sports columnist in *Milkovich*, that the plaintiff had lied under oath, from the *Moldea* facts. The assertion in *Milkovich*, that the plaintiff had perjured himself, was not protected because it was not tied to and supported by reference to the events being described, a wrestling meet and its aftermath.

Judge Edwards pointed out that had the book reviewer in *Moldea* falsely alleged that the book “was . . . badly written because its author was a drug dealer,” the review similarly would have been actionable. *Id.* at 315. “[T]he reviewer would simply be employing the medium of a book review as a vehicle for what would be a garden-variety libel” *Id.* Had the sports columnist-defendant in *Milkovich*, on the other hand, accused the plaintiff of being an inadequate or unsuccessful wrestling coach rather than a perjurer, that assertion in the context of sports journalism presumably would have fulfilled the *Moldea* test (assuming only that it constituted a “supportable interpretation” of the events being commented upon) and the column would therefore have been protected.

138. *Id.* at 315 (emphasis in original).

139. *Id.*

or history of criticism, is not limited to criticism.¹⁴⁰ It has implications that go well beyond it.

It may be useful to posit a post-*Moldea* standard generalized to state that (1) when an allegedly defamatory statement, in its particular context (for example, editorial, op-ed piece, sports column, review, or television commentary), would be expected to be opinion, (2) it is protected so long as (a) it is “tied to” the work or event being reviewed or commented upon and (b) it is a supportable interpretation of the work or event.¹⁴¹

*Partington v. Bugliosi*¹⁴² was rather more routine. It dealt with a lawyer’s memoir about one of his cases, later turned into a “docudrama” broadcast by a television network. The lawyer had successfully represented a defendant in a celebrated murder case; the plaintiff, in a separate trial, had unsuccessfully defended a man accused of the same crime. Not surprisingly, the first lawyer portrayed himself in complimentary terms; not so his comments about the plaintiff’s performance. The plaintiff alleged that the book and docudrama accused him of incompetence. The Ninth Circuit held it was merely critical opinion and therefore nonactionable.

The court employed an analysis drawn from its earlier opinion in *Unelko*.

[W]e examine [a] the work as a whole, [b] the specific context in which the statements were made, and [c] the statements themselves to determine whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact and therefore fall outside of the protection of the First Amendment.¹⁴³

140. Judge Edwards indicated that he thought the analysis went beyond literary and similar criticism by explaining its consistency with “situations analogous to that presented in *Milkovich*” which concerned statements by a sports columnist, not a book reviewer. *Id.*

141. See *Hunter v. Hartman*, 545 N.W.2d 699, 24 Media L. Rep. (BNA) 2004 (Minn. Ct. App. 1996) (similar analysis for interpretation of sportscaster’s criticism of performance of former college team physician).

This analysis bypasses reliance on *N.Y. Times Co. v. Sullivan*’s “actual malice” test. It therefore may require meritless cases to be disposed of early in the litigation process, before discovery into the state of mind of the defendant necessary to permit a court to address the “actual malice” question has begun.

142. *Partington v. Bugliosi*, 56 F.3d 1147, 23 Media L. Rep. (BNA) 1929 (9th Cir. 1995).

143. *Id.* at 1153 (citing *Unelko Corp. v. Rooney*, 912 F.2d 1049, 17 Media L. Rep. (BNA) 2317 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991)) (bracketed letters added); accord *Neumann v. Liles*, 358 Or. 706, 718–19, 369 P.3d 1117, 1124–25, 44 Media L. Rep. (BNA) 1433 (2016) (relying on and quoting *Partington*, 56 F.3d at 1153). This tripartite method of examination is, of course, very close to the four-part test set forth in

As for the “work as a whole,” the court concluded that the author’s observations in a book based on his own participation in a trial, itself subject to any number of varying interpretations, would be recognized by the reader as “the highly subjective opinions of the author rather than assertions of verifiable, objective facts.”¹⁴⁴

When, as here, an author writing about a controversial occurrence fairly describes the general events involved and offers his personal perspective about some of its ambiguities and disputed facts, his statements should generally be protected by the First Amendment. Otherwise, there would be no room for expressions of opinion by commentators, experts in a field, figures closely involved in public controversy, or others whose perspectives might be of interest to the public.¹⁴⁵

The court had no trouble reaching the same result with respect to the book-based docudrama.

We believe that viewers in this case would be sufficiently familiar with this genre to avoid assuming that all statements within them represent assertions of verifiable facts.¹⁴⁶

Employing the second part of the test, the court reviewed each particular statement complained of to see whether it implied provably false assertions of fact.¹⁴⁷ Each one, the court concluded, was clearly the author’s personal opinion.¹⁴⁸ Because the facts were set forth,

Ollman v. Evans, 750 F.2d 970, 979, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985), which had ostensibly been rejected by the Supreme Court in *Milkovich*. See section 4:2.3[B], *supra*.

144. *Partington*, 56 F.3d at 1154; see also *Weiner v. San Diego County*, 210 F.3d 1025, 1031 (9th Cir. 2000) (statement after acquittal in a retried case by the losing prosecutor that “this just proves that cases, unlike fine wine, get worse rather than better, with age” protected opinion); *Kaminske v. Wis. Cent. Ltd.*, 102 F. Supp. 2d 1066, 1080 (E.D. Wis. 2000) (statement by spokesman for defendant that he was disappointed in verdict for plaintiff protected opinion); *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 88 Cal. Rptr. 2d 843, 27 Media L. Rep. (BNA) 2364 (1999) (reference to plaintiff as “creepazoid attorney” and “loser wannabe lawyer”); *Thacker v. City of Hyattsville*, 135 Md. App. 268, 313, 762 A.2d 172, 196 (2000) (“In Maryland, when a statement is made in the form of an opinion, it becomes actionable ‘only if it implies the allegation of undisclosed facts as the basis for the opinion.’”) (citation omitted).

145. *Partington*, 56 F.3d at 1154.

146. *Id.* at 1155.

147. Comparable to the first part of the *Ollman* test: “the common usage or meaning of the specific language of the challenged statement itself.” *Ollman*, 750 F.2d at 979.

148. *Partington*, 56 F.3d at 1156 (citing *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227, 21 Media L. Rep. (BNA) 2161 (7th Cir. 1993)).

moreover, the reader would understand that they were meant to be opinion.¹⁴⁹

Last, the court reexamined the challenged statements to determine whether they were capable of being proved false.¹⁵⁰ The court found one lawyer's criticism of another's performance in court generally—and this lawyer's criticism of the plaintiff's defense of his client in particular—to be subjective statements not provably true or false. The court therefore concluded on this basis, too, that the alleged libels were nonactionable.¹⁵¹ On this score, the Ninth Circuit relied on pre-*Milkovich* case law, observing that *Milkovich* “does not disturb the long-standing rule that statements on matters of public concern, at least when media defendants are involved, are absolutely protected if they are not susceptible of being proved true or false.”¹⁵²

In *Levin v. McPhee*,¹⁵³ a well-known author had written a book about a collector of avant garde Soviet art. It contained a chapter treating the mysterious death of an artist in a fire in his Leningrad studio. It included five speculative accounts of how he may have died, some of them implicating both the K.G.B. and the plaintiff. Because the accounts were mere speculation based on disclosed facts, the Second Circuit held they were nonactionable opinion and dismissed the case. It relied on the New York Court of Appeals' interpretation of its state constitution, although the same result could well have been reached under post-*Milkovich* federal constitutional law.¹⁵⁴

Though the overall content of the book generally informs the reader that the book describes factual and historical accounts of real events, McPhee uses a number of clear signals to indicate to the reader that the versions of the events surrounding the studio fire were nothing more than conjecture and speculation.

* * *

[A] reasonable reader would understand that any allegations of murder, especially any implicating [the plaintiff], are nothing more than conjecture and rumor.¹⁵⁵

149. *Id.* at 1156–57. *See* section 4:3.2, *infra*.

150. Comparable to the second part of the *Ollman* test: verifiability. *Ollman*, 750 F.2d at 979.

151. *Partington*, 56 F.3d at 1157–58.

152. *Id.* at 1158, n.16 (citing *Milkovich*, 497 U.S. at 21); *see also* *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 133, 575 S.E.2d 858, 861–62 (2003) (similar).

153. *Levin v. McPhee*, 119 F.3d 189 (2d Cir. 1997).

154. *Id.* at 196–97.

155. *Id.* at 197; *see also* *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 250 (1st Cir. 2000) (“Here, the statement may be protected ‘opinion’ not because it is vague or judgmental but because it is speculative. The test, admittedly a

Finally, in *Riley v. Harr*,¹⁵⁶ the First Circuit addressed allegedly defamatory statements in the best-selling nonfiction book *A Civil Action* about the plaintiff, whose tannery may have contributed to the pollution that was the subject of the “civil action.” The court, in a wide-ranging discussion of protection for opinion, concluded that the statements in issue were privileged, partly because they reported speculation of others and partly because they contained the author’s own speculation based on an accurate description of facts that invited the book’s readers to come to their own conclusions as to whether the speculation was correct. For example, the assertion that the plaintiff had lied in a deposition was protected both because it was a report of a lawyer’s “inner musings about the evidence he was gathering,”¹⁵⁷ and because, even if the views were those of the author, the book “not only discussed . . . the facts underlying [Harr’s] views but also gave information from which readers might draw contrary conclusions.”¹⁵⁸

What if the defendant intends to state an opinion but a reasonable reader could understand the statement to be an allegation of fact? This situation commonly arises in the context of satire or parody when the recipient, or hypothetical “reasonable recipient,” of the communication just does not or would not “get it.” If the plaintiff is a public figure or public official, even an attempted but unsuccessful parody should be protected in light of the plaintiff’s inability to establish “actual malice”—that the defendant had the requisite knowledge that what was said, as he or she understood it, was false.¹⁵⁹

[B] Political Expression

Protection for statements of opinion must be applied in light of the justifications for protecting them. Debate about matters of public importance is itself of public importance.¹⁶⁰ Freedom to comment,

very crude one, is whether the statement is properly understood as purely speculation or, alternatively, implies that the speaker or writer has concrete facts that confirm or underpin the truth of the speculation.”) (citing, inter alia, *Levin*), cert. denied, 531 U.S. 1075 (2001); cf. *Howard v. Antilla*, 294 F.3d 244, 30 Media L. Rep. (BNA) 1936 (1st Cir. 2002) (holding that detailed discussion of the possible truth or falsity of a defamatory rumor about a public figure was not made with “actual malice”); accord *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 440 (Alaska 2004) (quoting *Gray*).

156. *Riley v. Harr*, 292 F.3d 282, 30 Media L. Rep. (BNA) 1961 (1st Cir. 2002).

157. *Id.* at 291.

158. *Id.* at 292 (quoting *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724, 730, 19 Media L. Rep. (BNA) 1786 (1st Cir.), cert. denied, 504 U.S. 974 (1992) (alteration in original)).

159. See section 5:5.2[G], *infra*.

160. Both under the common law, *Beauharnais v. Pittsburgh Courier Publ’g Co.*, 243 F.2d 705, 708 (7th Cir. 1957); *A.S. Abell Co. v. Kirby*, 227 Md. 267, 176 A.2d 340, 342, 90 A.L.R.2d 1264 (1961) (citing *HARPER & JAMES*,

particularly in the arena of politics, is encouraged as a matter of policy,¹⁶¹ and such protection is “indispensable to the exercise of freedom.”¹⁶² On balance, “[t]he social values inherent in a free interchange of opinion far outweigh the injury which such discussion might cause to a person in the public eye.”¹⁶³

Courts have therefore been particularly assiduous in using protections given opinion by common and constitutional law as tools to shelter strong, even outrageous, political speech.¹⁶⁴ Courts have been willing to read political invective as part of the political process and therefore worthy of unusually strong protection. The result is also

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- THE LAW OF TORTS § 525 (1956)); PROSSER ON TORTS 607 (2d ed. 1955); Edmonds v. Delta Democrat Publ'g Co., 230 Miss. 583, 93 So. 2d 171, 173 (1957), and under constitutional principles, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
161. See Ollman v. Evans, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985).
162. Julian v. Am. Bus. Consultants, Inc., 2 N.Y.2d 1, 137 N.E.2d 1, 155 N.Y.S.2d 1 (1956) (common-law principles).
163. Fisher v. Wash. Post Co., 212 A.2d 335, 337 (D.C. 1965); see also Sweeney v. Patterson, 128 F.2d 457 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942) (common-law principles); Pearson v. Fairbanks Publ'g Co., 413 P.2d 711, 713 (Alaska 1966).
164. See, e.g., Weyrich v. New Republic, 235 F.3d 617, 624–25, 29 Media L. Rep. (BNA) 1257 (D.C. Cir. 2001) (fact that statement that plaintiff was “paranoid” was about person devoted to partisan politics and appeared in “a magazine of political commentary” part of analysis in deciding that term was “rhetorical sophistry”); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 14 Media L. Rep. (BNA) 2281 (1988); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970); Koch v. Goldway, 817 F.2d 507, 14 Media L. Rep. (BNA) 1213 (9th Cir. 1987); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); Thomas v. News World Commc'ns, 681 F. Supp. 55, 15 Media L. Rep. (BNA) 1065 (D.D.C. 1988); Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277, 112 Cal. Rptr. 609 (1974); Maag v. Ill. Coal. for Jobs, 368 Ill. App. 3d 844, 858 N.E.2d 967, 306 Ill. Dec. 909 (2006) (critical statements about candidate for appellate judgeship); Meridian Star, Inc. v. Williams, 549 So. 2d 1332, 16 Media L. Rep. (BNA) 2446 (Miss. 1989); Julian v. Am. Bus. Consultants, Inc., 2 N.Y.2d 1, 137 N.E.2d 1, 155 N.Y.S.2d 1 (1956); Kilcoyne v. Plain Dealer Publ'g Co., 112 Ohio App. 3d 229, 678 N.E.2d 581 (1996); Clark v. Allen, 415 Pa. 484, 204 A.2d 42 (1964); cf. Ollman v. Evans, 750 F.2d 970, 1002, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (arguing that those who enter political arena must accept rough and personal debate in order to protect a vigorous marketplace of ideas), *cert. denied*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985); Seith v. Chi. Sun-Times, Inc., 371 Ill. App. 3d 124, 137–38, 861 N.E.2d 1117, 1129, 35 Media L. Rep. (BNA) 1630 (2007) (commenting, in applying the Illinois innocent construction rule, that “[a]lthough the fact that a statement is made as part of a political campaign is not an absolute defense against libel . . . , we note that when construing the meaning and value of a comment, one must consider the context, including the public

justified on the basis that the ordinary reader or listener will, in the context of political debate, assume that vituperation is some form of political opinion neither demonstrably true nor demonstrably false.¹⁶⁵

[C] Criticism

The law is particularly solicitous of criticism—artistic, literary, gustatory, and other. Although such protection stands on no different doctrinal footing from protection for nonfactual opinion generally, criticism is given particular breathing room because of its role in intellectual, social, and political life and its history.¹⁶⁶

Thus, for example, while *Moldea v. New York Times Co.*¹⁶⁷ suggests a broad rule for opinion,¹⁶⁸ its prescription for criticism is specific:

There is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works. . . . While a bad review necessarily has the effect of injuring an author's reputation to some extent—sometimes to a devastating extent . . . criticism's long and impressive pedigree persuades us that, while a critic's latitude is not unlimited, he or she must be given the "breathing space" appropriate to the genre. . . .

"The proper analysis would make commentary actionable only when the interpretations are *unsupportable by reference to the written work.*" This "supportable interpretation" standard provides that a critic's interpretation must be rationally supportable by reference to the actual text he or she is evaluating, and thus would not immunize situations . . . in which a writer launches a personal attack, rather than interpreting a book.¹⁶⁹

and social context of rhetoric uttered during a political campaign"); *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337, 37 A.L.R.4th 1070, 9 Media L. Rep. (BNA) 1769 (1983) (dicta) ("In cases involving political comment, there is a strong inclination to determine the remarks to be opinion rather than fact."); *George v. Fabri*, 345 S.C. 440, 455, 548 S.E.2d 868, 875 (2001) ("Th[e] value [of the right to 'elect[] the members of government'] must be protected with special vigilance.") (citation omitted); *West v. Thomson Newspapers*, 872 P.2d 999, 1019 (Utah 1994) ("Courts are much more likely to construe statements as opinion when they are made by participants in, and people who comment on, political campaigns.") (citations omitted).

165. See also sections 2:4.7 and 4:3.1[A], *supra*.

166. See, e.g., *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 22 Media L. Rep. (BNA) 1673 (D.C. Cir.), cert. denied, 513 U.S. 875 (1994) (book); *Mr. Chow v. Ste. Jour Azur S.A.*, 759 F.2d 219, 11 Media L. Rep. (BNA) 1713 (2d Cir. 1985) (restaurant); *Fisher v. Wash. Post Co.*, 212 A.2d 335, 337 (D.C. 1965) (art).

167. *Moldea*, 22 F.3d 310.

168. See section 4:3.1[A], *supra*.

169. *Moldea*, 22 F.3d at 315 (citations omitted; emphasis in original).

An author, athlete, or performer is likely to complain that a negative review injured him or her in his or her business, profession, or trade. But so long as the statement is directed to the work-product or performance, it is not actionable. A false allegation of fact about the author, athlete, or performer rather than the work, however, remains potentially actionable.¹⁷⁰

The Fourth Circuit has applied this approach to breezy critiques of the values of publicly traded securities.¹⁷¹ While eschewing a “doctrinal exemption” for such articles, the court said that “rarely would [such] a[n] article . . . prove actionable.”¹⁷²

[D] The Internet

In the same vein, some courts have recognized that Internet-borne communications, in the form of blogs, social media postings, reader-posted comments on established news sites, and the like, are frequently used as vehicles for often hyperbolic personal opinions. As a California court of appeal observed, “[n]ot only commentators, but courts as well have recognized that online blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts.”¹⁷³ Similarly, the New York appellate division opined that these media “encourage a freewheeling, anything-goes writing style,” and that “readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts.”¹⁷⁴

A judge in the U.S. District Court for the Southern District of New York specifically noted the familial relationship between the protection given for statements made on these Internet vehicles and that more generally available for communications in “place[s] usually devoted

170. *Id.*

171. *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180 (4th Cir. 1998).

172. *Id.* at 184 (quoting *Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1146, 22 Media L. Rep. (BNA) 1321, *modified in part on reh’g*, 22 F.3d 310, 22 Media L. Rep. (BNA) 1673 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994)).

173. *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 697, 142 Cal. Rptr. 3d 40, 60 (2012). The court quoted *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1162, 72 Cal. Rptr. 3d 231 (2008), for the proposition that “[t]he use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal.” And it quoted *Glob. Telemedia Int’l, Inc. v. John Doe 1*, 132 F. Supp. 2d 1261, 1267, 29 Media L. Rep. (BNA) 1385 (C.D. Cal. 2001), for its observation that Internet postings “are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings.” *Summit Bank*, 206 Cal. App. 4th at 697; *see also Bently Reserve LP v. Papaliolios*, 218 Cal. App. 4th 418, 429, 218 Cal. App. 4th 418, 426–27 (2013) (collecting cases).

174. *Sandals Resorts Int’l, Ltd. v. Google, Inc.*, 86 A.D.3d 32, 43–44, 925 N.Y.S.2d 407, 415–16 (1st Dep’t 2011).

to, or in a manner usually thought of as representing personal viewpoints”¹⁷⁵

[E] Academic Debate

Although opinion generally receives constitutional protection based on the argument that it is incapable of being proved true or false, in some cases it might be more accurate to say that courts *ought not* determine truth or falsity rather than that they *cannot*. It may be, for example, that whether the chemical “alar” causes cancer,¹⁷⁶ or whether there was a gunman on the “grassy knoll,”¹⁷⁷ *could* be decided by courts in the same manner that they decide other complex factual issues. The more meaningful question may be whether they *should* be. Judge Easterbrook commented that:

Scientific controversies must be settled by the methods of science rather than by the methods of litigation. More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around us.¹⁷⁸

The observation is as applicable to historical controversy as it is to scientific dispute. In *Groden v. Random House, Inc.*,¹⁷⁹ the court

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175. *Couloute v. Ryncarz*, 2012 U.S. Dist. LEXIS 20534, at *17, *20, 2012 WL 541089, at *5, *6 (S.D.N.Y. 2012) (quoting this treatise at section 4:3.1[A], *supra*; Judge Baer also relied on and quoted *Sandals*). *But see* *Varian Med. Sys., Inc. v. Delfino*, 113 Cal. App. 4th 273, 288–89, 6 Cal. Rptr. 3d 325, 337 (2003) (opining that the contents of Internet bulletin boards are not presumptively statements of opinion).
176. *See Auvil v. CBS “60 Minutes,”* 836 F. Supp. 740, 21 Media L. Rep. (BNA) 2059 (E.D. Wash. 1993), *cert. denied*, 517 U.S. 1167 (1996).
177. *See Groden v. Random House, Inc.*, 1994 U.S. Dist. LEXIS 11794, 1994 WL 455555, 22 Media L. Rep. (BNA) 2257 (S.D.N.Y. 1994), *aff’d*, 61 F.3d 1045, 23 Media L. Rep. (BNA) 2203 (2d Cir. 1995); section 3:12, *supra*.
178. *Underwager v. Salter*, 22 F.3d 730, 736, 22 Media L. Rep. (BNA) 1852 (7th Cir.) (citation omitted), *cert. denied*, 513 U.S. 943 (1994); *accord Underwager v. Dudley*, 75 F.3d 307 (7th Cir. 1996); *see also Ezrailson v. Rohrich*, 65 S.W.3d 373, 381–82 (Tex. App. 2001). *Ezrailson* held that an article employing erroneous analysis while questioning efficacy of plaintiff’s medical test was not actionable because defendant’s “hypothesis was shown to be incorrect; ‘and that in itself is an advance.’” *Id.* at 382 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)). “[I]n the area of medical science research, criticism of the creative research ideas of other medical scientists should not be restrained by fear of a defamation claim in the event the criticism itself also ultimately fails for lack of merit. [The possibility of liability] would serve to unduly restrict the free flow of ideas essential to medical science discourse.” *Id.*
179. *Groden v. Random House, Inc.*, 1994 U.S. Dist. LEXIS 11794, 1994 WL 455555, 22 Media L. Rep. (BNA) 2257 (S.D.N.Y. 1994), *aff’d*, 61 F.3d 1045, 23 Media L. Rep. (BNA) 2203 (2d Cir. 1995).

addressed a claim based on an advertisement for the book about the assassination of President Kennedy, *Case Closed*, which contained pictures of well-known conspiracy theorists, including the plaintiff, under the heading: “GUILTY OF MISLEADING THE AMERICAN PUBLIC.” The plaintiff sued, not for defamation, but on a variety of false advertising and invasion of privacy theories. Summary judgment was granted against him. The court held that the statement was to be treated as protected opinion because the facts of the assassination are unverifiable.

[T]he known evidence concerning the Kennedy assassination and the extensive debate over the Warren Commission’s findings demonstrate that the actual facts will never be verifiable to everybody’s satisfaction.

* * *

The assassination of President Kennedy has engendered a lively marketplace of competing theories. The fact that books advocating different views of this tragic event in American history continue to be published and promoted by persons such as plaintiff and the defendants is proof of the viability of that marketplace. As the Supreme Court has noted, “Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” The public interest in “uninhibited, robust, and wide-open” debate on public issues, is best served by allowing free competition between proponents of conflicting accounts of the Kennedy assassination, not by stifling it in the name of truth in advertising.¹⁸⁰

§ 4:3.2 Relationship Between Opinion and Underlying Facts

In a majority of jurisdictions, at common law, in order to rely on fair-comment protection, the defendant was required to set forth in the publication at issue the facts forming the basis for an opinion, unless they were widely known or available in the community. Otherwise, the opinion would lose its protection.¹⁸¹ Irrespective of whether they need

180. *Id.*, 1994 U.S. Dist. LEXIS 11794, at *21, *28–29, 1994 WL 455555, at *6, *9 (citations omitted).

181. *See* section 4:4.2, *infra*.

be stated, however, statements of underlying fact may be helpful to provide the context for understanding an opinion to be an opinion.¹⁸²

To describe a woman as a blackmailer, for example, might be to accuse her of a crime. But if there is first set forth an account of the underlying facts, a description of her dealings with a municipal agency relating to zoning negotiations, it becomes clear that the statement is but a hyperbolic form of opinion. Whether analyzed as hyperbole or as a statement not provably false, the comment is not actionable.¹⁸³

To say that a man is “insane” may be defamatory; but to explain first that he, a political newcomer, is planning a campaign against the most popular politician in the county makes it clear that “insanity” reflects no more than the speaker’s view of the candidate’s judgment or chances of success. The statement is hyperbolic and is not demonstrably false.

Similarly, both at common law and under constitutional principles, even when a statement of opinion is not explicitly defamatory, especially if it lacks an accurate statement of the facts upon which it is based, it may be understood to imply inaccurate allegations of fact that are defamatory.¹⁸⁴ “Liability for libel may attach . . . when a negative characterization of a person is coupled with a clear but false

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182. See *Partington v. Bugliosi*, 56 F.3d 1147, 23 Media L. Rep. (BNA) 1929 (9th Cir. 1995); *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724, 730–31, 19 Media L. Rep. (BNA) 1786 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992) (criticism protected because facts both disclosed and publicly available); *Ollman v. Evans*, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc) (presence of facts may suggest contested statement is only opinion), *cert. denied*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985).
183. See *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6 (1970), *reaffirmed in Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16, 17 Media L. Rep. (BNA) 2009 (1990); see also *Gold v. Harrison*, 88 Haw. 94, 962 P.2d 353, 26 Media L. Rep. (BNA) 2313 (1998) (calling judicial proceedings with adverse results “rape” not actionable); *Nat’l Ass’n of Gov’t Emps. v. Cent. Broad. Corp.*, 379 Mass. 220, 396 N.E.2d 996, 5 Media L. Rep. (BNA) 2078 (1979) (referring to plaintiff as communist is protected where basis for opinion, that plaintiff union warned person not to speak, was explicitly stated), *cert. denied*, 446 U.S. 935 (1980); *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 154, 623 N.E.2d 1163, 1168, 603 N.Y.S.2d 813, 21 Media L. Rep. (BNA) 2142 (1993) (“a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture”).
184. See *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 9 Media L. Rep. (BNA) 1257 (Colo. 1983); *Wiemer v. Rankin*, 117 Idaho 566, 790 P.2d 347, 17 Media L. Rep. (BNA) 1753 (1990); *Yancey v. Hamilton*, 786 S.W.2d 854, 17 Media L. Rep. (BNA) 1012 (Ky. 1989); *Mashburn v. Collin*, 355 So. 2d 879, 885, 3 Media L. Rep. (BNA) 1673 (La. 1977); *A.S. Abell Co. v. Kirby*, 227 Md. 267, 176 A.2d 340, 343, 90 A.L.R.2d 1264 (1961); *New York v. Grasso*, 21 A.D.3d 851, 801 N.Y.S.2d 584 (1st Dep’t 2005); *Lubin v. Kunin*, 17 P.3d 422, 426 (Nev. 2001) (per curiam); *Gross v. N.Y. Times Co.*,

implication that the author is privy to facts about the person that are unknown to the general reader.”¹⁸⁵ On the other hand:

When the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author’s interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed [defamatory] facts.¹⁸⁶

The test as to whether facts that may be actionable defamation have been implied “is whether a reasonable listener would take [the speaker] to be basing his ‘opinion’ on knowledge of facts of the sort that can be evaluated in a defamation suit.”¹⁸⁷

82 N.Y.2d 146, 153–54, 623 N.E.2d 1163, 603 N.Y.S.2d 813, 21 Media L. Rep. (BNA) 2142 (1993); *Trustco Bank of N.Y. v. Hearst Corp.*, 213 A.D.2d 940, 627 N.Y.S.2d 456 (3d Dep’t 1995); *Healey v. New Eng. Newspapers, Inc.*, 555 A.2d 321, 16 Media L. Rep. (BNA) 1753 (R.I.), *cert. denied*, 493 U.S. 814 (1989); RESTATEMENT (SECOND) OF TORTS § 566 (1977).

Opinions implying facts are sometimes referred to as “mixed opinions,” *see, e.g.*, *Lubin v. Kunin*, 17 P.3d 422, 426 (Nev. 2001) (per curiam); *Davis v. Boheim*, 24 N.Y.3d 262, 267, 22 N.E.3d 999, 1003, 998 N.Y.S.2d 131, 135 (2014) (“[A]n opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, is a ‘mixed opinion’ and is actionable.”) (brackets and some internal quotation marks omitted); *Trustco Bank of N.Y. v. Hearst Corp.*, 213 A.D.2d 940, 627 N.Y.S.2d 456 (3d Dep’t 1995); *Polish Am. Immigration Relief Comm., Inc. v. Relax*, 189 A.D.2d 370, 374, 596 N.Y.S.2d 756, 758, 21 Media L. Rep. (BNA) 1818 (1st Dep’t 1993), although that would seem to be equivalent to the phrase “mixed expressions of opinion and fact.” *See, e.g.*, *Mittelman v. Witous*, 135 Ill. 2d 220, 242, 142 Ill. Dec. 232, 552 N.E.2d 973 (1989).

185. *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913, 2 Media L. Rep. (BNA) 1545 (2d Cir.), *cert. denied*, 434 U.S. 834, 3 Media L. Rep. (BNA) 1128 (1977); *see also Barnes v. Horan*, 841 So. 2d 472 (Fla. Dist. Ct. App. 2002). That a harsh opinion is based on undisclosed facts does not render it actionable. It is implied specific false and defamatory implications that may permit liability. *See ZL Techs., Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 800 (N.D. Cal. 2010), *aff’d sub nom. ZL Techs., Inc. v. Gartner Grp., Inc.*, 433 F. App’x 547 (9th Cir.), *cert. denied*, 181 L. Ed. 2d 295 (2011).
186. *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995); *accord Partington v. Bugliosi*, 56 F.3d 1147, 23 Media L. Rep. (BNA) 1929 (9th Cir. 1995) (citing *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 21 Media L. Rep. (BNA) 1449 (4th Cir. 1993), *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 22 Media L. Rep. (BNA) 1673 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994), and *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724, 19 Media L. Rep. (BNA) 1786 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992)); *Beattie v. Fleet Nat’l Bank*, 746 A.2d 717, 721 (R.I. 2000) (citing *Yagman*).
187. *Sullivan v. Conway*, 157 F.3d 1092, 1097 (7th Cir. 1998) (citing, inter alia, *Milkovich*, 497 U.S. at 18–23).

The *Restatement (Second) of Torts*¹⁸⁸ takes a similar view: “A defamatory communication may consist of a statement in the form of an opinion; but a statement of this nature is actionable . . . if it implies the allegation of undisclosed defamatory facts as the basis of the opinion.”¹⁸⁹ Thus, to say “in my opinion she is a thief” or “I believe he is incompetent” may imply that the speaker is aware of facts which, if made known to the reader, would demonstrate an act of theft or of incompetence.¹⁹⁰ But if the defendant in the first example had explained that the opinion was based upon an unusually low price paid by the plaintiff to purchase property from a municipality, or in the second case had referred to the losing streak of the basketball team coached by the plaintiff, or if in either case those underlying facts were generally known to the defendant’s audience, then statements as to theft or incompetence would be understood as statements of opinion not demonstrably false, and protected as such.

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

189. *Accord* *Hammer v. City of Osage Beach*, 318 F.3d 832, 843 (8th Cir. 2003) (Mo. law); *Ramunno v. Cawley*, 705 A.2d 1029 (Del. 1998) (citing *Kanaga v. Gannett Co.*, 687 A.2d 173, 25 Media L. Rep. (BNA) 1684 (Del. 1996)); *Hamilton v. Hammons*, 792 So. 2d 956, 960 (Miss. 2001) (citing the *Restatement*). In its commentary, the *Restatement* takes the position that an expression of opinion based on disclosed or assumed nondefamatory facts “is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.” RESTATEMENT (SECOND) OF TORTS § 566 cmt. c. The rationale is that in such a case, the recipient can see from the communication itself that there is no defamatory factual statement, a position that is derived from constitutional principles. This position has been taken by a number of courts, but the rationale often given is that the disclosed facts allow the recipient to evaluate the merits of the opinion. *See, e.g.*, *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57, 23 Media L. Rep. (BNA) 1929 (9th Cir. 1995) (quoted in text at note 194, *infra*); *Sall v. Barber*, 782 P.2d 1216, 16 Media L. Rep. (BNA) 1700 (Colo. Ct. App. 1989); *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462, 8 Media L. Rep. (BNA) 2233 (1982); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, 2 Media L. Rep. (BNA) 2169, *cert. denied*, 434 U.S. 969 (1977).

For a helpful exposition of the *Restatement* position and citation to case law adopting it, see *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1439 & n.15 (9th Cir. 1995) (applying constitutional principles protecting defamatory opinion to disciplinary proceedings arising out of lawyer’s criticism of a judge).

190. *Cf. Nat’l Ass’n of Gov’t Emps. v. Cent. Broad. Corp.*, 379 Mass. 220, 227, 396 N.E.2d 996, 1001, 5 Media L. Rep. (BNA) 2078 (1979) (citation omitted), *cert. denied*, 446 U.S. 935 (1980):

[I]f I write, without more, that a person is an alcoholic, I may well have committed a libel *prima facie*; but it is otherwise if I write that I saw the person take a martini at lunch and accordingly state that he is an alcoholic.

To say that an agent “screwed” his client may imply knowledge of facts demonstrating that the agent unfairly dealt with the client; the opinion could, therefore, be defamatory.¹⁹¹ If it were based on an accurate statement of facts—for example, that the plaintiff received an unusually high commission—the statement would be hyperbole. To say a person was engaged in a “scam” might be an actionable allegation of fact,¹⁹² but where the statement is accompanied by the fact that what the plaintiff was selling commercially was available elsewhere free or at significantly lower cost, it is opinion.¹⁹³

[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.¹⁹⁴

In any case, if an opinion is based on a falsely stated allegation of fact, of course, the false allegation would not receive protection.¹⁹⁵

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191. *Rand v. N.Y. Times Co.*, 4 Media L. Rep. (BNA) 1556 (Sup. Ct. N.Y. Cty. 1978).
192. *Kolegas v. Heftel Broad. Corp.*, 154 Ill. 2d 1, 607 N.E.2d 201, 180 Ill. Dec. 307, 20 Media L. Rep. (BNA) 2105 (1992); *Kumaran v. Brotman*, 247 Ill. App. 3d 216, 617 N.E.2d 191, 198–99, 186 Ill. Dec. 952, 21 Media L. Rep. (BNA) 1833 (1993).
193. *NBC Subsidiary, Inc. v. Living Will Ctr.*, 879 P.2d 6 (Colo. 1994), *cert. denied*, 514 U.S. 1015 (1995).
194. *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57, 23 Media L. Rep. (BNA) 1929 (9th Cir. 1995) (describing cases reaching similar position in other jurisdictions), *quoted with approval in* *Riley v. Harr*, 292 F.3d 282, 289, 30 Media L. Rep. (BNA) 1961 (1st Cir. 2002) (author protected when describing factual situation accurately and drawing own defamatory factual conclusion so long as he implicitly invited readers to draw their own conclusions from those facts); *accord* *Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 700, 28 Media L. Rep. (BNA) 2017 (D. Md. 2000) (referring to plaintiff, publisher of online financial newsletter, as an “unpaid promoter” of securities “because [it is] not paid by the companies for publishing reports, but acknowledge[s] that [it] do[es] or might trade in shares of the companies [it is] writing about” protected because it is opinion based on disclosed statement of fact), *aff’d*, 248 F.3d 1133 (4th Cir. 2001) (table); *Balderman v. Am. Broad. Cos.*, 292 A.D.2d 67, 73, 738 N.Y.S.2d 462, 467, 30 Media L. Rep. (BNA) 1729 (4th Dep’t 2002) (“Given [the] disclosed facts, the allegedly defamatory statements . . . would be understood by the average person hearing them as personal surmise built upon those facts.”) (citation and internal quotation marks omitted).
195. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990) (“Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.”).

“A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning.”¹⁹⁶

If you say simply that a person is a “rat,” you are not saying something definite enough to allow a jury to determine whether what you are saying is true or false. If you say he is a rat because . . . , whether you are defaming him depends on what you say in the because clause.¹⁹⁷

Thus, whether a statement that may or may not be an epithet is to be understood in its epithetical sense can depend on the allegations of fact accompanying it.¹⁹⁸

“That [a defendant] considered facts in forming its opinions does not mean that the opinions are objectively verifiable” and therefore factual for these purposes.¹⁹⁹ “Based upon the relative value that [the defendant] assigns to different criteria, [it] weighs the importance of certain facts differently. The weight it applies to these facts is not verifiable. . . .”²⁰⁰

The Utah Supreme Court has identified a key difference between the opinion/fact relationship under pre-*Milkovich* constitutional and common-law approaches. Under the former an opinion was actionable if it implied or was based upon stated false and *defamatory* facts. The common law, on the other hand, protects only opinion based on facts truly stated. If it is based on materially false statements protection is lost irrespective of whether the false factual assertions are defamatory or not. *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994) (no common-law protection, on motion to dismiss complaint, where nondefamatory facts on which opinion was based allegedly false; state constitutional protection prevailed nonetheless because allegedly false allegations of fact not defamatory).

196. *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995) (conclusion that judge was anti-Semitic explicitly drawn from accurate statement that he had sanctioned three Jewish lawyers protected as opinion).

197. *Dilworth v. Dudley*, 75 F.3d 307 (7th Cir. 1996) (ellipses in original).

198. *Id.* at 309; *cf.* *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1185–87 (10th Cir. 2007) (detailing difference between protection provided by the *Restatement* and by *Milkovich*, but concluding, “In sum, we find little difference between § 566 and the *Milkovich* standard . . .”).

199. *ZL Techs., Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 798 (N.D. Cal. 2010), *aff’d sub nom.* *ZL Techs., Inc. v. Gartner Grp., Inc.*, 433 F. App’x 547 (9th Cir.), *cert. denied*, 181 L. Ed. 2d 295 (2011).

200. *Id.* (citing *Aviation Charter, Inc. v. Aviation Research Grp./US*, 416 F.3d 864, 870 (8th Cir. 2005) and *Browne v. Avvo Inc.*, 525 F. Supp. 2d 1249, 1252, 36 Media L. Rep. (BNA) 1444 (W.D. Wash. 2007)).

“[N]othing in *Milkovich* altered these” principles.²⁰¹ Once the facts are correctly stated, an author’s views about them are neither provably true nor provably false and therefore are protected under *Hepps*.

As *Milkovich* explicitly noted,²⁰² moreover, if a derogatory statement of fact is stated or implied about a public-figure or public-official plaintiff, it remains subject to the standard of “actual malice” protection; if the statement is about a private plaintiff on a matter of public concern, “fault” must be proven under *Gertz*.

§ 4:3.3 Epithet and Rhetorical Hyperbole As Nonactionable

In *Milkovich*,²⁰³ the Supreme Court reaffirmed as a matter of constitutional principle what had been generally understood at common law,²⁰⁴ that rhetorical hyperbole, vigorous epithets, and loose, figurative language are types of speech protected from state libel actions. They cannot reasonably be interpreted as assertions of fact.²⁰⁵ Protection of such speech “provides assurance that public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our nation.”²⁰⁶ Thus, in *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*,²⁰⁷ the defendant’s reference to the plaintiff’s store as “trashy” was held by the First Circuit to be protected, reflecting, the court said, “the reality that exaggeration and non-literal commentary have become an integral part of social discourse.”²⁰⁸ And in *Horsley v. Rivera*,²⁰⁹ the Eleventh Circuit held protected as hyperbole under both the First Amendment and state law a statement by a talk-show host that an antiabortion protestor was, inter alia, an “accomplice to homicide” because he hosted a website that listed the crossed-out name of a murdered doctor who had performed abortions. “[N]o reasonable viewer would have concluded that [the defendant] was

201. Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1439 n.151 (9th Cir. 1995).

202. *Milkovich*, 497 U.S. at 20–21.

203. *Id.* at 20.

204. See section 2:4.7, *supra*.

205. *Milkovich*, 497 U.S. at 20.

206. *Id.* (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 14 Media L. Rep. (BNA) 2281 (1988)).

207. *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 26 Media L. Rep. (BNA) 1161 (1st Cir. 1997).

208. *Id.* at 128.

209. *Horsley v. Rivera*, 292 F.3d 695, 30 Media L. Rep. (BNA) 1847 (11th Cir. 2002).

literally contending that [the plaintiff] could be charged with a felony in connection with [the doctor's] murder."²¹⁰

Name-calling, too, is recognized as such by the listener.²¹¹ It is not susceptible to a determination of truth or falsity and, indeed, "negate[s] the impression that the writer was seriously maintaining" a statement of fact.²¹² It is protected either because the names are "mere epithets" or because such language constitutes nothing more than strongly worded views neither provably true nor false—what was once simply dismissed as opinion.²¹³ Characterizing it as opinion not demonstrably false provides an alternative constitutional buttress to the common-law proposition that epithets and vituperation are not actionable.²¹⁴

The relationship between these types of speech and the concept of opinion is in some respects paradoxical. A major policy reason for

210. *Id.* at 702; *see also* *Horsley v. Feldt*, 304 F.3d 1125, 30 Media L. Rep. (BNA) 2389 (11th Cir. 2002) (similar statements about same plaintiff protected, but suggestion that he had advance knowledge of murder of doctor who performed abortions potentially actionable).

211. *Rowland v. Fayed*, 14 Media L. Rep. (BNA) 1257 (D.C. Super. 1987); *cf.* *Koch v. Goldway*, 817 F.2d 507, 14 Media L. Rep. (BNA) 1213 (9th Cir. 1987).

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

213. *See, e.g.*, *Beauharnais v. Pittsburgh Courier Publ'g Co.*, 243 F.2d 705 (7th Cir. 1957); *Klahr v. Winterble*, 4 Ariz. App. 158, 418 P.2d 404 (1966); *Good Gov't Grp., Inc. v. Superior Court*, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572, 4 Media L. Rep. (BNA) 2082 (1978), *cert. denied*, 441 U.S. 961 (1979); *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976); *Steinhausen v. HomeServices of Neb., Inc.*, 289 Neb. 927, 857 N.W.2d 816 (2015); *Ward v. Zelikovsky*, 136 N.J. 516, 643 A.2d 972 (1994); *see also* section 2:4.7, *supra*.

214. *See, e.g.*, *Hickey v. Capital Cities/ABC, Inc.*, 19 Media L. Rep. (BNA) 1980 (D. Or. 1992) (constitutional analysis relying on *Milkovich*); *Henderson v. Times Mirror Co.*, 669 F. Supp. 356, 14 Media L. Rep. (BNA) 1659 (D. Colo. 1987), *aff'd*, 876 F.2d 108 (10th Cir. 1989) (pre-*Milkovich* constitutional analysis); *Overhill Farms, Inc. v. Lopez*, 190 Cal. App. 4th 1248, 1262, 119 Cal. Rptr. 3d 127, 140 (2010) (concluding that a charge of employment discrimination based on race was actionable, while observing in dicta that "general statements charging a person with being racist, unfair or unjust—without more— . . . constitute mere name calling and do not contain a provably false assertion of fact" required for a successful defamation claim); *Piersall v. SportsVision of Chi.*, 230 Ill. App. 3d 503, 595 N.E.2d 103, 172 Ill. Dec. 40, 20 Media L. Rep. (BNA) 1223 (1992) (use of term "liar"); *Pease v. Tel. Publ'g Co.*, 121 N.H. 62, 426 A.2d 463, 465, 7 Media L. Rep. (BNA) 1114 (1981) ("journalistic scum of the earth"); *Ward v. Zelikovsky*, 136 N.J. 516, 538–40, 643 A.2d 972, 983–84 (1994) (reference to plaintiffs as anti-Semitic); *Covino v. Hagemann*, 627 N.Y.S.2d 894 (Sup. Ct. Richmond Cty. 1995) (allegation of racism); *Condit v. Clermont Cty. Review*, 110 Ohio App. 3d 755, 675 N.E.2d 475 (1996) (calling plaintiff political activist a fascist and anti-Semitic not actionable).

permitting derogatory or harsh opinion is that to prohibit it would be a serious incursion on political, intellectual, and ideological processes;²¹⁵ mere name-calling, in contrast, is suffered because, among other things, it is too trivial for courts to bother with.²¹⁶

§ 4:3.4 Expression of Opinion Not Genuinely Held

If the defendant falsely reports that others hold an ill opinion of the plaintiff, the report would properly be considered a false statement of fact—the existence of the opinions is for this purpose a fact—upon which a cause of action for defamation may lie.²¹⁷ But with regard to the speaker's own stated views, if the plaintiff can prove that the opinion similarly is not in fact sincerely held, can the statement be actionable? Some courts have held that it can.²¹⁸ Unlike most commentary, an opinion that is not genuinely believed—a review by a drama critic, for instance, who pans a show he rather likes because it has been produced by his hated brother-in-law—can, like the falsely reported opinions of others, legitimately be said to be false.²¹⁹ It is also not “self-expression” and can claim no value as a “good unto itself.”

under Ohio state constitutional protection for opinion); *Yeagle v. Collegiate Times*, 255 Va. 293, 497 S.E.2d 136, 26 Media L. Rep. (BNA) 2337 (1998) (calling plaintiff, university's vice president of student affairs, “Director of Butt Licking,” not statement of fact and therefore not actionable).

215. See section 4:3.1[B], *supra*.

216. See section 2:4.7, *supra*.

217. See, e.g., *Aisenson v. Am. Broad. Cos.*, 220 Cal. App. 3d 146, 269 Cal. Rptr. 379, 17 Media L. Rep. (BNA) 1881 (1990); *Wheeler v. Neb. State Bar Ass'n*, 244 Neb. 786, 508 N.W.2d 917, 923 (1993).

218. See *Sierra Breeze v. Superior Court*, 86 Cal. App. 3d 102, 149 Cal. Rptr. 914, 4 Media L. Rep. (BNA) 2141 (1978); *Fisher v. Wash. Post Co.*, 212 A.2d 335 (D.C. 1965); *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 149 A.2d 193, 206 (1959); *Leers v. Green*, 24 N.J. 239, 131 A.2d 781, 789 (1957); *Julian v. Am. Bus. Consultants, Inc.*, 2 N.Y.2d 1, 8, 137 N.E.2d 1, 155 N.Y.S.2d 1 (1956); RESTATEMENT OF TORTS § 606(1)(b) [1938].

The Supreme Court in *Milkovich*, 497 U.S. 1, 20 n.7 (1990), in discussing “opinion” in a constitutional context, distinguished between an analysis of the falsity of actionable defamatory facts implied by a statement and falsity in the sense that the “opinion” stated was not actually held by the speaker. The former would serve as the basis of a defamation action, “though falsity [of the latter] may serve to establish malice where that is required for recovery.” This accords with the modern English “fair comment” approach which appears to be that failure of the defendant to hold an expressed view is evidence that the plaintiff may use to prove common-law malice that will defeat the privilege, but does not establish that the comment is not “fair.” See *Telnikoff v. Matusevitch*, 4 All E.R. 817, 824–25 (House of Lords 1991).

219. *Franklin and Bussel* cite this example but conclude, “Because a naked statement of dislike or lack of respect cannot be proved false, we would

Some courts have held, nonetheless, that insincerely held opinions are protected, too, provided the facts supporting them are set forth;²²⁰ the logic of *Milkovich* does not change that conclusion. Perhaps that approach may be justified on the theory that protection of insincere opinions is required in order to protect sincere ones; that defendants ought not to face litigation about the sincerity of their beliefs each time they express one. “There simply is no viable way to distinguish between reviews written by those who honestly believe a book is bad, and those prompted solely by mischievous intent.”²²¹ A comparable rationale has been stated for the protection of false statements of fact in order to preserve the freedom to speak the truth.²²²

It is, of course, the case that a false attribution of a statement to the plaintiff to the effect that he intended to harm a third person may be actionable as a false statement of fact—that is, the plaintiff did not in fact make the statement—even if the plaintiff’s purported statement itself is deemed to be a statement of opinion.²²³

§ 4:3.5 Statements Held to Be Nonactionable

There is a host of cases in which the distinction between fact and opinion has been applied. Although many of the decisions were rendered pre-*Milkovich*—under the common law or the *Gertz* regime of absolute protection—they remain illustrative and would likely be decided the same way today. Courts have, for example, held the following statements to be nonactionable:

- Union officials are “willing to sacrifice the interests of the members of their union to further their own political aspirations and personal ambitions.”²²⁴
- A teacher was the “worst teacher,” a “babbler,” and “terrorized” by student action.²²⁵

conclude that insincerely held views are not actionable as defamations.” *The Plaintiff’s Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 868 n.165 (1984). That does not address the question, is it not demonstrably false to state as a belief a belief not in fact held?

220. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 381, 397 N.Y.S.2d 943, 366 N.E.2d 1299, 2 Media L. Rep. (BNA) 2169, *cert. denied*, 434 U.S. 969 (1977).

221. *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 320, 22 Media L. Rep. (BNA) 1673 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994).

222. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974).

223. *Tharpe v. Saunders*, 285 Va. 476, 737 S.E.2d 890, 41 Media L. Rep. (BNA) 1505 (2013).

224. *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425, 17 Cal. 3d 596, 131 Cal. Rptr. 641, 643 (1976).

225. *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 225 Cal. App. 3d 720, 275 Cal. Rptr. 494, 18 Media L. Rep. (BNA) 1602 (1990).

- A city manager would “stoop to any form of action . . . [in his] power to . . . stay in office,” and has assumed “the position of . . . dictator” and that the city’s affairs had descended to a “mutinous character.”²²⁶
- An obscure version of *Phantom of the Opera* was a “Fake Phantom,” a “rip-off, a fraud, a scandal, a snake-oil job.”²²⁷
- An employee was guilty of “favoritism” and a “brown nose” in the context of an employee grievance session.²²⁸
- A mayor “often misleads” reporters.²²⁹
- An elected county supervisor voted “to squander property tax funds for [an] airport.”²³⁰
- A judge is incompetent and ought to be removed from office.²³¹
- A charity was charging “hefty mark-ups” on goods shipped to American troops in the Persian Gulf.²³²
- A political candidate has “unfailingly injected a religious atmosphere into a political campaign” and that he has “attempted to becloud the issue by appeals to the ignorant, the prejudiced and the uninformed.”²³³

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226. Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277, 284, 112 Cal. Rptr. 609, 613 (1974).
227. Phantom Touring, Inc. v. Affiliated Publ’ns, 953 F.2d 724, 19 Media L. Rep. (BNA) 1786 (1st Cir.), cert. denied, 504 U.S. 974 (1992); see also Colodny v. Inverson, Yoakum, Papiano & Hatch, 936 F. Supp. 917 (M.D. Fla. 1996) (reference to plaintiff’s controversial book on Watergate as a “fraud” in letter to the editor not actionable).
228. Lund v. Chi. & Nw. Transp. Co., 467 N.W.2d 366 (Minn. Ct. App. 1991).
229. Craig v. Moore, 4 Media L. Rep. (BNA) 1402 (Fla. Cir. Ct. Duval Cty. 1978).
230. Sierra Breeze v. Superior Court, 86 Cal. App. 3d 102, 149 Cal. Rptr. 914, 4 Media L. Rep. (BNA) 2141 (1978).
231. Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, 2 Media L. Rep. (BNA) 2169, cert. denied, 434 U.S. 969 (1977); cf. Hopewell v. Vitullo, 299 Ill. App. 3d 513, 701 N.E.2d 99, 233 Ill. Dec. 456 (1998) (statement that plaintiff was terminated as employee of political campaign “because of incompetence,” without more, not actionable); Starnes v. Capital Cities Media, Inc., 19 Media L. Rep. (BNA) 2115 (Ill. App. Ct. 1992) (plaintiff behavior termed “a disgrace to the judiciary” not actionable).
232. Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 21 Media L. Rep. (BNA) 1449 (4th Cir. 1993); see also NBC Subsidiary, Inc. v. Living Will Ctr., 879 P.2d 6 (Colo. 1994) (referring to privately sold “living will” package much of which was obtainable free or at lesser cost as “scam” and buyers as “totally taken” held to be opinion), cert. denied, 514 U.S. 1015 (1995).
233. Devany v. Shulman, 184 Misc. 613, 53 N.Y.S.2d 401 (Bronx Cty. 1944), aff’d, 269 A.D. 1022, 59 N.Y.S.2d 401 (1st Dep’t 1945).

- A city council's choice for office "appeared" to have paid off a political debt and came from people who had "demonstrated a penchant for cronyism."²³⁴
- Will Rogers, who said he never met a man he didn't like, never met the plaintiff, a candidate for public office.²³⁵
- "Sure a lot of people know someone who's gone bad . . . but [the plaintiff] knows nothing but bad people."²³⁶
- "[S]ometimes a [named legislator's] change of heart comes from the pocket."²³⁷
- A California Superior Court judge was "a bad guy."²³⁸
- A reporter who had been part of an environmental group and reported on the energy business had a conflict of interest.²³⁹
- That the plaintiff was "able to parlay" publicity with respect to his role in a college basketball program "into a . . . basketball scholarship for his son."²⁴⁰
- That a judge was anti-Semitic, based on the disclosed fact that he had disciplined three Jewish lawyers, and that he was intellectually "dishonest."²⁴¹
- That the plaintiff was "a very poor lawyer."²⁴²
- That plaintiffs, Kennedy assassination "conspiracy theorists," were "guilty of misleading the American public."²⁴³
- Use of "Highway Robbery" as title for television report on automobile collision appraisal services.²⁴⁴

234. *Salvo v. Salem News Publ'g Co.*, 4 Media L. Rep. (BNA) 1856 (Mass. Dist. Ct. Essex Cty. 1978).

235. *Miller v. Bakersfield News-Bulletin, Inc.*, 44 Cal. App. 3d 899, 119 Cal. Rptr. 92 (1975).

236. *Lynch v. N.J. Educ. Ass'n*, 161 N.J. 152, 735 A.2d 1129 (1999).

237. *Sillars v. Collier*, 151 Mass. 50, 23 N.E. 723 (1890), *quoted in Salvo v. Salem News Publ'g Co.*, 4 Media L. Rep. (BNA) 1856 (Mass. Dist. Ct. Essex Cty. 1978).

238. *Aisenson v. Am. Broad. Cos.*, 220 Cal. App. 3d 146, 269 Cal. Rptr. 379, 17 Media L. Rep. (BNA) 1881 (1990).

239. *Savage v. Pac. Gas & Elec. Co.*, 21 Cal. App. 4th 434, 444–45, 26 Cal. Rptr. 2d 305, 22 Media L. Rep. (BNA) 1737 (1993), *cert. denied*, 513 U.S. 820 (1994).

240. *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 447 S.E.2d 293, 22 Media L. Rep. (BNA) 2337 (1994).

241. *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995).

242. *Sullivan v. Conway*, 157 F.3d 1092 (7th Cir. 1998).

243. *Groden v. Random House, Inc.*, 61 F.3d 1045, 23 Media L. Rep. (BNA) 2203 (2d Cir. 1995); *Lane v. Random House, Inc.*, 985 F. Supp. 141, 23 Media L. Rep. (BNA) 1385 (D.D.C. 1995).

244. *Dulgarian v. Stone*, 420 Mass. 843, 652 N.E.2d 603 (1995).

- That the plaintiff, a college basketball coach, “usually finds a way to screw things up.”²⁴⁵
- That the plaintiff, an amateur mathematician, was a “crank,” based on an evaluation of his published work.²⁴⁶
- That the plaintiff’s store was “trashy,”²⁴⁷ or that the plaintiff “ripped off” a customer by suggesting the need for an unnecessary purchase.²⁴⁸
- Reference to a university’s vice president of student affairs as the “Director of Butt Licking.”²⁴⁹
- Reference to the plaintiff, losing contestant on television program, as “local loser,” “chicken butt,” and a “big skank.”²⁵⁰
- That a councilman “did not consistently serve the interests of the City,” “usurp[ed] the functions of the City Manager,” “dictated appointments in violation of the charter,” “forced out of office useful employees of the City,” “had as little respect for sound business usage in [his] conduct of the City’s affairs as [he] showed for the charter or the merit system in the municipal service,” “did not always . . . take the highest and best bids when selling, and the lowest when buying,” and “lack[ed] that conscientious regard for the City’s interest which makes the City office a public trust.”²⁵¹
- That “in the aggregate, the data in this [appraiser’s] report combines to present such a misleading indication of the value of this property as to be considered fraudulent,” when combined with a statement of the facts on which the opinion was based.²⁵²
- That the plaintiff, active in partisan politics, “began to experience sudden bouts of pessimism and paranoia—early symptoms

245. *Washington v. Smith*, 893 F. Supp. 60 (D.D.C. 1995), *aff’d*, 80 F.3d 555 (D.C. Cir. 1996).

246. *Dilworth v. Dudley*, 75 F.3d 307 (7th Cir. 1996).

247. *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 26 Media L. Rep. (BNA) 1161 (1st Cir. 1997).

248. *Jaillett v. Ga. Television Co.*, 238 Ga. App. 885, 520 S.E.2d 721 (1999). The *Jaillett* court observed that if use of the term implies an unstated false assertion of fact, it can support an action for defamation.

249. *Yeagle v. Collegiate Times*, 255 Va. 293, 497 S.E.2d 136, 26 Media L. Rep. (BNA) 2337 (1998).

250. *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 119 Cal. Rptr. 2d 108, 30 Media L. Rep. (BNA) 1691 (2002); *cf. Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 88 Cal. Rptr. 2d 843, 27 Media L. Rep. (BNA) 2364 (1999) (reference to plaintiff as “creepazoid attorney” and “loser wannabe lawyer” not actionable).

251. *Taylor v. Lewis*, 132 Cal. App. 381, 22 P.2d 569 (1933).

252. *Beattie v. Fleet Nat’l Bank*, 746 A.2d 717 (R.I. 2000).

- of the nervous breakdown that afflicts conservatives today.”²⁵³
- In a note from one art dealer to another, that the first “had no reason to take” the plaintiff, a person seeking to buy a very expensive painting, “seriously.”²⁵⁴
 - In a radio talk show, statement that a sportscaster and his guest “really slobbered over each other, I mean, I really thought they were going to start performing oral sex on one another, it was so sickening.”²⁵⁵
 - In a handbill, that a company proposing to build a trash transfer station was a “trash terrorist.”²⁵⁶
 - A dog race-track operator’s reference to a dog kennel’s “sub-standard and poor performers.”²⁵⁷
 - A credit rating by a ratings service.²⁵⁸
 - A Better Business Bureau’s “D-” rating of the plaintiff’s home improvement company.^{258.1}
 - That a former publisher of a newspaper “wrought damage to’ the [paper’s] finances, reputation, business relationships, morale, and quality of its editorial product.”²⁵⁹
 - That the plaintiff was being terminated for “continuing issues” or for “disloyal and disruptive activity.”²⁶⁰
 - That the behavior of the defendant, a dismissed employee, “did not comport with the [unspecified] standards that [the employer] expects of its employees.”²⁶¹

253. *Weyrich v. New Republic*, 235 F.3d 617, 621, 29 Media L. Rep. (BNA) 1257 (D.C. Cir. 2001).

254. *Jaszai v. Christie’s*, 279 A.D.2d 186, 719 N.Y.S.2d 235 (1st Dep’t 2001).

255. *Finebaum v. Coulter*, 854 So. 2d 1120 (Ala. 2003).

256. *Diehl v. Kintz*, 162 S.W.3d 152 (Mo. Ct. App. 2005).

257. *Yates v. Iowa W. Racing Ass’n*, 721 N.W.2d 762 (Iowa 2006).

258. *Compuware Corp. v. Moody’s Inv’rs Servs.*, 499 F.3d 520, 529 (6th Cir. 2007) (the rating is protected opinion although the underlying statement of facts may be actionable defamation).

258.1. *Perfect Choice Exteriors, LLC v. Better Bus. Bureau of Cent. Ill., Inc.*, 99 N.E.3d 541, 549 & n.2, 421 Ill. Dec. 297, 305 & n.2 (Ill. App. 2018) (citing Better Business Bureau cases from Missouri and Texas intermediate appellate courts, and a federal court of appeals case and a federal district court case involving ratings by ratings agencies).

259. *Rose v. Hollinger Int’l, Inc.*, 383 Ill. App. 3d 8, 13–17, 889 N.E.2d 644, 649–52, 321 Ill. Dec. 371 (2008) (cataloging previous Illinois cases distinguishing between actionable assertions of fact and nonactionable expressions of opinion).

260. *Chambers v. Travelers Cos.*, 668 F.3d 559, 565 (8th Cir. 2012).

261. *Rosen v. Am. Isr. Pub. Affairs Comm., Inc.*, 41 A.3d 1250 (D.C. Ct. App. 2012).

- That the plaintiff, in business dealings with an organization with which she was affiliated, was acting contrary to the organization's conflict-of-interest policy.²⁶²
- That a doctor, who had allegedly treated the defendant's father insensitively, was referred to by an unidentified nurse as "a real tool."²⁶³
- That, according to a compilation by the defendant—a website proprietor of reviews submitted by consumers—the plaintiff's hotel was "the dirtiest hotel in America" in 2001.²⁶⁴
- Patently wild accusations on blog that the plaintiffs, acting with respect to a corporate bankruptcy, were engaged in "illegal activity," including "corruption," "fraud," "deceit on the government," "money laundering," "defamation," "harassment," "tax crimes," and "fraud against the government."²⁶⁵
- That the plaintiff, a securities trader, was a "sucker," "fool," "frontman," "industrial waste," "pilot[]" of the "ship of doom," and [a] "crook[] or moron[]."²⁶⁶
- An "Expression of Concern" published both online and in hard copy by the defendant American Diabetes Association questioning aspects of the plaintiff's work that had previously been published in the Association's "prominent research publication," *Diabetes*.²⁶⁷
- Suggestions in newspaper articles that a musician public figure may, to some extent, have been responsible for an associate's suicide.²⁶⁸
- That the plaintiff owned and operated a "puppy mill."^{268.1}

262. Coghlan v. Beck, 984 N.E.2d 132, 148, 2013 IL App (1st) 120891, 368 Ill. Dec. 407 (Ill. App. Ct. 2013) (citing California and Pennsylvania cases).

263. McKee v. Laurion, 825 N.W.2d 725, 733 (Minn. 2013).

264. Seaton v. Trip Advisor LLC, 728 F.3d 592, 598 (6th Cir. 2013).

265. Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284, 1293, 42 Media L. Rep. (BNA) 1186 (9th Cir. 2014) (applying test from Partington v. Bugliosi, 56 F.3d 1147, 1153 (9th Cir. 1995): "The test considers '(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false.'" (citation omitted).

266. Chau v. Lewis, 771 F.3d 118 (2d Cir. 2014).

267. Saad v. Am. Diabetes Ass'n, 123 F. Supp. 3d 175 (D. Mass. 2015).

268. Scholz v. Bos. Herald, Inc., 473 Mass. 242, 41 N.E.3d 38, 43 Media L. Rep. (BNA) 3172 (2015).

268.1. Smith v. Humane Soc'y of U.S., 519 S.W.3d 789, 801–02 (Mo. 2017) (en banc) ("As used in the [defendant's] report, the term 'puppy mill' is

- Reference to plaintiff white supremacist radio host as a “leader” of the Ku Klux Klan.^{268.2}

The Second Circuit, applying New Jersey law, held that actions indicating that the defendant suspected the plaintiff of a crime was nonactionable opinion.²⁶⁹

§ 4:3.6 Statements Held to Contain Allegations of Fact

It has nevertheless been held that the statement that the agent of a rock singer “screwed” his client might be actionable because, in the particular context, it suggested knowledge of underlying facts of unfair dealing.²⁷⁰

An allegation that the plaintiffs, Vietnamese refugees, “supported communism and the Viet Cong government” was a statement of fact, not opinion.²⁷¹

The Ninth Circuit decided that criticism of the actions of the corporate owner and operator of mobile home parks that included allegations that the plaintiff’s actions were “rent gouging at its worst” and indicative of “corporate greed,” that some “residents have already been forced to surrender their homes,” and that the plaintiff’s rent increase was well above the fair market rent for similar spaces, could be construed by a jury to constitute false allegations of fact.²⁷² The Fourth Circuit ruled that a jury might find actionable a statement by a union managerial employee that the plaintiff, a dismissed union organizer, “was not a good organizer” because “it is at least arguably an opinion that might be construed as implying [the fact of the

imprecisely used as ‘rhetorical hyperbole’ and a ‘lustly and imaginative expression of the contempt’ of political advocates during a hotly contested political campaign that cannot, therefore, ‘reasonably [be] interpreted as stating actual facts.’ . . . Unlike the ‘number’ of violations, which can be quantified, the ‘severity’ of a kennel’s violations is based purely on a subjective assessment . . . Accordingly, whether Ms. Smith’s kennel was one of the ‘Dirty Dozen’ or one of ‘the worst licensed kennels in the state’ is a subjective assessment based on the ‘number’ and the ‘severity’ of her kennel’s state and federal violations, which is not provable as false, and, therefore, as a matter of law does not present a basis for an actionable defamation claim.” (citations omitted; brackets in original).

268.2. Although a white supremacist and a public figure, the plaintiff was not in fact a member, or “leader,” of the Klan.

269. *Lee v. Bankers Tr. Co.*, 166 F.3d 540, 546–47 (2d Cir. 1999) (citing *Milkovich*, 497 U.S. at 18–20).

270. *Rand v. N.Y. Times Co.*, 4 Media L. Rep. (BNA) 1556 (Sup. Ct. N.Y. Cty. 1978).

271. *Duc Tan v. Le*, 177 Wash. 2d 649, 300 P.3d 356 (2013).

272. *Manufactured Home Cmty., Inc. v. County of San Diego*, 544 F.3d 959 (9th Cir. 2008).

plaintiff's] failure to fulfill the duties of his position."²⁷³ It was a statement of fact to say that members of the city council accepted "thirty pieces of silver" apiece in connection with a municipal contract with a garbage removal service, because the only conceivable meaning was that the members had, in fact, been bribed.²⁷⁴ It may be a factual allegation to say that a man is a "crook" without stating the basis for that conclusion.²⁷⁵ And it was an allegation of "bald and unambiguous fact," at least in the early 1950s, to refer to an entity as "communist dominated."²⁷⁶

It was a provably false statement of fact to imply that the plaintiff committed perjury in *Milkovich*,²⁷⁷ and would be to imply that a lawyer invited a witness to commit perjury.²⁷⁸ The republication of the statement of another may add the context necessary to understand that a statement is an assertion of fact: The Second Circuit concluded that an assertion published in a directory of professionals involved in gender discrimination litigation that a third person referred to the plaintiff as an "ambulance chaser" who took only "slam dunk" cases was a provably false assertion of fact.²⁷⁹ And the Ninth Circuit held it was potentially actionable for a television commentator to say of plaintiff's product, "It didn't work."²⁸⁰

It is a statement of fact to publish allegations of failure to perform an official duty by a state commissioner where specific alleged

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273. *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 306 (4th Cir. 2002).
274. *Catalano v. Pechous*, 69 Ill. App. 3d 797, 25 Ill. Dec. 838, 387 N.E.2d 714, 4 Media L. Rep. (BNA) 2094 (1978), *aff'd*, 83 Ill. 2d 146, 50 Ill. Dec. 242, 419 N.E.2d 350, 6 Media L. Rep. (BNA) 2511 (1980), *cert. denied*, 451 U.S. 911 (1981).
275. *See Hill, Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1231 (1976). *Contra Dubinsky v. United Airlines Master Exec. Council*, 303 Ill. App. 3d 317, 324, 708 N.E.2d 441, 236 Ill. Dec. 855 (1999) (calling plaintiff a "crook" not actionable when made without further context provided); *Klein v. McGauley*, 29 A.D.2d 418, 288 N.Y.S.2d 751, 755 (2d Dep't 1968) ("crook" a general expression of opprobrium, not slanderous "per se" unless it refers to a specific indictable crime).
276. *Utah State Farm Bureau v. Nat'l Farm Union Serv. Corp.*, 198 F.2d 20, 23, 33 A.L.R.2d 1186 (10th Cir. 1952).
277. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 Media L. Rep. (BNA) 2009 (1990).
278. *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 6649 N.E.2d 825, 25 N.Y.S.2d 477, 23 Media L. Rep. (BNA) 1532 (1995) (susceptible to a defamatory meaning).
279. *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 28 Media L. Rep. (BNA) 1329 (2d Cir. 2000).
280. Plaintiff could not prove that it did, so defendant prevailed nonetheless. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 17 Media L. Rep. (BNA) 2317 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991).

instances are cited²⁸¹ and to say that the plaintiff, promoting a charitable event, was “not for real” and was “scamming,” and that there was no such event.²⁸² And it has been observed that “[t]he greater number of courts have held that the imputation of a corrupt or dishonorable motive in connection with established facts is itself to be classified as a statement of fact and as such not to be within the defense of fair comment.”²⁸³

The statement that the plaintiff, a land developer, had “done well through poorly maintained properties” was defamatory because it might suggest that he had “prospered from rents gleaned from dilapidated, sub-standard buildings, or that he ha[d] failed to observe governing building and health codes.”²⁸⁴ The statement “CEO Dave Fitzgerald demoted [Executive Creative Director] Mark Gettner [in 2002] after poor performance” was a statement of fact about the reason for Gettner’s demotion and not a statement of opinion about his performance.²⁸⁵ And an insurance adjustor’s assertions that the plaintiff, a lawyer, “just takes peoples’ money” and that his clients “would receive more money [for their claims] if they had not hired [the lawyer] and had dealt with the adjuster [directly],” were held not to be statements of opinion because they could be proved to be false.²⁸⁶ Similarly, the allegation that the plaintiff, a public official, was stalking (misspelled “stocking”) the defendant, a frequent opponent of the plaintiff, was actionable.^{286.1}

Charges of specific criminal conduct, even when phrased as opinion, have been held to be actionable. The oft-stated reason is that such charges are too “laden with factual content” to be protected as opinion and cannot be saved even by cautionary language.²⁸⁷

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281. *Murphy v. Farmers Educ. & Coop. Union*, 72 N.W.2d 636 (N.D. 1955) (there were also suggestions of bribes and moonlighting and that the status of the official was “errand boy” for the industry he was charged with regulating).
282. *Kolegas v. Heftel Broad. Corp.*, 154 Ill. 2d 1, 607 N.E.2d 201, 180 Ill. Dec. 307, 20 Media L. Rep. (BNA) 2105 (1992).
283. *A.S. Abell Co. v. Kirby*, 227 Md. 267, 176 A.2d 340, 343, 90 A.L.R.2d 1264 (1961) (citing PROSSER ON TORTS 622 [2d ed. 1955]); THAYER, LEGAL CONTROL OF THE PRESS § 66 (3d ed. 1956)).
284. *Ramunno v. Cawley*, 705 A.2d 1029, 1037 (Del. 1998).
285. *Gettner v. Fitzgerald*, 297 Ga. App. 258, 261–62, 677 S.E.2d 149, 154 (2009).
286. *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 636 S.E.2d 447, 449 (2006) (brackets in original).
- 286.1. *Irish v. Hall*, 163 Idaho 603, 416 P.3d 975 (2018) (observing that “stalking” is a crime in Idaho).
287. *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 63, 6 Media L. Rep. (BNA) 1625 (2d Cir. 1980). The *Cianci* court specifically rejected the position of the RESTATEMENT (SECOND) OF TORTS § 566 (1977), and would have denied protection for such a statement even had all the underlying facts

Similar allegations in different contexts have been held to be fact under one circumstance and opinion under another. Suggestions of pro-Nazi sentiments or anti-Semitism, for example, have been held privileged as fair comment or constitutionally protected in several cases,²⁸⁸ although such allegations were held to be statements of fact capable of a defamatory meaning in another.²⁸⁹ The assertion that someone is a “liar” may be either a nonactionable statement of opinion or an actionable statement of fact depending on the circumstances in which the statement is made.²⁹⁰

been disclosed. *Accord* Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995) (citing *Cianci*); Vern Simms Ford, Inc. v. Hagel, 42 Wash. App. 675, 713 P.2d 736 (1986).

The New York Court of Appeals, however, has flatly denied the existence of any such principle. *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 155, 623 N.E.2d 1163, 1169, 603 N.Y.S.2d 813, 21 Media L. Rep. (BNA) 2142 (1993) (“Although plaintiff repeatedly suggests otherwise, there is simply no special rule of law making criminal slurs actionable regardless of whether they are asserted as opinion or fact.”). The Ninth Circuit once implied as much. *See Lewis v. Time, Inc.*, 710 F.2d 549, 9 Media L. Rep. (BNA) 1984 (9th Cir. 1983).

288. *Potts v. Dies*, 132 F.2d 734 (D.C. Cir. 1942) (commentary on plaintiff’s published work praising Adolf Hitler), *cert. denied*, 319 U.S. 762 (1943); *Sullivan v. Meyer*, 141 F.2d 21 (D.C. Cir.), *cert. denied*, 322 U.S. 743 (1944); *Ashotegiazaryan v. Zalmanyev*, 880 F. Supp. 2d 494 (S.D.N.Y. 2012); *Dall v. Pearson*, 246 F. Supp. 812 (D.D.C. 1963), *cert. denied*, 380 U.S. 965 (1965); *see also* Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995) (conclusion that judge was anti-Semitic explicitly drawn from accurate statement that he had sanctioned three Jewish lawyers protected as opinion).
289. *Holy Spirit Ass’n v. Sequoia Elsevier Publ’g Co.*, 4 Media L. Rep. (BNA) 2311 (Sup. Ct. N.Y. Cty. 1979) (statement that plaintiff religious organization “is a theological-political instrument, combining elements of Manicheism, Nazi-style anti-Semitism [and] Calvinism . . .’ is not couched in opinion form. Indeed, it has a scholarly aura about it which implies that the author is privy to facts about plaintiff that are unknown to the general reader . . .”).
290. *Madison v. Frazier*, 539 F.3d 646 (7th Cir. 2008) (statement that the plaintiff lied was an objectively verifiable statement of fact in context, albeit not actionable because not published with “actual malice”); *Cook v. Winfrey*, 141 F.3d 322, 26 Media L. Rep. (BNA) 1586 (7th Cir. 1998) (whether “liar” was an allegation of fact was a factual issue not resolvable on motion to dismiss); *Gill v. Del. Park, LLC*, 294 F. Supp. 2d 638 (D. Del. 2003) (use of the term “liar” in the course of trading charges about horse racing a nonactionable opinion); *Piersall v. SportsVision of Chi.*, 230 Ill. App. 3d 503, 172 Ill. Dec. 40, 595 N.E.2d 103, 107 (1992) (general statement that someone is a “liar” without a specific factual context is nonactionable opinion). *See* discussion of term at note 126, *supra*.

§ 4:3.7 Judge and Jury

The vast majority of courts, and all of the federal circuits, agree that whether a statement is fact or opinion is a matter of law for the court to decide.²⁹¹ Since this agreement is consistent with the view that opinion is protected as a matter of constitutional law, it is the responsibility of courts to “examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause to the Fourteenth Amendment, protect.”²⁹²

Some state courts, however, take the position that

[w]here the statements are unambiguously fact or opinion . . . the court determines as a matter of law whether the statements are of fact or opinion. However, where the alleged defamatory remarks

291. See, e.g., *Turner v. Wells*, 879 F.3d 1254, 1262–63 (11th Cir. 2018); *Knieval v. ESPN*, 393 F.3d 1068, 1073–74, 33 Media L. Rep. (BNA) 1097 (9th Cir. 2005); *Hammer v. City of Osage Beach*, 318 F.3d 832, 842 (8th Cir. 2003) (Mo. law); *Dilworth v. Dudley*, 75 F.3d 307 (7th Cir. 1996); *Mr. Chow v. Ste. Jour Azur S.A.*, 759 F.2d 219, 11 Media L. Rep. (BNA) 1713 (2d Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 11 Media L. Rep. (BNA) 1433 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127, 11 Media L. Rep. (BNA) 2015 (1985); *Baker v. L.A. Herald Examiner*, 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206, 13 Media L. Rep. (BNA) 1159 (1986), *cert. denied*, 479 U.S. 1032 (1987); *Owen v. Carr*, 113 Ill. 2d 273, 497 N.E.2d 1145, 100 Ill. Dec. 783 (1986); *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 225 Cal. App. 3d 720, 275 Cal. Rptr. 494, 18 Media L. Rep. (BNA) 1602 (1990); *NBC Subsidiary, Inc. v. Living Will Ctr.*, 879 P.2d 6 (Colo. 1994), *cert. denied*, 514 U.S. 1015 (1995); *Piersall v. SportsVision of Chi.*, 230 Ill. App. 3d 503, 595 N.E.2d 103, 172 Ill. Dec. 40, 20 Media L. Rep. (BNA) 1223 (1992); *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 612 N.E.2d 1158, 1162 (1993) (“If ‘the statement unambiguously constitutes either fact or opinion’”); *Lund v. Chi. & Nw. Transp. Co.*, 467 N.W.2d 366 (Minn. Ct. App. 1991); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 381, 397 N.Y.S.2d 943, 366 N.E.2d 1299, 2 Media L. Rep. (BNA) 2169 (citing Nat’l Ass’n of Letter Carriers v. Austin, 418 U.S. 264 (1974)), *cert. denied*, 434 U.S. 969 (1977); *Wampler v. Higgins*, 93 Ohio St. 3d 111, 752 N.E.2d 962, 29 Media L. Rep. (BNA) 2377 (2001); *Mathias v. Carpenter*, 587 A.2d 1, 18 Media L. Rep. (BNA) 1818 (Pa. Super. Ct. 1991); *WJLA-TV v. Levin*, 264 Va. 140, 156, 564 S.E.2d 383, 392 (2002); *Williams v. Garraghty*, 249 Va. 224, 455 S.E.2d 209, *cert. denied*, 516 U.S. 814 (1995).

[I]n effect the judge is being asked whether a reasonable jury could find the term defamatory, and that obviously is a judgment that cannot be left to the jury.

292. *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996).
N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

could be determined either as fact or opinion, the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury.²⁹³

Whatever the rule, of course, a court may on appropriate facts determine as a matter of law that a statement before it is not provably false and therefore not actionable.²⁹⁴

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293. *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 77–78, 155 Cal. Rptr. 29, 39, 5 Media L. Rep. (BNA) 1113, *cert. denied*, 444 U.S. 984 (1979) (citing *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976), and *Good Gov't Grp., Inc. v. Superior Court*, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572, 4 Media L. Rep. (BNA) 2082 (1978), *cert. denied*, 441 U.S. 961 (1979)); *see also* *Goldwater v. Ginzburg*, 261 F. Supp. 784, 786 (S.D.N.Y. 1966), *aff'd*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Yetman v. English*, 168 Ariz. 71, 811 P.2d 323 (1991) (statement by one politician about another, “What kind of communist do we have [here],” capable of defamatory meaning; jury to decide whether it was so understood) and cases cited therein; *Bently Reserve LP v. Papaliolios*, 218 Cal. App. 4th 418, 427–28, 218 Cal. App. 4th 418, 430 (2013); *Campanelli v. Regents of the Univ. of Cal.*, 44 Cal. App. 4th 572, 578, 51 Cal. Rptr. 2d 891, 895 (1996); *Kahn v. Bower*, 232 Cal. App. 3d 1599, 284 Cal. Rptr. 244, 19 Media L. Rep. (BNA) 1236 (1991); *Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 500 N.E.2d 794, 796–97, 13 Media L. Rep. (BNA) 1779 (1986) (“The determination whether a statement is a factual assertion or an opinion is a question of law if the statement unambiguously constitutes either fact or opinion. . . . However, if a statement is susceptible of being read by a reasonable person as either a factual statement or an opinion, it is for the jury to determine.”); *Miller v. Jones*, 114 Nev. 1291, 970 P.2d 571 (1998); *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337, 37 A.L.R.4th 1070, 9 Media L. Rep. (BNA) 1769 (1983); *Davis v. Boenheim*, 24 N.Y.3d 262, 272, 22 N.E.3d 999, 1006, 998 N.Y.S.2d 131, 138 (2014) (“[O]n a motion to dismiss we consider whether any reading of the complaint supports the defamation claim. Thus, although it may well be that the challenged statements are subject to defendants’ interpretation the motion to dismiss must be denied if the communication at issue, taking the words in their ordinary meaning and in context, is also susceptible to a defamatory connotation.”) (brackets and internal quotation marks omitted).
294. *Burns v. Denver Post, Inc.*, 5 Media L. Rep. (BNA) 1105 (Colo. Dist. Ct.), *aff'd*, 5 Media L. Rep. (BNA) 2004 (Colo. 1979); *Catalano v. Pechous*, 69 Ill. App. 3d 797, 25 Ill. Dec. 838, 387 N.E.2d 714, 723, 4 Media L. Rep. (BNA) 2094 (1978) (*dicta*), *aff'd*, 83 Ill. 2d 146, 50 Ill. Dec. 242, 419 N.E.2d 350, 6 Media L. Rep. (BNA) 2511 (1980), *cert. denied*, 451 U.S. 911 (1981) (citing *Hahnemannian Life Ins. Co. v. Beebe*, 48 Ill. 87 (1868)).

Courts have on occasion noted that, where opinion is involved, early dismissal of unwarranted litigation is peculiarly appropriate to safeguard the free-expression interests involved. *See, e.g.*, *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994); *cf.* section 16:3.1[A], *infra*.

§ 4:3.8 Advertising and Commercial Speech

Opinion contained in commercial speech is likely as protected as opinion in other contexts,²⁹⁵ although the fact that it is in an advertisement may influence the court's appraisal of whether a statement is provably false and therefore actionable by the context in which it is found.²⁹⁶ But assuming only that under *Hepps*, the burden of proof as to falsity remains with a plaintiff in a commercial setting, the mere fact that an evaluative statement is made in an advertisement rather than an editorial or from a soap box does not in itself make it any more provably false and therefore actionable.

§ 4:3.9 Appellate Review

Milkovich stated explicitly that, because protection for statements claimed to be nonactionable under that opinion is a matter of constitutional law, appellate courts must make an independent search of the record and decide de novo whether a statement for which protection is claimed should be accorded protection.²⁹⁷

§ 4:4 Common-Law Fair-Comment Privilege²⁹⁸

§ 4:4.1 Generally

The common-law fair-comment privilege is now largely obsolete as a result of developments in constitutional doctrine. It may nonetheless

295. Lane v. Random House, Inc., 985 F. Supp. 141, 23 Media L. Rep. (BNA) 1385 (D.D.C. 1995); Groden v. Random House, Inc., 1994 U.S. Dist. LEXIS 11794, 1994 WL 455555, 22 Media L. Rep. (BNA) 2257 (S.D.N.Y. 1994), *aff'd*, 61 F.3d 1045, 23 Media L. Rep. (BNA) 2203 (2d Cir. 1995). Note, however, that the *Groden* court of appeals was of the apparent view that the advertisement for a book about the Kennedy assassination was not commercial speech. 61 F.3d at 1052. Compare the discussion of the application of *New York Times v. Sullivan* to commercial speech, section 5:6, *infra*.

See generally STEVEN G. BRODY & BRUCE E.H. JOHNSON, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE (2d ed. 2004).

296. *See* section 4:3.1, *supra*.

297. *Milkovich*, 497 U.S. at 17; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

298. "Fair comment" was once dealt with as just one of the many qualified common-law privileges; chapter 9 is devoted to those privileges. Texas has a statute incorporating "fair comment." TEX. CIV. PRAC. & REM. CODE § 73.002(b)(2); *see, e.g.*, Golden Bear Distrib. Sys., Inc. v. Chase Revel, Inc., 708 F.2d 944, 9 Media L. Rep. (BNA) 1857 (5th Cir. 1983) (Tex. law).

retain some vitality in the wake of *Milkovich*, especially by filling in gaps in protection that remain.²⁹⁹

The fair-comment privilege was established primarily to protect public debate by sheltering communications about matters of public concern.³⁰⁰ Other threads of rationale underlying the protection are:

- that comment cannot be “false” and therefore cannot be actionable;³⁰¹
- that comment will be understood to be merely an individual viewpoint and will therefore tend not to injure reputation;³⁰² and
- that, so long as the factual basis for commentary is set forth or readily available, as the common-law privilege requires, readers may judge for themselves the validity of the opinion expressed.³⁰³

§ 4:4.2 Underlying Facts, Stated and Unstated

Courts in most states have held that fair comment is privileged only if it is based upon facts “truly stated.”³⁰⁴ The question is therefore

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299. See *Jankovic v. Int’l Crisis Grp.*, 593 F.3d 22, 38 Media L. Rep. 1399 (D.C. Cir. 2010) (noting that the defendant invoked the fair-comment privilege, albeit unsuccessfully); *Lane v. Random House, Inc.*, 985 F. Supp. 141, 23 Media L. Rep. (BNA) 1385 (D.D.C. 1995) (applying common-law privilege post-*Milkovich*); *Cassidy v. Merin*, 244 N.J. Super. 466, 582 A.2d 1039, 1048 (1990) (same). Statements not about matters of public interest may also require common-law protection. See section 4:2.4[C], *supra*.
300. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13, 17 Media L. Rep. (BNA) 2009 (1990); RESTATEMENT OF TORTS § 606(1) (1938). “The fair comment privilege developed because common law courts recognized early on that actions for defamation could frustrate the valuable discourse fostered by the free flow of evaluative ideas.” West v. Thomson Newspapers, 872 P.2d 999, 1013 (Utah 1994) (citation omitted).
301. See, e.g., *Potts v. Dies*, 132 F.2d 734 (D.C. Cir. 1942), *cert. denied*, 319 U.S. 762 (1943).
302. Cf. discussion of epithets in section 2:4.7, *supra*.
303. See, e.g., *Leers v. Green*, 24 N.J. 239, 131 A.2d 781, 787–88 (1957); *Holy Spirit Ass’n v. Sequoia Elsevier Publ’g Co.*, 4 Media L. Rep. (BNA) 2311 (Sup. Ct. N.Y. Cty. 1979).
304. See *Mashburn v. Collin*, 355 So. 2d 879, 885, 3 Media L. Rep. (BNA) 1673 (La. 1977); see also *Piscatelli v. Smith*, 424 Md. 294, 315, 35 A.3d 1140, 1152, 40 Media L. Rep. (BNA) 1262 (2012) (“The fair comment privilege protects an opinion only where the facts on which it is based are truly stated or privileged or otherwise known either because the facts are of common knowledge or because, though perhaps unknown to a particular recipient of the communication, they are readily accessible to him.”) (internal quotation marks omitted); *Parsons v. Age-Herald Publ’g Co.*, 181 Ala. 439, 450, 61 So. 345, 350 (1913) (“The privilege is limited to

whether the “subject matter was indicated with sufficient clarity to justify the comment being made.”³⁰⁵ The rule finds justification in the view that, if the facts are stated, readers are able to judge for themselves whether the comment is well-founded.³⁰⁶ An unsound comment on disclosed facts should reflect more on the person making it than on the person about whom comment is made.

The privilege extends also to comments on facts that are common knowledge or readily accessible to the reader.³⁰⁷ This extension protects continuing commentary on matters with which the reader is likely already to be familiar, such as headline news, without requiring the publisher to repeat on each occasion the details of the event. It also protects artistic, gustatory, and similar reviews.

It would, of course, be impossible for a motion-picture reviewer to convey a critical review only after publishing the “facts” on which it is based; it would be more difficult still to convey the “facts” upon which a review of a restaurant is based, short of sharing a meal with each reader, listener, or watcher. Any of them can, at least theoretically, determine the facts by attending the proper motion-picture theater or dining at the designated restaurant. Whether he or she would want to do so after reading a particularly unfavorable review is open to doubt.³⁰⁸

comment or criticism, and must be with regard to admitted or proven facts or conduct. Such comment should not go beyond the expression of legitimate inference, conclusion, or opinion, based upon such matters; and, if it does, it cannot be regarded as fair.”)

305. *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 149 A.2d 193, 206 (1959).

306. *Brewer v. Hearst Publ'g Co.*, 185 F.2d 846, 850 (7th Cir. 1950); *Leers v. Green*, 24 N.J. 239, 131 A.2d 781 (1957); *Holy Spirit Ass'n v. Sequoia Elsevier Publ'g Co.*, 4 Media L. Rep. (BNA) 2311 (Sup. Ct. N.Y. Cty. 1979).

307. *See Fisher v. Wash. Post Co.*, 212 A.2d 335, 338 (D.C. 1965); *Mashburn v. Collin*, 355 So. 2d 879, 96 A.L.R.3d 590, 3 Media L. Rep. (BNA) 1673 (La. 1977); RESTATEMENT OF TORTS § 606(a)(ii) (1938). *Mashburn* is a particularly interesting, scholarly opinion. The Supreme Court of Louisiana considered a colorful, devastating critique of a restaurant: “T’aint Cajun, t’aint French, t’aint Country American, t’aint good.” It called the restaurant “a travesty of pretentious amateurism,” and described the food as covered by “hideous sauces,” one of which was an “ugly sauce that tastes too sweet and thick and makes you want to scrape off the glop.” The fare, according to the review, included “badly overcooked fish” and “trout à la green plague.” It was held constitutionally protected. On these principles, adverse comment on an unpublished manuscript arguably would not be protected. Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1243 (1976).

308. *See Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1146, 22 Media L. Rep. (BNA) 1321, *modified on reh'g*, 22 F.3d 310, 22 Media L. Rep. (BNA) 1673

In determining whether facts upon which a comment is based are accurate, the rules of construction applicable to the proof of truth come into play.³⁰⁹ Minor errors of fact, such as who followed whom in order of presentation of a critically reviewed program, do not constitute falsity,³¹⁰ so long as the “gist” or “sting” of the factual allegations is accurate.³¹¹ Nor can liability attach if the underlying facts, although false, are privileged, since it is the privileged factual allegation, not the opinion, that is slanderous or libelous.³¹²

§ 4:4.3 Protection for Misstatement of Underlying Facts

According to the minority view, comment remains privileged, at least under certain circumstances, even if the underlying facts upon which it is based are inaccurately stated or, in some cases, even if they are not stated at all.³¹³

In a seminal decision by the District of Columbia Circuit, factual allegations contained in commentary about a congressman were held to be broadly privileged on the basis of fundamental principles of democratic debate.³¹⁴

This comprehensive privilege seems to have been largely limited to public officials and candidates for public office. Outside the political arena, in the majority of jurisdictions the privilege has generally been

(D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994). It is indeed difficult, for example, to imagine a remaining desire to dine at the restaurant reviewed by the critic in *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977), or to attend a performance of the Cherry Sisters, *Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901), after reading the *Des Moines Register's* reviews of their act—although the Cherry Sisters apparently prospered after the reviews began rolling in. See Michael Gartner, *Fair Comment*, AM. HERITAGE, Oct. 1982, at 28–31.

309. See section 3:7, *supra*.

310. *Orbach v. N.Y. News, Inc.*, 3 Media L. Rep. (BNA) 2229 (Sup. Ct. N.Y. Cty. 1978).

311. *La Rocca v. N.Y. News, Inc.*, 156 N.J. Super. 59, 383 A.2d 451, 3 Media L. Rep. (BNA) 2048 (1978).

312. *Cole Fischer Rogow, Inc. v. Carl Ally, Inc.*, 29 A.D.2d 423, 288 N.Y.S.2d 556, 563–64 (1st Dep't 1968), *aff'd on other grounds*, 25 N.Y.2d 943, 305 N.Y.S.2d 154, 252 N.E.2d 633 (1969) (citing 1 HARPER & JAMES, THE LAW OF TORTS 456 (1956)); *Yerkie v. Post-Newsweek Stations*, 470 F. Supp. 91, 94, 4 Media L. Rep. (BNA) 2566 (D. Md. 1979) (citing *Brush-Moore Newspapers, Inc. v. Pollitt*, 220 Md. 132, 151 A.2d 530 (1959)).

313. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 n.20 (1964); see also *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). After *New York Times*, more courts have adopted this view. See, e.g., *Klahr v. Winterble*, 4 Ariz. App. 158, 418 P.2d 404 (1966); *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A.2d 251 (1975).

314. *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942).

“restricted to extend protection only to opinion, not to misstatements of fact.”³¹⁵ It was the minority view protecting mistaken statements of fact about political matters that provided the basis for the doctrine enunciated by the Supreme Court in *New York Times Co. v. Sullivan*.³¹⁶

§ 4:4.4 Persons Subject to Fair Comment

Under the common law, courts defined people subject to fair comment according to their involvement in matters of “public interest,”³¹⁷ “public concern,”³¹⁸ or both,³¹⁹ or their dealings in matters of public importance.³²⁰ Discussion of political personages was particularly well guarded,³²¹ but any persons who presented themselves or their services or goods to the public were considered to be open to criticism with respect to the offering.³²²

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315. *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 81, 2 Media L. Rep. (BNA) 2201 (D.C. Super. 1977), *aff'd*, 424 A.2d 78, 6 Media L. Rep. (BNA) 2191 (D.C. 1980), *cert. denied*, 451 U.S. 989 (1981). In *Phillips*, the court said that in requiring facts to be truly stated it was embracing the majority viewpoint and rejecting the minority viewpoint which “allows ‘fair comment’ on misstatements of fact as well as opinion.” *Id.*, 424 A.2d at 88. The court observed that the nature and scope of the privilege have been the subject of judicial confusion. *Cf. Edwards v. Hall*, 234 Cal. App. 3d 886, 908–09, 285 Cal. Rptr. 810, 823, 19 Media L. Rep. (BNA) 1969 (1991) (“In California, . . . the cases have extended the fair comment privilege so that, where malice is disproved, the privilege applies not only to comment (opinions) but to false statements of fact as well.”) (quoting *Inst. of Athletic Motivation v. Univ. of Ill.*, 114 Cal. App. 3d 1, 8–9 n.4, 170 Cal. Rptr. 411 (1980) (citation omitted)).
316. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).
317. *Brewer v. Hearst Publ'g Co.*, 185 F.2d 846, 850 (7th Cir. 1950); *Piscatelli v. Smith*, 424 Md. 294, 314, 35 A.3d 1140, 1152, 40 Media L. Rep. (BNA) 1262 (2012) (“legitimate public interest”); *Fisher v. Wash. Post Co.*, 212 A.2d 335, 338 (D.C. 1965); *A.S. Abell Co. v. Kirby*, 227 Md. 267, 176 A.2d 340, 90 A.L.R.2d 1264 (1961).
318. *Wehringer v. Newman*, 60 A.D.2d 385, 400 N.Y.S.2d 533, 3 Media L. Rep. (BNA) 1708 (1st Dep't 1978).
319. *Beauharnais v. Pittsburgh Courier Publ'g Co.*, 243 F.2d 705, 708 (7th Cir. 1957); *Herman v. Labor Coop. Educ. & Publ'g Soc'y*, 139 F. Supp. 35, 38 (D.D.C. 1956); *Devany v. Shulman*, 184 Misc. 613, 53 N.Y.S.2d 401 (Bronx Cty. 1944), *aff'd*, 269 A.D. 1022, 59 N.Y.S.2d 401 (1st Dep't 1945).
320. *Orr v. Argus-Press Co.*, 586 F.2d 1108, 4 Media L. Rep. (BNA) 1593 (6th Cir. 1978), *cert. denied*, 440 U.S. 960, 4 Media L. Rep. (BNA) 2536 (1979).
321. *See Baldine v. Sharon Herald Co.*, 280 F. Supp. 440 (W.D. Pa. 1966), *aff'd*, 391 F.2d 703 (3d Cir. 1968); *Julian v. Am. Bus. Consultants, Inc.*, 2 N.Y.2d 1, 137 N.E.2d 1, 155 N.Y.S.2d 1 (1956). According to the first *Restatement*, the privilege covered all “fair comment” on government officers and employees. *RESTATEMENT OF TORTS* § 607 (1938).
322. *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 150, 28 Media L. Rep. (BNA) 1329 (2d Cir. 2000).

Fair-comment cases often involved persons who might also have been characterized as “public figures.”³²³ As one court put it, a person who comes “prominently forward in any way and becomes a public or a quasi-public figure . . . invites free expression of public opinion, including criticism,” such criticism being privileged so long as the privilege is not abused.³²⁴ The privilege attached to statements about people who entered the “public arena,”³²⁵ public officers of a foreign state,³²⁶ and those who held “positions of importance in their community”:³²⁷

Traditionally, fair comment concerned persons, institutions or groups who voluntarily injected themselves into the public scene or affected the community’s welfare, such as public officials, political candidates, community leaders from the private sector or private enterprises which affected public welfare, persons taking a public position on a matter of public concern, and those who offered their creations for public approval such as artists, performers and athletes.³²⁸

It was not necessary for the subject to be of interest to the entire community, so long as a substantial sector of the community was concerned.³²⁹ Those subject to fair comment have included:

- advertising agencies whose creations are put before the public;³³⁰
- places of public accommodation, such as hotels and restaurants;³³¹

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323. Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1229 n.113 (1976).
324. Edmonds v. Delta Democrat Publ’g Co., 230 Miss. 583, 93 So. 2d 171, 173 (1957).
325. Afro-Am. Publ’g Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966).
326. RESTATEMENT OF TORTS § 607(3) (1938); cf. Sharon v. Time, Inc., 599 F. Supp. 538, 563, 11 Media L. Rep. (BNA) 1153 (S.D.N.Y. 1984).
327. Maidman v. Jewish Publ’ns, Inc., 54 Cal. 2d 643, 7 Cal. Rptr. 617, 355 P.2d 265, 87 A.L.R.2d 439 (1960).
328. Mashburn v. Collin, 355 So. 2d 879, 882, 96 A.L.R.3d 590, 3 Media L. Rep. (BNA) 1673 (La. 1977) (citation omitted).
329. Klahr v. Winterble, 4 Ariz. App. 158, 418 P.2d 404 (1966); Maidman v. Jewish Publ’ns, Inc., 54 Cal. 2d 643, 7 Cal. Rptr. 617, 621, 355 P.2d 265, 87 A.L.R.2d 439 (1960); Reaves v. Foster, 200 So. 2d 453 (Miss. 1967).
330. Cole Fischer Rogow, Inc. v. Carl Ally, Inc., 29 A.D.2d 423, 288 N.Y.S.2d 556 (1st Dep’t 1968), *aff’d on other grounds*, 25 N.Y.2d 943, 305 N.Y.S.2d 154, 252 N.E.2d 633 (1969).
331. Twenty-Five E. 40th St. Rest. Corp. v. Forbes, Inc., 37 A.D.2d 546, 322 N.Y.S.2d 408 (1st Dep’t 1971), *aff’d*, 30 N.Y.2d 595, 282 N.E.2d 118, 331

- educational, charitable, and religious institutions;³³²
- manufacturers whose goods are on sale to the public, and their products;³³³
- artists and art galleries;³³⁴
- entertainers;³³⁵
- athletes;³³⁶
- authors;³³⁷
- scientists;³³⁸
- independent government contractors;³³⁹
- those who appeal for public support, participate in public activities, enter the public arena, or invite public judgment;³⁴⁰
- those who mount a rostrum for any purpose;³⁴¹
- those who begin controversies even though their subject matter is not theretofore independently a matter of public controversy;³⁴²
- people who call “public attention to [their] own grievances or those of [their] class”;³⁴³

N.Y.S.2d 29 (1972); *Steak Bit of Westbury, Inc. v. Newsday, Inc.*, 70 Misc. 2d 437, 334 N.Y.S.2d 325 (Nassau Cty. 1972); *see also Mashburn v. Collin*, 355 So. 2d 879, 96 A.L.R.3d 590, 3 Media L. Rep. (BNA) 1673 (La. 1977) (constitutional protection).

332. RESTATEMENT OF TORTS § 608 (1938).

333. *Safe Site, Inc. v. Nat'l Rifle Ass'n*, 253 F. Supp. 418 (D.D.C. 1966); *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 104 N.J. 125, 516 A.2d 220, 13 Media L. Rep. (BNA) 1594 (1986).

334. *Fisher v. Wash. Post Co.*, 212 A.2d 335 (D.C. 1965).

335. *Julian v. Am. Bus. Consultants, Inc.*, 22 N.Y.2d 1, 137 N.E.2d 1, 155 N.Y.S.2d 1 (1956); *Orbach v. N.Y. News, Inc.*, 3 Media L. Rep. (BNA) 2229 (Sup. Ct. N.Y. Cty. 1978).

336. Under the same rationale as entertainers. *See Mashburn v. Collin*, 355 So. 2d 879, 96 A.L.R.3d 590, 3 Media L. Rep. (BNA) 1673 (La. 1977) (dicta).

337. *Pearson v. Fairbanks Publ'g Co.*, 413 P.2d 711 (Alaska 1966).

338. RESTATEMENT OF TORTS § 609 (1938).

339. *Williams v. Daily Review, Inc.*, 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965).

340. *Afro-Am. Publ'g Co. v. Jaffe*, 366 F.2d 649, 656–57 (D.C. Cir. 1966) (citing authorities).

341. *Edmonds v. Delta Democrat Publ'g Co.*, 230 Miss. 583, 93 So. 2d 171 (1957).

342. *See* RESTATEMENT OF TORTS § 610 cmt. g (1938).

343. *Julian v. Am. Bus. Consultants, Inc.*, 2 N.Y.2d 1, 137 N.E.2d 1, 155 N.Y.S.2d 1 (1956).

- those who, in one form or another, seek public funds;³⁴⁴ and
- persons involved in public criminal trials relating to serious charges.³⁴⁵

The privilege also extended to commentary about those who exercise the privilege by criticizing publicly the works of others.³⁴⁶

§ 4:4.5 Scope of Privilege

The privilege of “fair comment” does not protect criticism of every facet of a person’s life.³⁴⁷ Protected opinion is restricted to commentary on matters rendering a person subject to such criticism—whatever makes that person “public.”³⁴⁸ Mere *ad hominem* attacks are not countenanced.³⁴⁹ The privilege accorded commentary on political figures remains, nonetheless, extremely broad because any statement touching a person’s fitness for public office is within the protection.³⁵⁰

§ 4:4.6 Defeasance of Privilege

The common-law privilege of fair comment is lost when an opinion is published with “malice” in the common-law sense,³⁵¹ that is, either

344. *Murphy v. Daytona Beach Humane Soc’y, Inc.*, 176 So. 2d 922 (Fla. Dist. Ct. App. 1965); see RESTATEMENT OF TORTS § 607(2) (1938).

345. *Piscatelli v. Smith*, 424 Md. 294, 315, 35 A.3d 1140, 1152, 40 Media L. Rep. (BNA) 1262 (2012).

346. See RESTATEMENT OF TORTS § 610 cmt. g (1938).

347. Under the common law, there apparently were no “all purpose” public figures as there are under *Gertz*, except insofar as commentary on public officials and candidates for public office was broadly protected.

348. *Fisher v. Wash. Post Co.*, 212 A.2d 335 (D.C. 1965); *Edmonds v. Delta Democrat Publ’g Co.*, 230 Miss. 583, 93 So. 2d 171, 173 (1957); see also *Hartmann v. Bos. Herald-Traveler Corp.*, 323 Mass. 56, 80 N.E.2d 16, 20 (1948). Private conduct may be commented upon insofar as it affects public conduct. RESTATEMENT OF TORTS §§ 606(2), 609 cmt. c (1938).

349. *Brewer v. Hearst Publ’g Co.*, 185 F.2d 846, 850 (7th Cir. 1950); *Pearson v. Fairbanks Publ’g Co.*, 413 P.2d 711 (Alaska 1966); *Devany v. Shulman*, 184 Misc. 613, 53 N.Y.S.2d 401 (Sup. Ct. Bronx Cty. 1944), *aff’d*, 269 A.D. 1022, 59 N.Y.S.2d 401 (1st Dep’t 1945).

350. *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281, 286 (1908), *quoted in* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 281 (1964):

[I]n measuring the extent of a candidate’s proof of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles.

For the limitations on the common-law privilege applied to comment on public figures, see RESTATEMENT OF TORTS § 607 cmt. i (1938).

351. *Beauharnais v. Pittsburgh Courier Publ’g Co.*, 243 F.2d 705, 708 (7th Cir. 1957); *Herman v. Labor Coop. Educ. & Publ’g Soc’y*, 139 F. Supp. 35, 38

in bad faith or with a bad motive.³⁵² While an occasional court has shown an inclination to import the *New York Times* “actual malice” standard—knowing or “reckless” falsehood³⁵³—that approach is inconsistent with the notion that opinion cannot be proved false and “actual malice,” therefore, cannot be established.

Explicit in the term “fair comment” is the requirement that opinions be fair.³⁵⁴ The test is “whether a reasonable man may honestly entertain such an opinion.”³⁵⁵ Courts have occasionally read the fairness requirement together with the requirement that the underlying facts be accurately stated. The Supreme Court of Mississippi said that, to be privileged, comment must be “fair [only] in the sense that the reader can understand the factual basis for the opinions containing the criticism.”³⁵⁶

Although there is some judicial authority on the meaning of fairness, Professor Hill, in his seminal law review article, observed that courts seem to be content with the general statement that the fairness or reasonableness of a comment is for the jury.³⁵⁷ It is precisely this inability to guide the prospective speaker and the power given to adversely minded juries that have rendered the fair-comment privilege inadequate.

Even in the same state, courts have divided as to whether the vituperative nature of criticism alone can remove the fair-comment privilege. If language is too strong, does it thereby become “unfair”?

(D.D.C. 1956) [malice in either common-law or *New York Times* sense will defeat privilege]; *Wehringer v. Newman*, 60 A.D.2d 385, 400 N.Y.S.2d 533, 3 Media L. Rep. (BNA) 1708 (1st Dep’t 1978). For discussion of common-law malice, see section 9:3.1, *infra*.

352. *Potts v. Dies*, 132 F.2d 734 [D.C. Cir. 1942], *cert. denied*, 319 U.S. 762 (1943); *Yetman v. English*, 168 Ariz. 71, 74, 811 P.2d 323, 326 (1991) (*dicta*). There is no privilege if the criticism is made for the sole purpose of inflicting harm.

353. *See Pearson v. Fairbanks Publ’g Co.*, 413 P.2d 711, 713 (Alaska 1966); *Marchesi v. Franchino*, 283 Md. 131, 387 A.2d 1129 (1978).

354. Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1229–30 n.122 (1976) (citing *Streeter v. Emmons Cty. Farmers’ Press*, 57 N.D. 438, 443, 222 N.W. 445, 457 (1928)).

355. *Grower v. State*, 23 A.D.2d 506, 255 N.Y.S.2d 135 (3d Dep’t 1965), *aff’d*, 19 N.Y.2d 625, 224 N.E.2d 899, 278 N.Y.S.2d 408 (1967). There is authority for the proposition that this qualification for the fair-comment privilege was dispensed with for criticism of public officials. RESTATEMENT OF TORTS § 607 cmt. c (1938).

356. *Edmonds v. Delta Democrat Publ’g Co.*, 230 Miss. 583, 93 So. 2d 171, 173 (1957); *accord Julian v. Am. Bus. Consultants, Inc.*, 2 N.Y.2d 1, 7, 137 N.E.2d 1, 155 N.Y.S.2d 1 (1956).

357. Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1233 (1976) (citing *Van Arsdale v. Time, Inc.*, 35 N.Y.S.2d 951 (Sup. Ct. N.Y. Cty.), *aff’d*, 265 A.D. 919, 39 N.Y.S.2d 413 (1st Dep’t 1942)).

Some courts have taken the position that, if the other elements of the fair-comment privilege are met, the opinion is not defamatory “no matter how severe, hostile, rough, caustic, bitter, sarcastic or satirical [it is,] for these are the very tools of criticism.”³⁵⁸ Others have required that the comment not be intemperate,³⁵⁹ unreasonably violent or vehement, or “excessively vituperative,” and have insisted that the opinion be presented in a “proper manner.”³⁶⁰ All agree, however, that “mere exaggeration, slight irony or wit, or all of those delightful touches of style that go to make an article readable, do not push beyond the limitations of fair comment.”³⁶¹

§ 4:5 Opinion and Other Speech Respecting Religion³⁶²

James Madison commented, in his *Memorial and Remonstrance Against Religious Assessments*,³⁶³ that

[a] bill [establishing a provision for teachers of the Christian Religion in Virginia] implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.³⁶⁴

Those sentiments are reflected in the principle that the freedom of religion clauses of the First Amendment protect commentary about religious tenets: “[W]here the issue involves the validity of a religious

358. *Orbach v. N.Y. News, Inc.*, 3 Media L. Rep. (BNA) 2229 (Sup. Ct. N.Y. Cty. 1978) (citing *MacDonald v. Sun Printing & Publ’g Ass’n*, 45 Misc. 441, 92 N.Y.S. 37 (Kings Cty. 1904)); *see also* *Beauharnais v. Pittsburgh Courier Publ’g Co.*, 243 F.2d 705, 708 (7th Cir. 1957); *Bucher v. Roberts*, 198 Colo. 1, 595 P.2d 239 (1979); *Leers v. Green*, 24 N.J. 239, 131 A.2d 781, 789 (1957); *Hoepfner v. Dunkirk Printing Co.*, 254 N.Y. 95, 172 N.E. 139, 72 A.L.R. 913 (1930).

359. *Devany v. Shulman*, 184 Misc. 613, 53 N.Y.S.2d 401 (Sup. Ct. Bronx Cty. 1944), *aff’d*, 269 A.D. 1022, 59 N.Y.S.2d 401 (1st Dep’t 1945).

360. *Hill, Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1229–30 nn.118–21 (1976) (citing *England v. Daily Gazette Co.*, 143 W. Va. 700, 718, 104 S.E.2d 306, 316 (1958); *Smith v. Levitt*, 227 F.2d 855, 857 (9th Cir. 1955); and *Bausewine v. Norristown Herald, Inc.*, 351 Pa. 634, 645, 41 A.2d 736, 742, *cert. denied*, 326 U.S. 724 (1945)).

361. *Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Publishers, Inc.*, 260 N.Y. 106, 118, 183 N.E. 193 (1932).

362. *See also* section 2:4.20 and section 2:10.2, text at notes 760–61.

363. James Madison, *Memorial and Remonstrance Against Religious Assessments*, 2 THE WRITINGS OF JAMES MADISON 183–91 (G. Hunt ed. 1901), set forth as Appendix II to the opinion of Douglas, J., dissenting, in *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 722 (1970).

364. *Id.* ¶ 5.

denomination's beliefs, the First Amendment would bar such a claim, as it would embroil the state in an inquiry into the truth or falsity of beliefs or teachings. . . ."³⁶⁵ As the Virginia Supreme Court observed,

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365. Holy Spirit Ass'n v. Harper & Row, Publishers, Inc., 101 Misc. 2d 30, 420 N.Y.S.2d 56, 4 Media L. Rep. (BNA) 2144 (Sup. Ct. N.Y. Cty. 1979). For a thorough discussion of the principle, see *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 250, 42 Media L. Rep. (BNA) 1492 (S.D.N.Y. 2014) (summarizing: "[W]here a court or jury would have to determine the truth of the defendants' statements . . . and, in doing so, would examine and weigh competing views of church doctrine, the result is entanglement in a matter of ecclesiastical concern that is barred by the First Amendment.") (internal quotation marks omitted; ellipsis in original); see also *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329, 1334, 21 Media L. Rep. (BNA) 1426 (4th Cir. 1993) ("Courts have no authority to determine what is or is not a religion, and no legal formula by which to measure the truth or philosophical acceptability of an entity's spiritual beliefs."); *Klagsbrun v. Va'ad Harabonim of Greater Monsi*, 53 F. Supp. 2d 732, 741 (D.N.J. 1999) (claims against rabbis by members of Jewish community barred); *Yaggi v. Ind. Ky. Synod Lutheran Church*, 860 F. Supp. 1194, 1198 (W.D. Ky. 1994) (defamation claim by minister against parishioners barred), *aff'd*, 64 F.3d 664 (6th Cir. 1995); *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1290 (D. Minn. 1993) (defamation claims in connection with termination of minister by church barred); *Church of Scientology v. Siegelman*, 475 F. Supp. 950, 5 Media L. Rep. (BNA) 2021 (S.D.N.Y. 1979); *Ex parte Bole*, 103 So. 3d 40 (Ala. 2012); *Seefried v. Hummel*, 148 P.3d 184 (Colo. Ct. App. 2005) (no cause of action with respect to statements made in a church meeting at which there was a discussion as to whether the pastor should be terminated); *Thibideau v. Am. Baptist Churches of Conn.*, 120 Conn. App. 666, 994 A.2d 212 (2010) ("[T]he plaintiff's claims[, including that for defamation, relating to the defendants' refusal to recognize the plaintiff's ordination or to assist him in obtaining employment with its churches] are simply too closely related to the ecclesiastical functions of the church and the religious aspects of the plaintiff's relationship with the defendant to be treated as simple civil wrongs able to be addressed solely by neutral secular principles of law without consideration of areas protected from inquiry by the first amendment."); *Heard v. Johnson*, 810 A.2d 871, 883 (D.C. 2002) ("When a defamation claim arises entirely out of a church's relationship with its pastor, the claim is almost always deemed to be beyond the reach of civil courts because resolution of the claim would require an impermissible inquiry into the church's bases for its action."); *Diocese of Palm Beach, Inc. v. Gallagher*, 249 So. 3d 657, 660 (Fla. Dist. Ct. App. 2018) (assertions that defendant diocese called plaintiff priest "a liar, unfit to be a priest, and in need of professional help") (footnotes omitted); *Goodman v. Temple Shir Ami, Inc.*, 712 So. 2d 775 (Fla. Dist. Ct. App. 1998) (statements made with respect to termination of rabbi's services); *First United Church v. Udofia*, 223 Ga. App. 849, 479 S.E.2d 146 (1996) (church's charges of witchcraft); *O'Connor v. Diocese of Honolulu*, 77 Haw. 389, 885 P.2d 361 (1994) (statements made with respect to plaintiff's excommunication); *Orr v. Fourth Episcopal Dist. AME Church*, 2018 IL App (4th) 170469, ___ N.E.3d ___ (Ill. App. Ct. 2018) ("ecclesiastical abstention" applied with respect to allegations of sexual harassment made within church's internal

disciplinary process); *Steppek v. Doe*, 392 Ill. App. 3d 739, 910 N.E.2d 655, 331 Ill. Dec. 246 (2009) (allegations, during disciplinary hearings, of sexual improprieties of a Roman Catholic priest); *Jenkins v. Trinity Lutheran Church*, 356 Ill. App. 3d 504, 512–13, 825 N.E.2d 1206, 1214, 292 Ill. Dec. 195 (2005) (“remarks [not actionable if they] were inextricably involved in the discipline, faith, administration or rules of the church”); *Thomas v. Fuerst*, 349 Ill. App. 3d 929, 935, 803 N.E.2d 619, 624, 281 Ill. Dec. 215, 220 (2004) (complaint dismissed where “[r]esolution of the [defamation] counts cannot be made without extensive inquiry by civil courts into religious law and polity”); *Ind. Area Found. of the United Methodist Church, Inc. v. Snyder*, 953 N.E.2d 1174 (Ind. Ct. App. 2011) (statements in connection with assessing the plaintiff’s fitness for the ministry); *Purdum v. Purdum*, 48 Kan. App. 2d 938, 301 P.3d 718, 726 (2013) (concluding that statements made to organs of the Roman Catholic Church in the course of a marriage annulment proceeding could not be actionable under the First Amendment because “[t]he very nature of [the defendant’s] defenses and [the plaintiff’s] defamation action will entangle the civil courts in the details of the administration and procedures of the Archdiocese’s annulment proceedings”); *Downs v. Roman Catholic Archbishop of Balt.*, 111 Md. App. 616, 683 A.2d 808 (1996) (remarks made with respect to plaintiff’s denial of consideration for priesthood); *Hiles v. Episcopal Diocese of Mass.*, 437 Mass. 505, 773 N.E.2d 929 (2002) (exploring the extent to which statements connected with an intradenominational dispute can be the subject of a defamation suit consistent with the First Amendment); *Mallette v. Church of God Int’l*, 789 So. 2d 120, 123 (Miss. Ct. App. 2001) (“A civil court is forbidden, under the First and Fourteenth Amendments to the United States Constitution, from becoming involved in ecclesiastical disputes.”) (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)); *Brady v. Pace*, 108 S.W.3d 54 (Mo. Ct. App. 2003) (statements by pastors with respect to dissension within church); *Sieger v. Union of Orthodox Rabbis*, 767 N.Y.S.2d 78, 1 A.D.3d 180 (1st Dep’t 2003) (statement in connection with religious divorce proceedings); *Lippard v. Diamond Hill Baptist Church*, 821 S.E.2d 246 (N.C. Ct. App. 2018) (statements made within context of the plaintiffs’ removal from church membership and seeking declaratory judgment); *Anderson v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 2007 Tenn. App. LEXIS 29, 2007 WL 161035 (2007) (statements as to expulsion of church members); *Thiagarajan v. Tadepalli*, 430 S.W.3d 589 (Tex. App. 2014); *Jennison v. Prasifka*, 391 S.W.3d 660, 666 (Tex. App. 2013) (applying the “ecclesiastical abstention doctrine” where the statements in question were made “in the course of the church disciplinary process”); *Patton v. Jones*, 212 S.W.3d 541 (Tex. App. 2006) (alleged defamation of youth ministries director by various church officials in course of director’s termination); *cf. Briggs & Stratton Corp. v. Nat’l Catholic Reporter*, 978 F. Supp. 1195 (D. Wis. 1997) (accepting the principle but finding truth and falsity issues in the case before it could be decided without resolving religious doctrine questions); *Legrande v. Emmanuel*, 889 So. 2d 991, 994 (Fla. Dist. Ct. App. 2004) (reversing grant of defendant’s motion to dismiss defamation lawsuit that was based in part on defendants’ assertion that the plaintiffs, a minister and his wife, had used money stolen from their church to buy a luxury automobile, because the “suit involve[d] a neutral principle of tort law that does not involve ‘excessive’ entanglement in internal church matters or in the

"[M]ost courts that have considered the question whether the Free Exercise Clause divests a civil court of subject matter jurisdiction to consider a pastor's defamation claims against a church and its officials have answered that question in the affirmative."³⁶⁶ In some jurisdictions, however, a court can decide a defamation or invasion of privacy claim relating to church affairs so long as the court "do[es] not need to inquire into or interpret religious matters to decide" the case.³⁶⁷

interpretation of religious doctrine or ecclesiastical law"); *Trice v. Burress*, 137 P.3d 1253, 1257 n.7 (Okla. Civ. App. 2006) (concluding that statement made by minister in connection with termination of youth director was not actionable because of First Amendment concerns, but deciding that even if it was otherwise actionable, it would be protected by qualified common-interest privilege).

Where a defamatory communication is circulated within the church community, it may also be protected by the qualified "common interest" privilege. *See id.*; *see also* section 9:2.3, *infra*.

More generally, the Supreme Court has observed, "[T]he First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976).

The protection is sometimes referred to as the "ecclesiastical abstention doctrine." *See* section 2:4.20, *supra*. "There is some ambiguity about whether the prohibition on civil courts considering questions of canonical law or policy derives from the Free Exercise Clause or the Establishment Clause." *See Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 250 n.9, 42 Media L. Rep. (BNA) 1492 (S.D.N.Y. 2014).

366. *Cha v. Korean Presbyterian Church of Wash.*, 262 Va. 604, 615, 553 S.E.2d 511, 516 (2001). A court "lack[s] subject matter jurisdiction to review [a] plaintiff's claims . . . [where] [r]esolution of the . . . claims . . . would require[] that the . . . court adjudicate issues regarding the church's governance, internal organization, and doctrine, and such judicial intervention would . . . limit[] the church's right to select its religious leaders." *Id.* at 612, 553 S.E.2d at 515.

The Supreme Court of Pennsylvania considered the so-called "deference rule" as applied to defamation cases in detail in *Connor v. Archdiocese of Phila.*, 975 A.2d 1084 (Pa. 2009), holding that, in the case before it, the courts could adjudicate the dispute without treading on protected religious grounds.

367. *See Doe ex rel. Doe v. Catholic Diocese of Rockford*, 2015 IL App (2d) 140618, 38 N.E.3d 1239, 395 Ill. Dec. 483 (2015) (concluding that allegedly defamatory written complaint to pastor of church about the behavior of the petitioner's son was not covered by clergy-penitent privilege; inquiry into or interpretation of religious matters not asserted); *Duncan v. Peterson*, 359 Ill. App. 3d 1034, 835 N.E.2d 411, 421, 296 Ill. Dec. 377, 387 (2005) (citing *Madsen v. Erwin*, 395 Mass. 715, 727, 481 N.E.2d 1160, 1167 (1985) ("[T]he First Amendment religion provisions contain two concepts, 'freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'")) (quoting

Where a defamatory falsehood that might have been immune had it been circulated within a religious community is circulated to the community at large, however, it may support a civil action.³⁶⁸

Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940)); Guinn v. Church of Christ, 1989 OK 8, 775 P.2d 766 (1989); Tubra v. Cooke, 233 Or. App. 339, 225 P.3d 862 (pastor’s jury verdict in case where he had been publicly accused of misusing church funds by church officials reinstated: “[W]e fail to understand how a defamatory statement accusing a pastor of theft is any more (or less) a matter of church ‘discipline, faith, internal organization, or ecclesiastical rule, custom, or law[,]’ [Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976),] than is a defamatory statement accusing a pastor of child molestation.”), *cert. denied*, 562 U.S. 1256 (2010); Banks v. St. Matthew Baptist Church, 406 S.C. 156, 160–61, 750 S.E.2d 605, 607 (2013) (permitting the pursuit of such litigation where “[t]he truth or falsity of [the allegedly defamatory] statements [could] easily be ascertained by a court without any consideration of religious issues or doctrines”); Bowie v. Murphy, 271 Va. 126, 135, 624 S.E.2d 74, 79 (2006) (deciding that court can decide defamation claim arising out of events that led to the removal of a church deacon so long as it does not involve church governance and consideration of the case is otherwise “without reference to questions of faith and doctrine”) (citation and internal quotation marks omitted).

368. See Kliebenstein v. Iowa Conference of the United Methodist Church, 663 N.W.2d 404 (Iowa) (in letter mailed to persons outside the church, reference to church dissident as reflecting “the spirit of Satan” potentially actionable), *cert. denied*, 540 U.S. 977 (2003).

